



**TC03069**

**Appeal number: TC/2012/03058**

*VAT default surcharge - payment received by HMRC three days late - instructions for BACS transfer of funds not given to bank until last working day - whether in the circumstances a penalty of £1317.30 was unfair and disproportionate - no - whether reasonable excuse - no - Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MAINE ENGINEERING LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL S CONNELL  
                  ROLAND PRESHO**

**Sitting in public at Kings Court Royal Quays Earl Grey Way North Shields on 4  
June 2013**

**The Appellant did not attend and was not represented  
Ms Rosalind Oliver Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

5 1. Maine Engineering Limited (“the Appellant”) appeals against a default surcharge of £1,317.30, imposed for its failure to submit, in respect of its VAT period ended 30 September 2011, by the due date, payment of the VAT due.

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

10 3. The Appellant did not attend the hearing and was not represented. The Appellant was contacted by the clerk to the Tribunal and said that they would not be attending the hearing and would not be represented. They confirmed that they were content for the appeal to be heard in their absence. The Tribunal was satisfied that it was in the interests of justice to proceed.

### Background

15 4. The Appellant’s principle business activity is the supply of dust extraction and ventilation systems.

20 5. The Appellant had previously defaulted on VAT payments in period 09/10 when a VAT Surcharge Liability Notice was issued. After that default further defaults occurred on 12/10 and 03/11. There had also been six defaults prior to the issue of the surcharge liability notice extending back to 09/10 but these were not relevant for the purposes of calculating the surcharge payable.

25 6. 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].

7. The due date for the Appellant’s 09/11 period was 31 October 2011. The Appellant’s return was received in time by HMRC on 24 October 2011. The amount due under the return was £26,346.15. Payment of the VAT due was received by HMRC by BACS transfer of funds on 10 November 2011, that is three days late

30 8. Section 59 Value Added Tax Act 1994 (“VATA”) 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. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default  
35 surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates.

9. 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 after the issue of a VAT Surcharge Liability Notice, the specified percentage is 2% and the percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

10. 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: -

10 (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 –

15 (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

20 (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 ..’

11. 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.

#### Appellant’s Case

12. The Appellant does not dispute that its VAT payment for the period 09/11 was due on 7 October 2011, or that HMRC received the payment on 10 November 2011, but says that the payment should have reached HMRC by the due date of 7 October 2011.

13. The Appellant also says that the surcharge is excessive and disproportionate given that the VAT payment was only three days late.

#### HMRC’s Case

14. Ms Oliver for HMRC said that the Appellant’s VAT Period 09/11 had a statutory due date of 31 October 2011. The due date is extended by seven days where payment is made electronically (except where this falls on a bank holiday or weekend when the due date is deemed to be the last previous working day.) The VAT should have been received by 7 November 2011 but was received three days later on 10 November 2011.

15. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice for period 09/10 and further surcharge default notices for periods 12/10 and 03/11. The information contained on the reverse of each Notice states:

5                                   ‘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.’

10 16. The requirements for submitting timely electronic payments can also 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](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

15 17. Also the reverse of each default 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).

18. Therefore the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

20 19. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. No request for a time to pay arrangement was received by HMRC from the Appellant prior to the default.

### Conclusion

20. The Appellant says that the VAT payment should have reached HMRC by 7  
25 November 2011. However the payment was by BACS which takes three working days or more and therefore there was never any possibility of the VAT reaching HMRC until at least 9 November 2011, that is two days late. In the event the funds were received three days late. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment and so there was  
30 no reasonable excuse for the late payment.

21. The Appellant says that the surcharge is excessive and disproportionate. The case of *Total Technology (Engineering) Limited* [2012] UKUT 418 heard by the Upper Tribunal, (where a penalty of £4,260.26 was held not to be disproportionate although the VAT payment had only been one day late.) The case established the  
35 VAT default surcharge penalty regime was not “flawed legislation” and did not “amount to a breach of convention rights”, as had been argued in that case. The Tribunal said that the amount of the penalty had been arrived at by applying a scheme of calculation, which did not involve a breach of the principle of proportionality. In *Energys Holdings UK Ltd* [2010] UKFTT 20 (TC), a penalty of £130,000 imposed

when the VAT payment was only one day late could be regarded as “not merely harsh but plainly unfair” and was therefore disproportionate.

22. There is therefore nothing in the VAT default surcharge regime which leads to the conclusion that its architecture is fatally flawed or that it infringes the principle of proportionality. The Upper Tribunal in *Total* recognised that the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no, discretion for HMRC to relieve a surcharge once imposed. The Tribunal said that clearly there must be some upper limit on the penalty for a default which was proportionate, but did not suggest what that might be, given that all the circumstances of the default must be taken into account.

23. It is therefore open to Tax Tribunals to consider individual default surcharges without having first concluded that the default surcharge regime as a whole is disproportionate. However in assessing whether a penalty in any particular case is disproportionate, the Tribunal must be astute not to substitute its own view of what is fair for the penalty, which Parliament has imposed. The Tribunal should show the greatest deference to the will of Parliament when considering the application of the VAT default surcharge scheme.

25. By way of further background to the Tribunal’s reasoning in *Total*, the Tribunal referred to what Simon Brown LJ had said in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26], setting out the test for assessing proportionality -

“... it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference.”

The Tribunal observed that the “not merely harsh but plainly unfair” test set a high threshold which must be surmounted before a Tribunal could find that a penalty, correctly levied on the taxpayer by statutory provisions set by Parliament, should be struck down as disproportionate.

26. Although the Appellant regards the penalty as unfair, a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of

each other. It is then open to the taxpayer to show whether a reasonable excuse exists for the late payment.

27. So is the penalty disproportionate? The penalty imposed on the company was £1,317.30. The delay was three calendar days. The penalty is certainly substantial but cannot be described as “devoid of reasonable foundation” (*Energysys*). Even if the penalty is more than would possibly be imposed if it was a matter to be decided by the Tribunal, it is significantly below and cannot be compared with the penalty of £130,000 imposed by HMRC in *Energysys*. It does not approach the level, which the Tribunal described in *Energysys* as unacceptable or ‘unimaginable’. Therefore in our view the surcharge imposed in this case cannot be said to be within a range, which would reasonably be regarded, as disproportionate.

28. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal’s view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant’s late payment of VAT for the 09/11 period.

29. The appeal is accordingly dismissed and the surcharge upheld.

30. 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.

**MICHAEL S CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 21 November 2013**