



TC03649

Appeal number: TC/2014/00220

VAT default surcharge – Appellant overlooked making VAT payment due to working commitments – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEPHEN LEE ALLEN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 15 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 received by the Tribunal Service on 8 January 2014 and HMRC's Statement of Case submitted on 27 January 2014, the Appellant submitting no Reply.

DECISION

The Appeal

- 5 1. Stephen Lee Allen ('the Appellant') appeals against a default surcharge of £702.18 imposed by HMRC on 11 October 2013, in respect of the VAT period ended 31 August 2013, for his failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £4,681.23.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payments.

10 Background

3. The Appellant has been in the VAT default surcharge regime from period 05/12.
4. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg. 25(1) and Reg 40(1) VAT Regulations 15 1995.]
5. In respect of the default period, as payment was made by cheque the due date for payment was 30 September 2013. The return was received on late on 1 October 2013 and the VAT payment on 24 October 2013.
- 20 6. 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. Section 59 (7) VATA 1994 sets out the relevant provisions : -
- 25 ' (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 –
- (a)
- 30 (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.'
- 35 7. The onus of proof rests with HMRC to show that the surcharge was 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 the balance of probabilities.

Appellant's contentions

8. The Appellant does not dispute that his VAT payments for the period 08/13, was late.

5 9. The Appellant's grounds of appeal are that he had 'long work commitments, working day and night'. He simply overlooked paying the VAT on time.

10. The Appellant also says that the penalty is unfair and that he cannot afford to pay 'such a large fine'.

HMRC's contentions

10 11. The Appellant entered the Default Surcharge Regime following a default in period 05/12. He then defaulted in periods, 08/12, 11/12 and again in period 05/13, prior to the default period under appeal.

12. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 05/12 Surcharge Liability Notice.

15 13. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

20 *'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'.*

25 14. The reverse of each 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).

15. The requirements for submitting timely payments can in any event be found-

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- 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
 - On the E-VAT return acknowledgement.

16. The Surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4), payment having been received by HMRC after the due date.

17. The Appellant says that the surcharge is unfair. The case of *Total Technology (Engineering) Limited v HMRC*, heard in the Upper Tribunal held that:

- 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
- 2) The Tribunal found that the VAT default penalty regime does not breach EU law on the principle of proportionality.
- 3) 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
 - (c) The 'inexact correlation of turnover and penalty'
 - (d) The 'absence of any power to mitigate'

The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality. HMRC say that the penalty is determined by the number of defaults and amount paid late. The penalty is therefore commensurate with the default and unless devoid of reasonable foundation cannot be held to be unfair.

Conclusion

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

19. The burden of proof is on the Appellant to show that he has a reasonable excuse for the late payment of VAT for the period 08/13.

20. The Appellant says that he overlooked the payment because he was busy, night and day, due to work commitments. The Appellant says that he forgot about the VAT being payable. This does not constitute a reasonable excuse as recognised by law.

21. There is no statutory definition of 'reasonable excuse', which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

22. In this case there was no unexpected or unforeseeable event which caused the Appellant to overlook the VAT payment liability. The Tribunal sympathises with the Appellant, who was clearly very busy and working hard at the due date for payment. He did not delay payment of the VAT deliberately or recklessly, but simply forgot to pay the VAT on time. However, at law, this does not constitute a reasonable excuse.

23. The Appellant also says that the surcharge is unfair. For the reasons submitted by HMRC and set out in paragraph 17 above, this is not a ground of appeal which can be considered by the Tribunal.

5 24. In the Tribunal's view, for the reasons given above, the Appellant has not shown a reasonable excuse for his failure to submit, by the due date, payment of VAT due of £4,681.23 for period 08/13.

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

10 26. 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 27 May 2014

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