



**TC07121**

**Appeal number: TC/2018/06016**

*VALUE ADDED TAX – default surcharge – payment one day late –  
reasonable excuse – no – penalty proportionate – yes – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PVC TRADE SUPPLIES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE NIGEL POPPLEWELL  
ANDREW PERRIN**

**Sitting in public at Cardiff on 15 April 2019**

**Mr Jonathan Thomas director of the Appellant for the appellant**

**Mr Joel Price Officer of HMRC for the Respondents**

## DECISION

### INTRODUCTION

1. This is a VAT case. It concerns the default surcharge. The respondents (or “HMRC”) have assessed the appellant to a default surcharge of £3,710.99 (the “surcharge” or “penalty”) for late payment of VAT for the VAT period 07/17 (the “default period”).
2. There is little or no dispute about the relevant law. The main issue in this appeal is whether the appellant has a reasonable excuse for the late payment.
3. For the reasons given below we have decided to dismiss the Appeal.

### SUMMARY OF THE LAW

4. The appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires a VAT return and payment of VAT due, on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995.]
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 (2), 40(2)]. Under that discretion, HMRC allow a further seven days for filing and payment.
6. Section 59 Value Added Tax Act 1994 ("VATA 1994") sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. HMRC may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. 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 chargeable default the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.
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(s). Section 59(7) VATA 1994 sets out the relevant provisions: -

“(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 -

(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

(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 -

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

9. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

“The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

## **FINDINGS OF FACT**

10. We were provided with a bundle of documents. Mr Thomas gave oral evidence on behalf of the appellant. He gave his evidence clearly and we found him to be a cogent and reliable witness.

11. From this evidence we make the following findings of fact;

(1) The appellant was registered for VAT in 2014. The nature of its business is PVC trade products (double glazing).

(2) The appellant must submit its VAT returns and payments electronically.

(3) The appellant has been in the default surcharge regime from period 01/15 onwards. It has persistently made late payments of VAT.

(4) The default period had a due date of 7 September 2017 for submission of the electronic VAT return and payment of the VAT.

(5) On 4 or 5 September 2017 Mr Thomas called HMRC. He did so with the intention of paying the VAT for the default period. Initially he stated, in evidence, that the reason why he could not pay during that call (he intended to pay by way of debit card) was either that there was an issue with HMRC's computer or it was an issue concerning authorisation by his bank. When questioned further, he thought in fact it was more likely that it was a failure by his bank to authorise the payment an issue with HMRC's computer.

(6) However, the consequence was that he was not able to make the payment of VAT for the default period, on that call. The lady to whom he spoke that HMRC told him that he had a couple more days before he needed to pay.

(7) It would have been possible to pay the VAT for the default period as late as 7 September if payment had been made using online payments or telephone banking (FPS)

(8) However payment was actually made over the phone by way of a Visa debit card on 8 September 2017. Mr Pook told us that this was the earliest opportunity that he was able to contact HMRC, and payment on this date is borne out by the debit card statement and HMRC's telephone records as well as the confirmatory email sent by HMRC to the appellant timed at 14:14 on 8 September 2017.

(9) Following receipt of the surcharge liability notice, the appellant requested a review of the surcharge. The respondents considered that the surcharge was still due, as a result of which the appellant then appealed to this tribunal.

## **BURDEN AND STANDARD OF PROOF**

12. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

## **DISCUSSION**

### **Appellant's grounds of appeal**

13. The appellant puts forward two grounds of appeal:

(1) Firstly, although the payment was late, had it known that it had to pay the VAT on or before 7 September 2017, it would have paid by online banking.

(2) Secondly, the payment was made just one day late and so the penalty is disproportionate.

### **Respondents' submissions**

14. HMRC submit as follows:

(1) Payment was made late. Mr Thomas had been told that the appellant had a

couple of days more to pay but he simply missed the deadline. HMRC's website would have told him, had he chosen to examine it, that payment could be made by 7 September 2017 by FPS or by an online payment. The appellant has been in default surcharge regime for a number of years and so knows the ropes.

(2) The penalty is proportionate

## **Discussion**

15. Regrettably for the appellant, we do not consider that it has a reasonable excuse. Mr Thomas was clearly told during his telephone conversation with a lady from HMRC on 4 or 5 September 2017 that the appellant had a couple more days to pay the VAT. This information was correct.

16. If taken literally, it meant that Mr Thomas knew that the VAT had to be paid on 6 or 7 September 2017. Mr Thomas says that had he known this (and that failure to so pay would have resulted in a penalty) he would have paid by online banking. But he did know this. He had been told that the VAT needed to be paid by 7 September, and the appellant had been in the default surcharge regime long enough to know that failure to pay VAT on the due date would result in a penalty.

17. If there was any ambiguity in the information given to him during that telephone conversation, Mr Thomas could have enquired of HMRC's website what the position was, and so clarified the position. There is no evidence that he did so.

18. Mr Thomas made a mistake. We all do. But the law gives no protection to a taxpayer for making a mistake. The taxpayer must show us either that it had a reasonable excuse or that it was reasonable to expect that the VAT would have been received by HMRC on or before 7 September. Mr Thomas has not been able to establish either. The reasonable taxpayer in the appellant's position having been told that it needed to pay its VAT within a couple of days and who was fully conversant with the default surcharge regime would have ensured that payment of the VAT would have been made to HMRC on or before the due date of 7 September 2017. It was not reasonable to expect that the VAT would have been received by HMRC on or before 7 September given that payment was not made by FPS or by online payment, but by way of debit card on 8 September 2017.

19. Nor do we consider that the penalty is disproportionate. The lateness of a payment is largely a question of fact and once it occurs a surcharge accrues. The length of the delay is immaterial. The surcharge applies even if payment is one day late.

20. The level of the surcharge is specified in s 59 VATA 1994 and as such HMRC have no discretion as to the amounts to be levied.

21. The appellant says that the surcharge is unfair given the one day delay which has occurred. 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.

(2) The Tribunal found that the DS penalty 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:

- (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.’”

22. 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.

23. Furthermore, notwithstanding that the application of a proportionate regime can, theoretically, be disproportionate in its application to the circumstances of a particular taxpayer, we do not consider that the penalty is disproportionate. The penalty is neither harsh, nor is it plainly unfair, the test that must be applied in the circumstances. The appellant was aware of the default surcharge regime, and had been within the 15% rate for a number of periods. Mr Thomas simply missed a deadline. We have some sympathy for him. But this does not make the penalty disproportionate.

## **DECISION**

24. For the foregoing reasons we dismiss the appeal.

## **APPEAL RIGHTS**

25. 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.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 28 APRIL 2019**