



TC04624

Appeal number: TC/2015/03471

*VAT – default surcharge – payment late by four days – reliance of
accountant – whether reasonable excuse – no – whether penalty
disproportionate – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EXPRESS BEDS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DR HEIDI POON
BEVERLEY TANNER**

**Sitting in public at at Tribunals Service, City Exchange, 11 Albion Street, Leeds
on 22 July 2015**

Mr Ashraf Esat for the Appellant

**Mr T Burke, presenting officer of HM Revenue and Customs, for the
Respondents**

DECISION

1. The appellant, Express Beds Limited, appeals against a default surcharge in the amount of £9,222.32 imposed for the quarter return period ended 31 January 2015.

The Facts

2. Mr Ashraf Esat, a director of the company, appeared for the appellant and also gave evidence. The Tribunal found Mr Esat a credible witness, who answered questions from HMRC and the Tribunal in a direct and open manner.

3. From Mr Esat, the Tribunal learned that the appellant started trading in April 2013, and its business is the sale of beds and mattresses online through eBay and Amazon. The appellant does not have any shop premises and conduct its business from a warehouse, and employed more than 50 people.

4. The appellant is an associated company of Joseph International, which is a manufacturer of beds and mattresses, and also used to distribute the manufactured products. The distribution branch of the business became devolved to the appellant as a separate company from April 2013. Mr Esat's email address remains hosted by the domain name: 'josephinternational.co.uk'.

5. We heard Mr Esat in evidence that the weekly sales of the business are in the region of £50,000 to £75,000, of which 15% is automatically deducted as fees by eBay and Amazon for providing the website platforms for the sales to be made. The remaining 85%, which is the turnover due to Express Beds, is withheld by eBay and Amazon for 7 to 14 days to ensure that delivery to customers is made before the money is released.

6. Mr Esat referred to the retention of what is in effect two weeks' turnover as a potential cause for cash flow difficulties. He also stated that while the sales volume is high for the business, the profit margin is not high.

7. In respect of the period 01/15 (quarter ended 31 January 2015), the statutory due date for the return and VAT payment was 28 February 2015. By HMRC's practice, if payment is made electronically, 7 concessionary days are given to allow payment to reach HMRC by 7 March 2015 before the payment was reckoned as late for default surcharge purposes.

8. We heard from Mr Esat that the appellant was advised by its accountant by email dated 27 February 2015 (included in documents bundle), that the payment for the period 01/15 was not due until 12 March 2015. Acting on the advice, the appellant arranged for the VAT due of £92,223.28 to be paid by two Faster Payments (ie: same day payments), on 11 and 12 March 2015. The appellant made two payments instead of one owing to the £50,000 limit imposed by its bank on a single transfer by Faster Payment method.

Grounds of Appeal

9. In the Notice of Appeal, the appellant stated its grounds of appeal as:

5 ‘We believe it is a severe punishment for this Surcharge to be applied given the fact that we have been given incorrect information and the payment was only 4 days late. To be given a penalty of £9,222.32 is harsh given the circumstances.’

10. The essential issues for the Tribunal to consider are:

- (a) Whether reliance of a third party amounts to a reasonable excuse;
- (b) Whether the penalty is disproportionate to the gravity of the default.

10 The Law and Discussion

Reliance of a third party

11. The default surcharge regime is set out under section 59 of Value Added Tax Act 1994 (‘VATA 1994’). Under section 59(7)(b), it is provided that if *there is a reasonable excuse for the return or VAT not having been so despatched* (that is
15 submitted or paid on time), then the taxpayer *shall not be liable to the surcharge ... and shall be treated as not having been in default in respect of the prescribed accounting period in question.*

12. ‘Reasonable excuse’ cannot be considered at large, and is circumscribed by statute and precedent. The relevant statutory exclusion comes under section 71(1)(b)
20 of VATA 1994, which provides that:

‘where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.’

13. The statutory exclusion of reliance of a third party being a reasonable excuse
25 has a very pragmatic reason behind it, and Parliament’s intention for incorporating this statutory exclusion was evidenced by the minister’s statement as recorded in Hansard: *If all one had to do to have a reasonable excuse was to find an accountant who would delay everything, there would be easy pickings to be made.*¹

14. We do not doubt that the appellant had a *bona fide* reason to trust its
30 accountant’s statement that the VAT liability for the period 01/15 was not due until 12 March 2105, notwithstanding the fact that the appellant had been in business for two years by then and that its directors had had business experience for much longer than two years through their involvement in Joseph International prior to April 2013.

¹ Hansard 21 May 1985 (HC Official report SC B (Finance Bill) 21 May 1985, col 173. The statutory exclusion referred to in the minister’s statement in respect of the Finance Bill became legislated under section 33(2)(b) of Finance Act 1985, and section 33(2)(b) is, to all intents and purposes, the predecessor of section 71(1)(b) of VATA 1994 which applies to the current case. See also the decision *Profile Security Services (South) Ltd v C&E Commissioners* [1996] STC 808.

15. The Tribunal, however, is bound by the legislation to give effect to the statutory exclusion from allowing the reliance of a third party to amount to a reasonable excuse. We accept Mr Esat's basis of reliance on the accountant as not unreasonable; he stressed the fact that an accountant is no ordinary person but a person with professional knowledge that one could reasonably rely on to give reliable advice based on his supposed expertise. If in this instance, the reliance of the accountant's advice has proved to be misplaced, and has resulted in financial harm in the form of a default surcharge imposed on the appellant, that is a matter between the appellant and its accountant, with remedy to be sought in contract or in tort. It is not equitable to request the public purse to provide the remedy by waiving the default surcharge that has been correctly imposed in accordance with the legislation.

Proportionality

16. The questions of proportionality as applied to the default surcharge regime have been addressed in some length in *Commissioners for HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), see in particular paragraphs [85] to [105]. The decision examined the various features of the default surcharge regime which might be said to result in unfairness in different circumstances, and none of these features 'leads to the conclusion that the default surcharge regime infringes the principle of proportionality' from the perspective of both the EU law and the European Convention on Human Rights.

17. The appellant emphasised that the payment was only *four days* late and that it was 'harsh given the circumstances'. As highlighted in *Total Technology*, it is a feature of the default surcharge regime that *a trader who is late is subject to a penalty which cannot be reduced even though his payment is only a single day late* (at [88]).

18. It is made clear in *Total Technology* that the 'questions of proportionality can only be judged against the aim of the legislation' (at [79]). The aim of the default surcharge regime, as manifest from the legislation, is to penalise *only the failure to deliver a return and to make payment of the tax owed by the due date*. Unlike other penalties, the default surcharge regime does not penalise the failure further or progressively by reference to the delay in remedying the failure.

19. While the due date is the only time reference for the purpose of determining when a default is triggered, the regime has certain features that allow for the penalty to be calculated proportionately to the magnitude of the default:

(a) the penalty is tax-g geared, calculated with reference to the VAT liability;

(b) the rate of penalty escalates from 0%, 2%, 5%, 10% to 15% as a reflection of the persistence of the trader's defaults.

20. The surcharge of £9,222.32 was the fourth default in the 12-month surcharge rolling period, and the penalty was charged at 10% of the VAT due for period 01/15. The default under appeal was therefore the culmination of previous defaults, not an isolated event without forewarning. In line with the conclusion drawn in *Total*

Technology, the penalty in this case has been arrived at by applying a rational scheme of calculation which involves no breach of proportionality.

21. The default surcharge regime is specifically excluded from the provisions under section 70 of VATA 1994, which enables the Commissioners or the Tribunal to mitigate some other civil penalties. The Tribunal acknowledges that the appellant had acted in good faith in its attempt to comply with its statutory obligations. However, once the surcharge is imposed, there is no scope for mitigation, and in the absence of a reasonable excuse, the Tribunal is bound by statute to uphold the surcharge.

Decision

22. For the reasons stated above, the appeal is dismissed. The default surcharge of £9,222.32 is upheld.

23. 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.

**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 3 SEPTEMBER 2015