



**TC03163**

**Appeal number: TC/2013/03417**

*VAT default surcharge – payment one day late – payment inadvertently made by BACS rather than FPS which delayed payment – whether reasonable excuse – no – whether penalty disproportionate – no – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MALOY & FLYNN RECRUITMENT LIMITED                      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL  
SUSAN STOTT**

**Sitting in public at Nottingham MJC Carrington Street Nottingham on 6 August  
2013**

**Mr Justin Auckland of Proactive Financials Limited for the Appellant**

**Mr Tom Eyre, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

- 5 1. This an appeal by Maloy & Flynn Recruitment Limited (“the Appellant”) against a VAT default surcharge of £4,081.53, for its failure to submit, in respect of its VAT period ended 31 December 2012, by the due date, payment of the VAT due. The surcharge was calculated at 5% of the VAT due of £81,630.69.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.
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### Background

3. Prior to the default for 31/12 the Appellant had previously defaulted on VAT payments in period 12/11 when a VAT surcharge liability notice was issued, and again on 03/12.
- 15 4. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Section 59 of VATA 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].
- 20 5. The Appellant paid VAT on a quarterly basis, usually by BACS. The Appellant’s return was received by HMRC on 11 January 2013 and was therefore on time. The Appellants VAT was due for payment to HMRC on 31 January 2013.
- 25 6. 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 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 default the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.
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7. 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 filing and payment. The due date for the 12/12 period was 7 February 2013.
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8. The VAT payment was made late by BACS on 8 February 2013. The payment was therefore one day late.

9. 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 sets out the relevant provisions : -

5                   ‘(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 –

10                   (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

15                   (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 ..’

20 10. The burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question. It is s 59(7)(b) VATA on which the Appellant seeks to rely on the basis that the VAT was paid late because of an inadvertent mistake by their new accounts clerk.

25 11. The onus of proof rests with HMRC to show that the surcharges were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of a balance of probabilities.

12. The Appellant’s appeal against the surcharge was received out of time by the Tribunal on 8 May 2013. Its request to bring a late appeal was allowed on the basis that it was not fully conversant with the review and appeal procedure and there was no objection by HMRC.

30 Appellant’s Case

13. The Appellant does not dispute that its VAT payment for the period 12/12 was due on 31 January 2013, or that it was late making payment. It is agreed that the payment, if made electronically, was due on 7 February 2013 but that payment was made by BACS and the funds did not reach HMRC until 8 February 2013.

35 14. In its notice of appeal to the Tribunal the Appellant’s stated grounds of appeal were that the company’s new accounts clerk assumed that all electronic bank payments were ‘same day transfers’. She did not know that the company used BACS instead of FPS payments and that BACS payments take at least two days to reach HMRC. She made the payment on 6 February and thought that the funds would reach  
40 HMRC on the same day, that is, one day before the due date. The payment reached HMRC on 8 February 2013 and was therefore one day late

15. Mr Auckland said that he was a management accountant for the company but that he did not deal with its day to day bookkeeping. He said that the late payment was an innocent misunderstanding by a new accounts clerk. She thought that CHAPS and BACS were the same thing. The directors knew about the deadline for payment and had done everything in their power to ensure payment was made on time. There was a backlog of work to catch up on following the retirement of the previous clerk and the new clerk had done well to get the VAT December quarter end completed on time for the return to be submitted and the payment made.

16. The Appellant also says that the penalty of £4,081.53 is excessive and disproportionate to the minimal delay that occurred.

#### HMRC's Case

17. The Period 12/12 had a due date of 7 February 2013 for electronic VAT payments and the Return. The VAT Return was received electronically by HMRC on time. The amount due on the tax return was £81,630.69. The payment was made by BACS rather than by CHAPS or the 'Faster Payment' scheme, with the result that the funds were not received by HMRC until 8 February 2013.

18. The potential financial consequences attached to the risk of a default would have been known to the Appellant after the issue of the Surcharge Liability Notice in June 2011, given the information contained in the Notice. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

'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.'

19. 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.

20. 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).

21. The Appellant has in any event confirmed that it was aware of the VAT deadline. Therefore HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

22. The responsibility for VAT payments lies with the Appellant and not employees. A taxpayer cannot delegate its obligations to a third party employee.

23. Insofar as the Appellant argues that the surcharge is entirely excessive or disproportionate to the modest delay which occurred, the case of *Total Technology (Engineering) Limited v HMRC* heard in the Upper Tribunal held that:

5 (1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.

(2) 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

10 (c) The ‘inexact correlation of turnover and penalty’

(d) The ‘absence of any power to mitigate’

and decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality. The penalty was therefore not disproportionate.

15 Conclusion

24. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

25. The Appellant’s main ground of appeal is that there is a reasonable excuse because of an unfortunate sequence of events. The clerk who the company had relied on for many years had to leave her employment suddenly and the new clerk, although experienced, was not aware of the fact that a BACS payment was not a same day payment. The funds were available to be remitted to HMRC and the Appellant did its best to ensure they reached HMRC on time. Given that background, the Appellant says that the penalty is totally disproportionate to the one day late payment.

25 26. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure the Tribunal must take for comparison a person in a similar situation to that of the actual taxpayer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person’s exercise of reasonable foresight, due diligence and a proper regard for  
30 the fact that the tax would become payable on the particular dates, those factors would not have avoided the failure to pay the VAT on time.

27. 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, that burden has not been discharged  
35 and there was no reasonable excuse for the Appellant’s late payment of VAT for the 12/12 period. The sequence of events was indeed unfortunate and the Tribunal has some sympathy for the Appellant. However the legislation and the law are clear. If the reason for the delayed payment was not outside the control of the Appellant, and in

this case it was not, it is very unlikely that a reasonable excuse has been shown. The employer must also accept responsibility for the actions of its employees no matter how well intentioned or inadvertent.

5 28. With regard to the Appellant's submission that the penalty is disproportionate, as the Upper Tribunal said in *Total Technology*, there is 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 Tribunal 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  
10 to relieve a surcharge once imposed. It concluded however that there must be some upper limit on the penalty for a default which was proportionate, although it did not suggest what that might be, given that all the circumstances of the default must be taken into account.

15 29. 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.

20 30. 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 -

25 ".... 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  
30 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,  
35 correctly levied on the taxpayer by statutory provisions set by Parliament, should be struck down as disproportionate.

40 31. In the case of *Energys Holdings UK Limited* referred to by the Appellant, due to a human error the relevant return was submitted, and payment made, one day late. This resulted in a 5% penalty amounting to just over £130,000. Judge Colin Bishop held that the penalty was wholly disproportionate to the gravity of the offence. It was not merely harsh but plainly unfair and in the absence of any justification it could not be saved by the State's margin of appreciation. As he said, penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so

disproportionate to the gravity of the infringement that it becomes an obstacle to the underlying aims of the VAT Directive by imposing a disproportionate burden on a defaulting trader and distorting the VAT system as it applies to him. It possible to envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate.

32. 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.

33. Is the penalty disproportionate? The penalty imposed on the company was £4,081.53. The delay was one day, but the penalty would have been the same if the delay had only been one day or significantly longer. There must of course be a proportionate upper limit to a penalty. The penalty is certainly substantial but cannot be described as “devoid of reasonable foundation”. The penalty is significantly below, and cannot be compared with, the penalty of £130,000 imposed in *Energysys*. It does not approach the level which the Tribunal described in *Energysys* as ‘unimaginable’. In our view it cannot be said to be within a range which would properly be regarded as entirely disproportionate.

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

35. 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: 19 December 2013**