



TC03655

Appeal number: TC/2013/07529

*VALUE ADDED TAX – default surcharge – whether appellant liable – yes
whether there was a “reasonable excuse” for late payment – no – whether
penalty disproportionate - no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GPF TRADING LTD

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 29 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 03 November 2013, HMRC’s original statement of case, the appellant’s response dated 29 November (with enclosures) and HMRC’s amended statement of case (with enclosures) acknowledged by the Tribunal on 21 January 2014 (with enclosures).

DECISION

The Appeal

1. This is an appeal against a default penalty surcharge of £1,004.42, imposed for the late payment of VAT for the three month period ending 30 June 2013. The penalty was imposed in accordance with Section 59(4) Value Added Tax Act 1994.
2. Mr Gregory Fee is a director of the appellant company (“the company”) and appeals on its behalf.

The issues

3. Mr Fee appeals on the following grounds:
- (1) The company are not liable for the penalty;
- (2) There was a reasonable excuse for late payment and
- (3) The penalty is unfair and disproportionate.
4. These matters are disputed by HMRC.

The facts

The Contested facts

5. The default history was not agreed and areas of contention outlined below.
- (1) Period 02/12 (three months) – default one - Electronic payment was due on 07 April 2012. HMRC state that the appellant paid the VAT late on 23 April 2012. The VAT amounted to £3,642.49. Mr Fee states that this payment was an advance payment for the period 05/12. No penalty was issued but a help letter was sent to the appellant on 13 April 2012. Mr Fee states that he did not receive the letter.
- (2) Period 05/12 (three months) - default two - The return was due on 07 July 2012 and was filed on 31 July 2012. Mr Fee states that he delegated the task of filing the return to his accountant and assumed it had been filed on time. Electronic payment was due on 07 July 2012 and was paid late on 23 and 24 July. Mr Fee states that the VAT for this period was paid early on 23 April. No penalty was incurred but a surcharge liability notice was issued on 13 July 2012. Mr Fee states that he did not receive the surcharge liability notice.
- (3) Period 06/12 (one month) – no default – this was a short period due to a change in accounting periods. The VAT return was due on 07 August and was received on 06 August. It appears that the VAT was paid on time.
- (4) Period 09/12 (three months) - default three - Electronic payment was due on 07 November 2012 and was paid on time. The return was due on 07 November 2012 and was received on 13 December 2012. HMRC issued a 2% late payment penalty and a surcharge liability extension notice for one year on

16 November 2012. The penalty was later cancelled as HMRC agreed that the payment had been made on time. However the surcharge liability extension notice remained in place due to the late submission of the return. Mr Fee states that he did not receive the surcharge liability notice.

5 *The agreed facts – the current default*

6. For the period 06/13 the return was due on 07 August 2013 and was filed on time. The VAT was due on 07 August and was paid by faster payments service on 09 August 2013. A 5% late payment surcharge of £2,511.05 was imposed on 16 August 2013. However this was later reduced to a 2% surcharge of £1,004.42 on 17 October 2013.

Findings of fact

7. I find that the VAT payment of £3,642.49 made on 23 April 2012 was a late payment for the period 02/12 and was not an early payment for the period 05/12. In forming this view I take into account that the payment made represented the precise amount of the company’s VAT liability for the period 02/12.

8. I find that the surcharge liability notices dated 13 July and 16 November 2012 were sent to the correct address of the company. I accept that the notices themselves have not been reproduced however HMRC’s records show that the notices were sent to the correct address of the company.

9. Mr Fee states that as “the appointed officer of the company [he] has never received such notices”. Section 7 of the Interpretation Act 1978 creates a rebuttable presumption that the notices were “delivered in the ordinary course of the post”. I am satisfied that the notices were received as Mr Fee merely states that the notices did not come to his attention and he has not provided evidence as to the systems employed for managing post within the firm. In addition the evidence provided by HMRC shows that Mr Fee contacted HMRC on 13 December 2012 regarding the late return.

Liability for the penalty

The law

10. Section 59 Value added Tax Act 1994 (“VATA”) provides:

(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...

- (a) the Commissioners have not received that return, or
- (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.....

(2)subsection (4) below applies in any case where—

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

5 (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.

10 (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

15 (4) if a taxable person on whom a surcharge liability notice has been served—

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

(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 11. HMRC has the burden of proving that the penalty has been incurred. *Jussila v Finland* (75053/01) [2006] ECHR 996.

The submissions

30 12. Mr Fee submits that he did not receive the surcharge liability notice and accordingly he is not liable for the penalty. He relies upon the case of *Mark Kelly v The commissioners for Her Majesty’s Revenue and Customs TC/01439*.

13. HMRC maintain that the surcharge notices were served to the correct address of the company and are therefore deemed to be served in accordance with s7 of the Interpretation Act 1978.

Reasons for decision

35 14. For the reasons given above, I find as a fact that the surcharge liability notices of 13 July and 16 November 2012 were correctly served.

40 15. I accept that the payment for the period 09/12 was made on time and the initial penalty of 2% was wrongly issued. However the return was submitted after the due date and accordingly the surcharge liability notice was correctly issued in accordance with s59(2) VATA.

16. The penalty of 2% for the default period 06/13 was correctly incurred in accordance with s59(5) VATA as this was the first default after the service of the surcharge liability notice.

17. For these reasons I am satisfied that the company is liable for the penalty.

5 **Reasonable excuse**

The Law

18. Section 59 (7) VATA provides:

10 " If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above 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

15 (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..

20 19. 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]*.

20. Section 71(1)(b) VATA provides:

25 “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 on is a reasonable excuse.”

The submissions

(a) The appellant’s case

30 21. Mr Fee submits that there is a reasonable excuse for the late submission of the return for the period 09/12 as he relied upon EWK accountants to file the return on time. In support of his case he relies upon the decision of the First Tier Tribunal in the case of *Hanson v HMRC [26 April 2012]*.

22. In relation to the late payment for the period 06/13 he submits that this occurred due to his mistaken belief that payment was due on the 10th of the month.

35 *(b) The Respondent’s case*

23. HMRC submit that there is no reasonable excuse for the late filing of the return for the period 09/12 as reliance upon a third party does not amount to a reasonable

excuse. They do not accept that Mr Fee was unaware of the payment date as this would have been made clear to him when submitting the return.

Reasons for decision

24. I accept that Mr Fee relied upon his accountant to file the return time for the period 09/12. However the mere fact of reliance upon a third party does not amount to a reasonable excuse in accordance with s71(1)(b) VATA. It would have been reasonable in the circumstances for Mr Fee to have monitored the actions of his accountant in filing the return and it appears that he did not do so. Indeed in his letter of 29 November 2013 Mr Fee states “the company has not been aware of when these submissions have taken place”.

25. I accept that Mr Fee made a genuine mistake regarding the due date for payment for the period 06/13. However I do not accept that this mistake was reasonable in the circumstances because the due date was readily available via the HMRC website and helpline.

26. For these reasons I do not find that there is a reasonable excuse for the late submission of the return for the period 09/12 or the late payment of VAT for the period 06/13.

Proportionality

The law

27. The penalty is triggered if the payment is made after the due date, s59(1) VATA. The penalty is imposed for the late payment and does not take into account the period of the default s59(4) VATA.

28. In the case of *Total Technology (Engineering) Ltd V HMRC [2012] UKUT 418 (TCC)* (“*Total Technology*”). The Upper Tribunal acknowledged that the default surcharge regime did not take into account the number of days of the default. However it was decided that this did not

“lead to the conclusion that the default Surcharge regime infringes the principle of proportionality”. [105]

The submissions

29. Mr Fee submits that the surcharge is disproportionate in the circumstances. He states that they are a small business trading in Oil and incur a substantial net VAT liability. The surcharge is significant for the company and amounts to 5% of the net profit of the business for this financial year. He also submits that the surcharge is disproportionate to the period of the default. In support of his case he refers to the decision of the first Tier Tribunal in the case of *Energys Holdings Uk Limited v HMRC [2010] UKFTT 20 (TC)* (“*Energys*”) in which the Tribunal found that the penalty was disproportionate to the period of the default

30. HMRC submit that the surcharge has been imposed in accordance with the default surcharge regime which does not take into account the period of the default. In support of their case they rely upon the decision of the Upper Tribunal in the case of *Total Technology* (above).

5 *Reasons for decision*

31. I accept that this was a short default period of only two days. However the penalty was correctly imposed in accordance with s59(4) VATA (above) which does not take into account the period of the default. In the case of *Total Technology* the Upper Tribunal considered this aspect of the legislation and did not find it to be disproportionate.

32. The case of *Energys* cited by Mr Fee was considered in the case of *Total Technology*. Mr Justice Warren remarked at [102]

15 “the amount of the penalty has been arrived at by applying a rational scheme of calculation which involved no breach of the principle of proportionality. And even if the penalty was more than would be imposed if it were a matter for the decision of this Tribunal the amount of the penalty does not approach the sort of level which Judge Bishopp described as unimaginable in *Energys*”

33. The decision of the Upper Tribunal in the case of *Total Technology* is binding upon this Tribunal.

34. I accept that the penalty imposed is substantial for this company. However I find that the penalty was imposed as a result of a “rational scheme of calculation” and was properly reduced from 5% to 2% to take account of the amended default history.

35. For these reasons I find the penalty imposed to be proportionate.

25 **Decision**

36. The company is liable for the penalty

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

38. The penalty imposed was proportionate.

39. The appeal against the VAT penalty surcharge of £1,004.42, is dismissed.

30 **Rights of appeal**

40. 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.

5

**JOANNA LYONS
TRIBUNAL JUDGE**

RELEASE DATE: 30 May 2014