



**TC04995**

**Appeal number: TC/2015/04432**

*VAT – default surcharge – whether reasonable excuse – computer system failure - no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CALIGOR RX LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE Abigail McGregor  
Caroline De Albuquerque**

**Sitting in public at Fox Court, London on 16 February 2016**

**The Appellant did not appear**

**Ms Joanna Bartup, presenting officer for HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant, Caligor RX Limited (“**Caligor**”) appealed against the imposition  
5 of a VAT default surcharge of £35,060.20 for the VAT period 12/14 (being the 3  
month period ending 31 December 2014).

2. Caligor was not represented at the hearing. Nevertheless I was satisfied that the  
company had been notified of the hearing and that it was in the interests of justice to  
proceed with the hearing because the Tribunal contacted the representative of Caligor  
10 (Angela Wormell, Head of Finance), who had been dealing with the appeal, on the  
day of the hearing and she confirmed that neither she nor any other representative of  
Caligor intended to attend and she was content for us to proceed in her absence.

3. There was no dispute about the background to this case.

4. Caligor entered the VAT default surcharge regime in respect of the VAT period  
15 09/14 as a result of submitting the VAT return 3 days late, with the consequent delay  
in payment of the amount due because the payment was collected by direct debit. As  
this was the first default, a surcharge liability notice was issued but no surcharge  
arose. Caligor did not raise any arguments relating to this earlier default and it  
therefore stands.

20 5. The defaults and surcharge are detailed in the following table:

VAT period	Due date*	Amount due	Date received	Surcharge issued	Rate of default surcharge	Amount of default surcharge (£)
09/14	31/10/14	1524708.25	13/11/14	14/11/14	0%	0
12/14	31/01/15	1753010.20	09/03/15	04/03/15	2%	35060.20

\* The deadline for payment is extended by 7 days when the taxpayer pays electronically, and a further 3 bank working days where the taxpayer pays by direct debit.

25 6. This appeal concerns only the default surcharge of £35060.20 arising in relation to VAT period 12/14.

7. It was agreed that, in relation to the VAT period 12/14, Caligor:

- (1) was required to submit a VAT return to HMRC by 7 February 2015 (relying on the 7 day extension for electronic payments);
- 30 (2) was required to pay the VAT due to HMRC by 10 February 2015 (relying on the further 3 days extension because it was paying by direct debit);
- (3) submitted the return on 4 March 2015; and

(4) paid the VAT due on 9 March 2015 by direct debit.

8. It was also not in dispute that HMRC issued:

(1) a VAT notice of assessment to Caligor for the amount of £1604450.00 and associated surcharge of £32089.00 on 13 February 2015; and

5 (2) an amended surcharge of £35060.20 based on the amount of VAT on the return submitted on 4 March 2015.

*Grounds of appeal*

9. Caligor submitted (in its notice of appeal and accompanying letters) that it had a reasonable excuse for the late payment because:

10 (1) its accounting system had been inaccessible for the period from 4 February 2015 to 13 February 2015 due to a failure in remote desktop access (RDA) to the US-based server;

15 (2) after the RDA problem had been resolved, Caligor needed time to investigate whether there was any corruption of their files and bring their data back up to date before they could submit the VAT return; and

(3) the VAT return was submitted as soon as was physically possible.

10. Caligor submitted evidence of the RDA problem in the form of an invoice for the work required to resolve the RDA problem. The invoice was dated 28 February 2015 and identified labour provided in New Jersey, USA, for the resolution of issues related to RDA on the 4 and 16 February.

*HMRC's arguments*

11. HMRC accepted, based on the invoice evidence, that there had been a RDA problem for the period from 4 February 2015 to 13 February 2015.

12. However, HMRC disputed that Caligor had a reasonable excuse on the basis that:

(1) Caligor's submissions explained that there were RDA problems in the UK, but did not make it clear whether someone in the US (rather than the UK) could have accessed the relevant information (ie not via remote access) to have enabled a VAT return to be submitted to HMRC in some form at least;

30 (2) Caligor could have submitted estimated figures in the appropriate time frame that could have reduced or eliminated the surcharge;

35 (3) Caligor did not contact HMRC to discuss the problems it was having until 4 March 2015 – the day the return was submitted and after the issue of the initial default surcharge notice and a call from HMRC. If Caligor had contacted HMRC a time to pay arrangement could have been agreed, which could have prevented a surcharge from arising;

5 (4) Caligor's submissions relating to the need to check data for corruption did not provide sufficient detail to justify a reasonable excuse, for example they did not explain why data might have been corrupted as a result of RDA problems or why a return could not have been submitted as soon as possible after the RDA problems were fixed and then subsequently amended if any corruption was found.

10 13. HMRC therefore argued that even if a reasonable excuse had existed until 13 February 2015 when the RDA problem was fixed, it did not persist until 4 March 2015 when the return was submitted.

*Discussion and decision*

14. We considered two questions in relation to this VAT default surcharge amount:

- (1) Was the default surcharge validly issued?
- (2) Did Caligor have a reasonable excuse for the late payment?

15 15. As Caligor did not dispute that the payment of VAT was made late; that the earlier default had resulted in Caligor entering the default surcharge regime; or the amount of the VAT due or the date that it was due, we conclude that the default surcharge was validly issued and that the rate of 2% for the 2<sup>nd</sup> default within the default surcharge period was the appropriate rate to apply.

20 16. The burden of proof for showing that they had a reasonable excuse for not making the payment on time was on Caligor. While the evidence submitted by Caligor (the invoice) might support such an argument, insufficient additional information was supplied alongside it to show that the result of the RDA problems was that no-one could submit a VAT return.

25 17. In addition, even if such information had been supplied and a reasonable excuse was found for that period, the argument relating to the period from 13 February to 4 March (looking for corruption in the data) was not substantiated by Caligor and therefore they did not meet the burden of proof to establish a reasonable excuse for that period.

30 18. In summary, we find that:

- (1) the default surcharge was validly issued in accordance with the law; and
- (2) Caligor did not have a reasonable excuse for the late payment of VAT.

35 19. Therefore the appeal is dismissed, which means that the default surcharge of £35060.20 stands and is payable by Caligor.

20. 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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**ABIGAIL MCGREGOR  
TRIBUNAL JUDGE**

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**RELEASE DATE: 31 MARCH 2016**