



TC03538

Appeal number: TC/2014/00188

*VALUE ADDED TAX – default penalty surcharge – whether reasonable
excuse for late payment – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**HASSAN LAL
t/a PARK LICENSED GROCERIES**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 04 April 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 04 January 2014 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 23 January 2014.

DECISION

The Appeal

1. This is an appeal against a default penalty surcharge of £189.13, imposed for the late payment of VAT for the three month period ending 31 August 2013.

The issue

2. The appellant appeals on the grounds that there was a reasonable excuse for late payment. This is opposed by HMRC.

The law

3. Section 59 (7) Value Added Tax Act 1994 (“VATA”) provides:

" If a person who, apart from this subsection, would be liable to a surcharge ... satisfies ..a tribunal that, in the case of a default which is material to the surcharge -

(a) ... 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 ... VAT not having been so despatched,

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..

4. Section 71 (1) VATA provides:

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse;

5. In the case of *Customs and Excise commissioners v Steptoe [1992] STC 757* Court of Appeal held that an insufficiency of funds cannot, of itself, constitute a reasonable excuse but that the Tribunal was obliged to consider whether the reasons for an insufficiency of funds, or the underlying cause of a default, might do so. Lord Donaldson MR indicated :-

“if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment”

6. The legislation does not define the term “reasonable excuse”. It has been held to be “a matter to be considered in the light of all the circumstances of the particular case” *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

Burden of proof

5 7. HMRC has the burden of proving that the penalty has been incurred. The taxpayer has the burden of proving that there was a reasonable excuse. *Jussila v Finland (73053/01) [2006] ECHR 996*.

The agreed facts

8. The default history is summarised as follows:

10 (1) Period 11/11 - default one - electronic payment was due on 07 January 2012 and was paid on 05 March 2012. No penalty was incurred but a surcharge liability notice was issued. The surcharge liability notice contained the following paragraph

15 “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 .. or the National advice service”

20 (2) Period 02/12 - default two - electronic payment was due on 07 April 2012 and was paid on 06 June 2012. A surcharge of 2 % was applied. However, because this was less than £400, HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months. The surcharge liability notice contained the following paragraph

“Pay your VAT on time - don’t rely on HMRC to remind you”.

(3) Mr Lal telephoned the HMRC helpline on 12 June 2012 and was “educated about payment dates”.

25 (4) Period 11/12 - default three - electronic payment was due on 07 January 2013 and was paid on 28 January 2013. A surcharge of 5 % was applied. Again this was less than £400 and HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months. The reminder paragraph quoted in (1) above was also included.

30 9. For the period 08/13 - electronic payment was due on 07 October 2013. The return was filed on 03 October 2013 and the VAT was paid by direct debit on 31 October 2013. The VAT amounted to £1,891.35 and the penalty, of £189.13, was calculated at the rate of 10 % of the tax due.

35 10. Mr Lal experienced a downturn in trade in September 2013 due to commercial competition. As result of this the business has suffered cash flow problems such that he has had to resort to using his bank overdraft facility. In support of his case he has provided a bank statement showing a credit balance of £329.37 on 30 September and an overdraft of £985.66 on 30 October 2013.

The Arguments

The appellant's case

11. Mr Lal states that he has a reasonable excuse for the late payment due to confusion regarding payment dates. He also submits that he did not have sufficient funds available to pay the VAT due to the downturn in business.

The respondent's case

12. HMRC submit that there is no reasonable excuse due to confusion as to payment dates because Mr Lal had previously received advice on this issue and did not contact HMRC to clarify the position before the due date. They do not accept that there was an insufficiency of funds available to pay the VAT on time.

Reasons for decision

13. I do not find that Mr Lal has established a reasonable excuse due to confusion as to the due date for payment because:

(1) He was given advice on payment dates during the telephone call with HMRC of 12 June 2012 and

(2) he had the opportunity to seek further advice from HMRC regarding the timing of direct debits but failed to do so.

14. I accept that the business experienced cash flow problems. However I do not find that there was an insufficiency of funds such that Mr Lal was unable to pay the VAT on 07 October as the bank statements show that the business was operating within an agreed overdraft facility. Accordingly I am not satisfied that Mr Lal has established a reasonable excuse due to an insufficiency of funds.

Decision

15. There was no reasonable excuse for the late payment of VAT.

16. The appeal against the VAT default penalty surcharge of £189.93 is dismissed.

Rights of appeal

17. 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.

**JOANNA LYONS
TRIBUNAL JUDGE**

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RELEASE DATE: 28 April 2014