



TC03446

Appeal number: TC/2012/04230

VAT – Default surcharge – Reasonable excuse – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MILLER LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
 MS SONIA GABLE**

Sitting in public in London on 9 July 2013

No appearance by or on behalf of the Appellant

Mr C Jacobs for the Respondents

DECISION

Introduction

1. This is an appeal against the imposition of a default surcharge of £5,009.19
5 under s.59 of the Value Added Tax Act 1994 on late payment of VAT for the period
ending 30 November 2011.

2. A summary decision in this appeal was released on 16 July 2013. The
Appellant subsequently submitted a notice of appeal, which has been treated by the
Tribunal as an application for full written reasons. These are now provided.

10 The hearing

3. At the hearing, there was no appearance by or on behalf of the Appellant. The
Tribunal asked the clerk to telephone the Appellant. The clerk informed the Tribunal
that he had telephoned HMCTS in Birmingham requesting that the hearing be
15 postponed as he could not attend on the day, and that he had added that if he attended
he would only repeat what he had already stated in writing, namely that he wanted to
ask the Tribunal for clemency. The Tribunal was satisfied in the circumstances that
the Appellant had notice of the date and time of the hearing. The Tribunal had no
information to confirm that he had telephoned Birmingham to request a
20 postponement. In any event, there was no suggestion that he was renewing that
application before the Tribunal on the day of the hearing, and the Appellant had not
advanced any specific reason why he could not attend on the date listed for the
hearing. Mr Jacobs submitted that the Tribunal should proceed to determine the
appeal in the Appellant's absence.

4. The Tribunal was satisfied that it was in the interests of justice to proceed to
25 determine the appeal in the Appellant's absence. In addition to the matters above, the
Tribunal took into account that Mr Jacobs was present and had prepared for the
hearing, that unnecessary adjournments or postponements on the day of hearing are
inconsistent with the public interest in judicial efficiency, and that Rule 38 of the
Rules makes provision for a decision of the Tribunal to be set aside in circumstances
30 where the Appellant or his representative were not present at the hearing, if it is in the
interests of justice to do so (Rule 38(2)(d)).

The relevant legislation

5. Section 59 of the Act states in relevant part as follows:

35 (1) ... if, by the last day on which a taxable person is required in
accordance with regulations under this Act to furnish a return for a
prescribed accounting period—

...

40 (b) the Commissioners have received that return but have not
received the amount of VAT shown on the return as payable
by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

...

5 (2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

10 (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

...

15 (4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

20 (b) has outstanding VAT for that prescribed accounting period, he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

25 (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

30 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

35 (c) in relation to the third such period, the specified percentage is 10 per cent;

...

40 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (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,

5 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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

...

10 6. Section 71(1) of the Act states in relevant part as follows:

(1) For the purpose of any provision of sections 59 to 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

15 (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 parties' submissions

20 7. The Appellant's notice of appeal does not dispute that the payment in question was late, nor does the Appellant dispute that the amount of the surcharge has been correctly calculated in accordance with the legislation. Rather, the notice of appeal states that the Appellant "is appealing to the Tribunal to show clemency" in the circumstances of the case, which are said to be as follows. Two signatories are
25 required to go to the bank to sign the request for an electronic transfer, which is done on the day that payment is due "or before if funds are available". On Friday 6 June 2012, an official of the company was abroad and remembered that payment was due that day. That official telephoned his office, and was informed that only one signatory was available to go to the bank, and that it was uncertain whether the other
30 possible signatory could make it to the bank by 3.30pm. The official then mistakenly came to the conclusion that as the due date of 7 June 2012 was a Saturday, it would suffice if he made the payment on Monday 9 June 2012. The Appellant acknowledges that there was a mistake of law which is no excuse, and that there was a lack of foresight on the Appellant's part. However, the Appellant requests that
35 clemency be shown because the delay was due to "human error" and because the funds were available and there was no reason not to make the payment.

8. The Tribunal has also taken into account the submissions in the HMRC statement of case.

The Tribunal's findings

40 9. We find that the penalty imposed in the present case is in accordance with the legislative scheme. The Tribunal finds that the kind of error of law or human error

described by the Appellant does not amount to a reasonable excuse for the late payment, within the meaning of the applicable legislation. The Appellant, if acting diligently, would have been aware of the due dates for payment, the possible means of payment and the times that different types of payment take in order to reach HMRC, and would have taken steps to ensure that the payment was made on time. In the absence of a reasonable excuse, the Tribunal has no jurisdiction or discretion to waive a penalty simply on the grounds of clemency.

Conclusion

10. For the reasons above, the Tribunal dismisses the appeal.

11. 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.

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 25 March 2014