



TC03281

Appeal number: TC/2011/07648

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VAT – late payments on account – penalties-reasonable excuse- cash management-failure by staff members –lack of notification by HMRC of first missed payment on account –disproportionality –held – taxpayer not acting as prudent and reasonable taxpayer-penalty not disproportionate – HMRC no obligation to notify of late payment on account - appeal dismissed.

TOM TOM SALES BV (UK Branch)

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
HELEN MYERSCOUGH**

Sitting in public at 45 Bedford Square, London WC1 on 21 October 2013

Mr Vos for the Appellant

Mr Robinson instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This is an appeal against a VAT default surcharge of £38,041.00 charged at the 5% rate for the period from 1 April to 30 June 2011, the 06/11 period. The total amount of tax treated as paid late for this period is £760,838.71.
2. The Appellant submitted a skeleton argument to the Tribunal on the day of the hearing. With HMRC's consent this was relied upon by the Appellant.

Facts

3. The Appellant has been registered for VAT since 1 January 2006 in the UK and carries on business in the UK as a supplier of personal navigation systems. The Appellant has been in the payment on account regime since September 2006. The Appellant's turn over for the 06/11 period in the UK was £317m.
4. The Appellant has been in the default surcharge regime since the 06/09 VAT period and a surcharge liability notice was issued to the Appellant in February 2011 in respect of the 12/10 VAT period.
5. The Appellant was in the payment on account regime for the period 06/11 and was due to make monthly payments on account on 31 May and 30 June 2011. Both of these payments were made at the end of the VAT period on 18 July 2011 along with the balancing payment for that period.
6. The May and June payments were made late due to internal miscommunications, leading to the failure by the Appellant's cash management team to schedule the payments.
7. HMRC issued a default surcharge liability notice on 19 August 2011 for the 06/11 period. The Appellant requested a statutory review of HMRC's application of penalties for this and earlier periods (which are not the subject of this appeal) on 9 August 2011. On 24 August 2011 HMRC notified the Appellant that a surcharge of 5% was due for the 06/11 period and taking account of an over payment of tax for a previous period the amount of the surcharge was £38,014.00. The Appellant appealed against this decision on 20 September 2011.

The Law

8. The relevant legislation relating to the payment on account regime is the VAT (Payments on Account) Order SI 2011/93. The default surcharge provisions are set out at s 59A Value Added Tax Act 1994 ("VATA 1994") in respect of the payment on account regime and the definition of a reasonable excuse for these purposes is set out at s 71 VATA 1994.

The Appellant's Arguments

9. Mr Vos appealed against the surcharge for three reasons;
 - (1) The Appellant had not received a VAT surcharge notice in respect of the first monthly pre payment due on 31 May 2011. HMRC's own guidance notice (VCP 10536) stipulates that a surcharge liability notice should be issued after a late payment on account. If a penalty notice had been received in respect of the

first late payment on account, the second payment would not have been made late. A liability notice should have been received before any default surcharge was issued. Mr Vos suggested that changes of personnel at HMRC at the time might have accounted for the lack of effective notification that the payments had not been made on time.

(2) The penalty was disproportionate, particularly since all of the payments for the quarterly accounting period had been made on time. Although the first two payments on account were made late, the balancing payment at the end of the period was made on time. In these circumstances the 5% surcharge was excessive and unfair and did not comply with the EU principle of proportionality or the Human Rights Act as set out in the *Profaktor* case (Case C-188-09). Mr Vos referred to the *Total Technology* decision (*Total Technology Engineering Ltd v HMRC* [2012] UKUT 418 (TCC)) but said that his facts were more similar to the *Energys* decision (*Energys Holdings UK Ltd v HMRC* [2010] UKFTT 20(TC)). Mr Vos also referred to the fact that the Dutch system of VAT did have a cap on the amount of penalty payable

(3) The payment was made late as a result of the failure by the Appellant's employee to submit the payments on time due to an internal communication issue. The Appellant is an overseas business only relatively recently registered for VAT in the UK, with a good compliance record who has only made a small number of late pre payments.

HMRC's Arguments

10. For HMRC, Mr Robinson argued that the action of an employee could not be treated as a reasonable excuse under s 71(1)(b) VATA 1994, other than in extreme circumstances (such as were established in the *Blaze Group Holdings Limited* decision ([2011] UKFTT 616 (TC)) which were not present here. The fact that these missed payments arose from a genuine error does not give rise to a reasonable excuse for late payment.

11. On the question of proportionality, HMRC pointed out that the *Total Technology* decision had established that save for the lack of an upper limit on the amount of penalty chargeable, the VAT surcharge regime was not itself disproportionate. Nor was this particular surcharge disproportionate by reference to the Appellant's turn over (£317m for the 06/11 VAT period), or close to the level at which any proposed cap might apply.

12. HMRC said that by reference to s 59A VATA 1994, HMRC was not obliged to issue a surcharge liability notice in respect of each pre payment period, but only at the end of every prescribed accounting period, which for the Appellant was quarterly. A surcharge liability notice had been served on the Appellant for the 12/10 period making it clear that they would be in the default surcharge regime until 31 December 2011. HMRC stressed that it had followed normal procedures in this case which had not been impacted by changes of personnel at HMRC which had occurred at the time.

Discussion

13. The Tribunal agree with HMRC on each of these points; the fact that these late payments arose from a genuine error is not in itself a determining factor when deciding whether the taxpayer has a reasonable excuse for late payment. Even if the

error was genuine, the actions of the Appellant's cash management team did demonstrate shortcomings in not providing any warning to the Appellant when tax payments had not been made, which the Tribunal considers were not the actions of a reasonably prudent taxpayer.

14. The circumstances in which the actions of an employee can be treated as a reasonable excuse for s 71 VATA purposes are rare. S 71 (1)(b) states that "*where reliance is placed on any 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*". It is only where an employee has gone beyond their authority or acted with an intention to deceive, that a reasonable excuse might be found to exist. There was no evidence to suggest that the Appellant's employees had failed to submit payments intentionally and hidden this from the Appellant, as was the case in the *Blaze* decision. The actions of the employees did not therefore amount to a reasonable excuse and were caught by the restrictions in s 71(1)(b) VATA 1994.

15. In the context of the Appellant's turn over and taking account of the lateness of the two payments, the Tribunal agrees with HMRC that this default surcharge is not disproportionate. In the *Total Technology* decision the court considered whether the VAT default surcharge regime was disproportionate because it penalised traders for trivial or non intentional errors, as the Appellant suggests was the case here, particularly because the full payment for the 06/11 period was made on time. The conclusion of the court on that point was that this was not sufficient to make the VAT default surcharge regime disproportionate overall and that it would only be in very extreme individual cases that the regime would apply to produce a disproportionate penalty, as in the *Energys* decision.

16. The Appellant argues that these circumstances are one of those extreme cases in which the VAT regime has produced a disproportionate result, but the Tribunal does not agree. This was not the Appellant's first late payment; the Appellant's first late payment under the payments on account regime was the second payment of the 06/09 period. Also, both of the payments on account were late by several weeks, not merely a matter of days. Nor does the Tribunal consider that the penalty was unduly harsh by reference to the Appellant's turnover. Unlike in the *Energys* decision, the default surcharge has not been imposed in respect of a period for which an unusually large amount of VAT is due. The Tribunal considers that the Appellant has not demonstrated that the penalty in this instance is "not merely harsh, but plainly unfair" taking account in particular of the statements in the *Total Technology* decision of the need for this Tribunal to be cautious in overriding the penalties set by the VAT legislation.

17. The Appellant made a comparison with the way in which the VAT regime is applied in the Netherlands, but in the Tribunal's view this is not a relevant consideration. The decisions referred to above stress that national tax authorities have a "wide margin of appreciation" in determining how to operate the VAT penalty regime. The UK penalty regime should not be treated as disproportionate only because in some instances it provides for a greater penalty than the Netherlands regime would impose.

18. The Tribunal also agree with HMRC that their obligations to issue default surcharge notices under s 59A VATA 1994 operates by reference to prescribed accounting periods and would point out that the Appellant had had a surcharge notice

issued to it on 21 February 2011 for the 12/10 VAT period which should have put them on notice that late payments on account would trigger penalties.

19. Finally, the Tribunal would comment that any issues concerning HMRC's administrative procedures, including the fact that they did not issue penalty notices after the first late payment on account to the Appellant, are outside the remit of this Tribunal because they are not enshrined in the tax legislation. They are therefore properly raised through judicial review proceedings, as made clear in the *Hok* decision. ([2012] UKUT 363(TC))

20. For these reasons this appeal is dismissed and the surcharge penalties are confirmed in the amount of £38,041.00

21. The Appellant requested an order for costs in their favour. This case has been categorised by the Tribunal as a standard case with the result that costs can only be awarded if it is considered that either party has acted unreasonably in bringing these proceedings, which the Tribunal does not consider to be the case. Therefore, no order for costs is made.

22. 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.

23.

**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 29 January 2014