



TC04766

Appeal number: TC/2015/00222

VAT – hearing in the absence of the appellant – default surcharge – late payment, lack of funds due to tenant’s late payment of rent – whether reasonable excuse – held, no reasonable excuse – whether surcharge correctly applied, yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VINCENZO MARINO

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
JULIAN STAFFORD**

Sitting in public at Cambridge on 11th May 2015

The Appellant did not attend and was not represented

Lynne Ratnett, Officer of HMRC, for the Respondents

DECISION

1. The appellant did not attend. At the request of the Tribunal the Clerk
5 telephoned the mobile telephone number in the papers but there was no response.

2. It was clear from the file that the appellant had been notified of the hearing and had not objected to the listing on 11th May 2015. Further, Ms Ratnett noted that the appellant had contacted the respondent (“HMRC”) to confirm receipt of his copy of the bundle of documents for the hearing.

10 3. HMRC argued that the hearing should take place in the absence of the appellant on the basis that it was obvious that the appellant had been notified of the hearing and had made no objection to its proceeding, having been warned of the consequences of not appearing.

15 4. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules since there was no explanation as to the non-appearance by or for the appellant. The appellant’s attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

20 *The appeal*

5. The appellant appealed against default surcharges imposed as a result of the late payment of VAT for the VAT periods 12/11, for £220.00, and 03/12, for £330.00.

25 6. It should be noted that the appeal was made out of time, and the notice of appeal states that the reason why the appeal was made late is that “No reply has been received by my initial appeal online”. As HMRC raised no objection to the late appeal, the Tribunal decided that it was in the interests of justice to allow the appeal to be made late.

Background

7. The appellant’s VAT returns were late for a number of periods, as follows:

30 (1) 03/10: return and payment due by 7 May 2010; return submitted on 14 June 2010, payment made on 17 June 2010. This was the first default and as such did not attract a surcharge.

35 (2) 09/10: return due by 7 November 2010, payment due 10 November 2010 as a direct debit had been set up; return submitted 7 December 2010, payment received by direct debit on 10 December 2010. This default attracted a 2% surcharge but, as the amount was below £400, no demand was made by HMRC.

(3) 12/10: return due by 7 February 2011, payment due 10 February 2011 as paid by direct debit; return submitted on 3 March 2011, payment received by

direct debit on 8 March 2011. This default attracted a 5% surcharge but, as the amount was below £400, no demand was made by HMRC.

5 (4) 09/11: return due by 7 November 2011; return submitted on 12 December 2011 showing a repayment due. The late return extended the surcharge period, but no surcharge was made because of the repayment.

(5) 12/11 (under appeal): return due on 7 February 2012, payment due on 10 February 2012 as paid by direct debit; return submitted on 7 March 2012, payment received by direct debit on 12 March 2012. This default attracted a 10% surcharge, being £220.00.

10 (6) 03/12 (under appeal): return due by 7 May 2012, payment due on 10 May 2012 as direct debit set up; return submitted on 10 May 2012, payment received by direct debit on 15 May 2012. This default attracted at 15% surcharge, being £330.00.

Law

15 8. Under the Value Added Tax Regulations 1995 (“VAT Regulations”) a VAT return must be submitted and payment made to HMRC, “on the last day of the month next following the end of a period to which it relates”. However, where returns are submitted electronically, HMRC has exercised its discretion under Regulation 25A of the VAT Regulations to allow an additional seven days after the end of the calendar
20 month when payment would normally fall due (together with a further three days when the VAT is collected by direct debit) for submission of the return and payment.

9. Section 59 of the Value Added Tax Act 1994 (“VATA”) provides that a person who has not submitted a VAT return or paid the VAT by the due date shall be served a liability notice. If having received a liability notice a subsequent VAT return or
25 payment is not submitted or paid by the due date he shall be liable to a surcharge equal to the “specified percentage of his outstanding VAT for that prescribed accounting period”. Under s59(5) VATA the “specified percentage” rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default
30 the specified percentage this is 2% which increases to 5%, 10% and 15% for the second, third and fourth default respectively.

10. However, if the Tribunal is satisfied that there was a reasonable excuse for the late payment of VAT s 59(7) VATA provides that:

35 ... he shall not be liable to the surcharge ... and shall be treated as not having been in default in respect of the accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

11. The legislation does not provide a definition of a “reasonable excuse” which is
40 “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2008] STC (SCD) 536).

12. Additionally, a taxable person is not liable to a default surcharge if he has a “time to pay” arrangement with HMRC provided that the arrangement is made before the date when the VAT is “due and payable” (see s 108 Finance Act 2009).

Appellant’s submissions

5 13. In his notice of appeal, the appellant explains that:

(1) the VAT payments are made late because his tenant is constantly late with payments and he has insufficient funds to pay the VAT otherwise;

(2) the VAT “return was sent hours late”;

10 (3) the surcharge is calculated on the basis of the turnover and VAT for the relevant period and not calculated on the basis of his annual VAT liability, which generally includes at least one repayment period;

(4) no advice of surcharges were shown on his account (a copy of the appellant’s VAT activity for the periods 10/13 to 01/15 was provided by the appellant);

15 (5) he was not aware of the increase in the surcharge; and

(6) he was charged the 10% surcharge from the outset and not the “normal 2% and then 5%”.

HMRC’s submissions

20 14. HMRC submitted that an insufficiency of funds is not a reasonable excuse for late payment of VAT or a late submission of a return, in accordance with s71(1) VATA. Although the underlying cause for the insufficiency may constitute a reasonable excuse, the appellant had contacted HMRC in May 2009, June 2010 and March 2011 to advise them that cashflow was a problem. Accordingly, HMRC submitted that this was not a new or unexpected situation for the periods under appeal
25 and so cannot constitute a reasonable excuse.

15. HMRC submitted that the appellant had not sought assistance from HMRC for “time to pay” arrangements and so the exclusion from the default surcharge regime for those under “time to pay” arrangements would not apply.

30 16. With regard to the timing of the return, HMRC submitted that their records showed that the returns under appeal were submitted 28 days and 3 days late respectively.

35 17. With regard to the request to calculate the surcharge on the basis of annual VAT liability, rather than quarterly liability, HMRC submitted that s59 VATA requires the default surcharge to be calculated on the basis of the VAT liability for the period for which the payment is made late. In this case, that is the quarter for which the return was made. HMRC submitted that there is no provision in statute to calculate the surcharge on any other basis.

18. HMRC submitted that the reason that the surcharges are not shown in the VAT account activity provided by the appellant is that the record produced by the appellant does not cover the periods under appeal and no default surcharges have arisen for the periods covered by that record.

5 19. With respect to the lack of notification of the increase in surcharge, HMRC submitted that surcharge liability notices were produced on various dates in 2010, 2011 and 2012 showing how the surcharges are calculated and the percentage used in determining the surcharge.

10 20. With regard to the appellant's submission that he was charged 10% from the outset, HMRC set out the default surcharge history and submitted that he was correctly assessed to the 2% and 5% default surcharges as set out above.

Discussion

15 21. For the tenant's lateness in paying to constitute a reasonable excuse for the appellant's late VAT payment, it is well-established that it would need to be unusual for that payment to be late. The appellant himself notes that the tenant is constantly late with payments and so we cannot accept that this is a reasonable excuse for the late payment of VAT by the appellant.

20 22. We find that the surcharges were correctly calculated and communicated to the appellant. As the 2% and 5% surcharges were below the threshold at HMRC demands payment, it may have seemed to the appellant that the surcharges began at 10% but we find that this was not the case.

25 23. We agree that there is no statutory provision for the surcharge to be calculated on the annual VAT liability of the appellant but also considered whether, nevertheless, the surcharge was disproportionate as the appellant's appeal seemed to suggest that this was also a concern.

30 24. The Upper Tribunal in *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), a decision which is binding on us, considered the issue of proportionality in relation to the default surcharge regime. It decided that the VAT default surcharge regime viewed as a whole does not suffer from any flaw which infringes upon the principle of proportionality and, as in *Total Technology*, even if the returns (and payment) had been made only "hours" late it would not render the surcharges disproportionate or invalid.

Conclusion

35 25. We therefore dismiss the appeal and confirm the surcharges in the amounts listed in paragraph 5, above.

Right to Apply for Permission to Appeal

26. 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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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 3 December 2015

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