



TC03745

Appeal number: TC/2013/06889

VALUE ADDED TAX - default surcharge - whether there was a reasonable excuse for late payment - no - whether penalty disproportionate - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BARRY TURNER LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 08 January 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 letters of appeal dated 31 July and 04 October 2013 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 05 November 2013.

DECISION

The Appeal

1. This is an appeal against a default penalty surcharge of £1,917.50, imposed for the late payment of VAT for the three month period ending 31 May 2013. The penalty
5 was imposed in accordance with s59(4) Value Added Tax Act 1994.

2. Accountants, Cooper-Paul, (“the agents”) appeal on behalf of the appellant company (“the company”)

The issues

3. The agents appeal on the following grounds:

- 10 (1) There was a reasonable excuse for the late payment and
(2) The penalty is disproportionate.

4. These matters are disputed by HMRC.

The Law

Liability for the penalty

15 5. Section 59(1) Value Added Tax Act 1994 (VATA) provides

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...

20 (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,

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

25 (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

30 *Time to pay agreements*

6. Section 108(1) Finance Act 2009 (“FA”) provides

“(a) If a person “P” fails to pay an amount of tax ..when it become due and payable,

35 (b) P makes a request to an officer of Revenue and Customs that payment of the amount be deferred, and

(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”)

(2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if

5 (b) P would apart from this subsection become liable to it between the date on which P makes the request and the end of the deferral period.”

Reasonable excuse

7. 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 8. 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]*.

Insufficiency of funds

9. Section 71(1) VATA provides:

25 “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

30 10. 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 :-

35 “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”

Proportionality

11. The issue of proportionality was considered in the case of *The commissioners for Her Majesty's Revenue and Customs v Total Technology (Engineering) Ltd V HMRC [2012] UKUT 418 (TCC)*. 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]

Burden of proof

12. 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

13. The default history was not contested and can be summarised as follows:

(1) Period 05/12 - default one - electronic payment was due on 07 July 2012 and the VAT was paid by direct debit on 09 August 2012. No penalty was incurred but a surcharge liability notice was issued.

(2) Period 08/12 - default two - electronic payment was due on 07 October 2012 and payment was made by direct debit on 24 October 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.

(3) Period 11/12 - default three - electronic payment was due on 07 January 2013 and was paid by direct debit on 22 January 2013. The VAT amounted to £12,999.86 and a late payment surcharge of 5% was applied amounting to £649.99.

14. For the period 05/13 the return was filed on 05 July showing a VAT liability of £19,175.06. The VAT was due to be paid by direct debit on 10 July 2013, three bank working days after the submission of the return. The direct debit payment could not be taken as there were insufficient funds available in the company's bank account. The VAT was paid by cheque on 12 July. As the payment was made after the due date a default penalty surcharge of 10% was imposed in the sum of £1,917.50.

15. The company believed that the VAT was due to be taken from their account on 12 July 2013. However the bank informed them that the transfer could not be made into their account to enable the payment to be made on time. The agent's representative contacted HMRC to explain the late payment and was advised to pay the VAT by cheque. The agent's representative assumed that this payment would be treated as being “in time” and that no default surcharge would be applied. The agent does not assert that any specific promise was made regarding the imposition of the penalty. HMRC have not provided a transcript of this telephone call.

16. HMRC's website contains the following information regarding time to pay arrangements.

5 "VAT default surcharges will not be charged if you contact HMRC before the payment is due and HMRC agree to a time to pay agreement which is adhered to"

The arguments

The appellant's case

17. The agents submit the company has a reasonable excuse for the late payment because:

10 (1) they made every effort to transfer funds into their account on 12 July but were unable to do so.

(2) they contacted HMRC for advice and were advised to make prompt payment which they duly did.

15 18. The agents submit that this was a very short default period and the surcharge imposed is disproportionate and punitive.

The Respondent's case

19. HMRC oppose this appeal on the grounds that the request for time to pay was made after the due date and the officer had no authority to waive the penalty in accordance with s108 FA. They submit that the company and their agents did not act
20 reasonably in that they did not make a request for time to pay before the due date.

20. They submit that the penalty has been correctly 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 refer to the decision in the case of *Total Technology (Engineering) Ltd (above)* in which the structure of the default surcharge regime was
25 found to be proportionate.

Reasons for decision

Reasonable excuse

21. The company is liable for the penalty as the VAT was paid after the due date in accordance with s59(1)(b) and s59(4) VATA. The effect of s108(2)(b) FA (above) is
30 that the company "is not liable to a penalty" if the request to defer payment was made and agreed before they "become liable" i.e. before the due date. In this case the request for time to pay was made after the due date. Accordingly HMRC had no power to extend the due date for payment or suspend the penalty in accordance with s108(2) FA.

35 22. An insufficiency of funds cannot ordinarily amount to a reasonable excuse in accordance with s71(1) VATA. The underlying cause of the insufficiency of funds can amount to a reasonable excuse if the company can establish that they acted with

“reasonable foresight and of due diligence”. *Customs and Excise commissioners v Steptoe (above)*

23. I accept that the company were unable to pay the VAT on 12 July due to the failure of their bank to transfer sufficient funds to enable to payment to be made.
5 However I do not find that the company have acted with reasonable foresight and due diligence because:

(1) they have not provided any evidence to show that the bank made an error in refusing the transfer or that alternative funds were available to pay the VAT on the due date and

10 (2) the payment was due on 10 July and the company appear to made a mistake as to the due date for payment.

24. For these reasons I do not find that there is a reasonable excuse for the late payment.

Proportionality

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

20 26. I also take into account that this was the company’s fourth late payment within a twelve month period.

27. For these reasons I do not find the penalty to be disproportionate.

Decision

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

25 29. The penalty imposed is proportionate.

30. The appeal against the VAT default penalty surcharge of ££1,917.50 is dismissed.

Rights of appeal

30 31. 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)”
35 which accompanies and forms part of this decision notice.

**JOANNA LYONS
TRIBUNAL JUDGE**

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RELEASE DATE: 19 June 2014