



TC02898

Appeal number: TC/2013/00204

VAT default surcharge - payment made by BACS on day payment was due - not received by HMRC until three days later - bank did not transfer money by Faster Payment Scheme as amount exceeded FPS limit - whether reasonable excuse - no - whether penalty disproportionate - no appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GIELLY GREEN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
JO NEILL**

Sitting in public at 45 Bedford Square, London WC1 on 18 April 2013

**Warren Hyams of WLH Tax Limited for the Appellant
Erika Carroll officer of HM Revenue and Customs, for the Respondents**

DECISION

The Appeal

- 5 1. Gielly Green Limited ('The Appellant') appeals against a default surcharge of £5,389.23 imposed by HMRC on 12 October 2012, in respect of the VAT period ended 31 August 2012 for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the VAT due of £35,928.23
- 10 2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

Background

- 15 3. The Appellant operates a boutique hairdressing and beauty salon in London. The company registered for VAT and commenced trading in 2008. It began to suffer cash flow problems in November 2010. The company had a poor VAT payment compliance record and had previously defaulted on VAT payments on the 5/10, 08/10, 11/10, 02/11, 05/11, 11/11 and 05/12.
- 20 4. Section 59 VATA 1994 provides for default surcharges. All VAT registered businesses are required by law to send to HMRC both their return and payment of the VAT by the due date which is normally one calendar month after the end of the accounting period covered by the return.
- 25 5. The company was on a quarterly basis for VAT, and therefore its VAT returns and the related payment was due on or before the end of the month following each calendar quarter. Reg. 25(1) and Reg 40(1) VAT Regulations 1995.
- 30 6. 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.
- 35 7. Section 71 (1) VATA, 1994 - Reasonable Excuse provides:
(1) For the purpose of any provision of sections 59-70 which refers to a reasonable excuse for any conduct:-
(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
(b) where reliance is placed on any other person to perform any task, neither the fact
40 of that reliance, nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

Appellant's Contention

- 45 8. The Appellant does not dispute that its VAT payment for the period 08/12, due on 30/09/12 was late. It is agreed that the payment was due on Friday, 05 October 2012 but did not reach HMRC until Monday 8 October 2012.

- 5 9. The Appellant says that payment of its VAT liability was made via internet banking on Friday 05 October (after business hours). The Appellant says that the director who made the payment intended to use the banks online 'Bill Payment' facility which he understood to operate under the Faster Payment Scheme and that payment (guaranteed processing within two hours) should have been received by HMRC on Saturday 06 October. For reasons which have not been explained by the bank (HSBC), the payment was not processed until Monday 08 October.
- 10 10. The Appellant asserts that it made every effort to pay its VAT liability on time and the reason the payment was received three day late by HMRC was due to a banking error beyond the Appellant's control. Enquiries have been made of HSBC to establish why the payment was not processed on 06 October, but without success.
- 15 11. The penalty imposed is entirely disproportionate to the nominal delay in HMRC receiving payment.

HMRC's Contention

- 20 12. The Period 08/12 had a due date of 7 October, 2012 for electronic VAT Payments and Returns. The VAT Return was received electronically by HMRC on 27 September, 2012. The company paid their VAT by way of a BACS transaction which was received by HMRC on 8 October, 2012. As the payment was received after the due date (05 October 2012), the Surcharge was correctly imposed.
- 25 13. Only an electronic transmission of monies by CHAPS would have reached HMRC on the day of transfer. The payment from the Appellant was received by BACS on 08 October 2012. It had been making electronic payments for some considerable time and therefore it is expected that the proprietors would have familiarised themselves with the time taken to process to payments.
- 30 14. The Appellant had been advised of the default surcharge regime previously and therefore must have been aware of the consequences of not paying its VAT by the due date.
15. The requirements for submitting timely electronic payments can be found-
- 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.
- 35
16. Previous correspondence from HMRC including help sheets had advised that only CHAPS payments would reach HMRC on the day of transfer.

17. The Surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4) payment having been received by HMRC after the due date for the Period 08/12.
- 5 18. The first default was recorded for Period 05/10 and the company entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default should have been known to the Appellant from this point on given the information printed on the Surcharge Liability Notice.
- 10 19. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:
- 15 *"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".*
- 20 20. 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).
- 25 21. HMRC contend that the Appellant's VAT return was submitted electronically for the Period 08/12. When the VAT Return was submitted on 27 September, 2012 the Appellant would have received an Acknowledgement which advises the Payment due date and to check with their bank as to the cut of times for making payments as below.

30 *"Any tax due must be paid electronically and received by HM Revenue & Customs by [Payment Due Date]. Payment should be made electronically, by Bankers Automated Clearing Services (BACS), Bank Giro Credit Transfer or by clearing House Automated Payment system' (CHAPS). You must use the VAT Registration number as a reference on your payment. Sort code, Account number and Account Name can be found on the HMRC web site.*

35 *[http://www. hmrc.gov.uk/payinghmrc/bank-accouhnt-checker.htm](http://www.hmrc.gov.uk/payinghmrc/bank-accouhnt-checker.htm)*

40 *Please note: HMRC now accepts Faster Payments. Before making an electronic payment please contact your bank or building society to check the services available to you, any daily value limits and the latest cut off times for making payment. For more information on making electronic payments see the 'How to pay' guide on the HMRC website:*

<http://www.hmrc.gov.uk/payinghmrc/vat.htm>"

45 *HMRC provides an on line internet VAT Payment Deadline Calculator which advises when Paying by BACS for Period ending 31 August, 2012 that HMRC must received cleared funds by 5 October, 2012.*

The due date for payment will be shown on your online VAT return, and you must make sure that cleared funds reach HMRC's bank account by this date. The exception to this is Direct Debit - see below. If your due date fails on a bank holiday or weekend, your payment must clear into HMRC's bank account the bank working day before then, unless you pay using the Faster

Payments Service (see below). If your payment arrives later than this you may be liable to a surcharge for late payment.

<http://www.hmrc.gov.uk/vat/managing/returns-accounts/deadlines.htm>

- 5 22. HMRC contend that as the company made their VAT payment by way of BACS after business hours on Friday, 5 October, 2012. It would not have been possible for the cleared funds to have reached HMRC's bank account on the same day.
- 10 23. Notice 700/50 (December 2011) section 6.3 (the notice represents HMRC's policy and understanding of the relevant legislation) states that HMRC consider that genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses for surcharge purposes. The fact that the proprietors of the company intended to make payment in time is not a reasonable excuse
- 15 24. The Directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon. The Appellant has not provided any evidence that the bank was at fault in the late payment.
- 20 25. Each surcharge liability notice warns that should the trader default again they may become liable to a surcharge and the percentage rate is given it clearly warns of the consequences of further defaults and details how the surcharge will increase. Each SLN or SLNE is issued with the same or similar guidance'
- 25 26. The Appellant says that the surcharge is entirely disproportionate to the delay which has occurred. The case of *Total Technology (Engineering Limited v HMRC)* was heard in the Upper Tribunal when it was held that:
- 30 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
- 35 2) The Tribunal found that the DS penalty does not breach EU law on the principle of proportionality.
- 40 3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal decision in the case of case of *Total Technology* addressed the following factors:
- 45 (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'
- 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

45 Conclusion

27. At the end of the hearing the Tribunal reserved its decision. Mr Hyams, for the Appellant said that the company was continuing its efforts to illicit a response

5 from HSBC and an explanation as to why a payment made using the 'bill
payment' facility was instead processed by BACS. The Tribunal offered the
Appellant a period of 30 days to submit any correspondence from HSBC as
additional evidence. None has been forthcoming and therefore this decision is
made on the basis of the evidence available to the Tribunal on the day of the
hearing.

10 28. It is clear that the director of the company, who made the 'Bill Payment', on line
on 05 October 2012, did so either very close to, or after banking hours. There is
no evidence that he used the Faster Payment Service. The money was received by
HMRC as a BACS payment which normally takes three days. Whether the delay
was caused because the payment exceeded the banks monetary limit for a 'Bill
Payment' or because it missed the cut off time for Bill Payments is something
15 which is not known, but the proprietors of the company should have taken into
account. The director who made the payment simply left it too late.

20 29. The Appellant has a poor compliance history and had been in the VAT default
surcharge regime for some time. The proprietors of the company would have
been aware of the deadline for payment and the consequences of late payment. As
stated in VATA 1994 s71(1)(b) 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. The
Appellant therefore cannot rely on any delay caused by the bank, unless it can also
25 show that the delay was caused by events entirely outside its own control. Given
that the VAT payment was made at or after normal banking hours the Appellant
cannot suggest it is blameless for the delay that occurred. It has therefore not
shown a reasonable excuse for the late payment.

30 30. For the above reasons the appeal is dismissed.

35 31. 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 J
TRIBUNAL JUDGE

RELEASE DATE: 20 September 2013

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