



TC03931

Appeal number: TC/2014/00689

VAT default surcharge – payment made one day late due to oversight – whether reasonable excuse – no – whether penalty disproportionate – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DOMINIC JACQUES t/a THE WHEATSHEAF Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 30 May 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 notification of Appeal dated 10 January 2014, and HMRC's Statement of Case, the Appellant submitting no response.

DECISION

The Appeal

5 1. Dominic Jacques t/a The Wheatsheaf ('the Appellant') appeals against a default surcharge of £2,006.55 imposed by HMRC on 16 August 2013, in respect of the VAT period ended 06/13, for its failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £13,377.06.

2. The point at issue is whether the Appellant has a reasonable excuse for making the payment late.

10 Background

3. The Appellant has been in the VAT default surcharge regime from period 12/10 and prior to the default under appeal had defaulted in five other periods.

15 4. The Appellant was on a quarterly basis for VAT. 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 1995.]

20 5. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for electronic filing and payment.

6. In respect of the default in period 06/13, as payment was made electronically the due date was 7 August 2013. The return was received on 8 August 2013 and the VAT payment on 8 August 2013, one day late.

25 7. 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 : -

30 '(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 –

35 (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 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.

8. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

- 5 ‘(1) for the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -
- (a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

10 Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

15 9. 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

10. The Appellant does not dispute that its VAT payment for the periods 08/13 was late.

20 11. The Appellant’s grounds of appeal are that the payment was only twelve hours late and that he got muddled up with his dates. In its letter of appeal he says

 “ I wish to appeal against this surcharge based on the fact I made a mistake with the date it was due (I thought I had paid it on the due date — I merely made a mistake and got muddled up with the dates).

25 Running a small business in the pub/restaurant trade is tough, working 7 days a week means I don't always appreciate the date and whilst I understand my payment was technically late, it was only by 12 hours and should I have paid it anytime up to midnight the day before I would not be facing this huge surcharge. It is difficult enough to set aside the VAT in the current market, but I did pay the amount due in full and I am now unable to stretch to a

30 further £2000. I would therefore appreciate your compassion and understanding of this minor oversight on my part when considering my case of appeal to withdraw the surcharge.”

HMRC’s contentions

35 12. The Period 06/13 had a due date of 7 August 2013 for electronic VAT Payments and Returns. The VAT return was not received on time. The Appellant paid his VAT electronically. The tax due was £13,377.06. The payment was received by HMRC on 8 August 2013, one day late. As the payment was received late the surcharge was correctly imposed.

13. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 02/12 V160 Surcharge Liability Notice and subsequent V161 default notices.

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

'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'.

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

- 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.

20 17. 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.

25 18. Surcharges issued under VAT Act 1994 s.59 are a penalty based solely on the amount of VAT paid after the due date, no matter the length of delay, and neither the Commissioners nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

30 19. The Appellant would have been aware of the need to ensure that they were aware of the due date for submission of the return and payment of any VAT due as they would have received an information sheet entitled "Top tips on how to avoid VAT surcharges" with a letter issued to them on 22 October 2012, following their request for a review of an earlier default surcharge notice.

20. Whilst the delay could be considered to be a genuine error or oversight by the Appellant, Notice 700/50 Default Surcharge s.6.3 which represents HMRC's understanding of the legislation, precludes this from providing a reasonable excuse.

35 21. The nature of the business is a Public House, which would also indicate that this is ostensibly a cash business so any VAT would in fact be collected at the point of sale and therefore prior to the due date. This cash was therefore available to the business to meet its VAT obligations.

22. In relation to the argument that the default surcharge is excessive or disproportionate HMRC refer to the decision in the case of *Total Technology (Engineering) Ltd* in the Upper Tribunal which creates a binding precedent on appeals before the First-tier Tribunal considering issues of proportionality when they are raised.

23. The Total Technology case centred on a payment being made one day late triggering the imposition of a default surcharge which the company argued was disproportionate. In his judgement Upper Tribunal Judge Mr Justice Warren found that:

- (1) HMRC's decision to charge Total Technology (Engineering) Ltd a default surcharge for the late payment was correct;
- (2) The default surcharge regime itself does not infringe the principles of proportionality; and
- (3) The surcharge imposed on Total Technology (Engineering) Ltd did not infringe the principle of proportionality.

24. HMRC contend the above judgement supports HMRC's position that the default surcharge regime itself is proportionate and that HMRC was correct in charging a default surcharge in respect of the late payment for the accounting period 06/13.

25. The potential effect that the payment of the surcharge may have on the Appellant's finances cannot be considered a reasonable excuse or reason for removal of the surcharge for the period 06/13.

26. Whilst HMRC appreciate the steps taken by the Appellant to enable it to meet its future VAT obligations by setting up a Direct Debit instruction, this does not in itself provide a reasonable excuse for the removal of the surcharge.

27. The surcharge in respect of the period 06/13 has been correctly issued in accordance with VAT Act 1994 s.59(4) payment having been received after the due date.

28. The default surcharge is calculated by reference to and commensurate with the number of previous defaults and the amount of VAT paid late. It is not intended to reflect any loss to HMRC.

Conclusion

29. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment. He appears, as he says, to have simply made a mistake as to the date the VAT fell due.

30. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period. The number of days by which the payment is made late is not relevant. The Tribunal cannot

discharge a surcharge unless the Appellant can show that he has a reasonable excuse for the late payment. A genuine oversight or error is not a reasonable excuse even though the delay was only one day.

5 31. 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 06/13. In the Tribunal's view, for the reasons given above, that burden has not been discharged. As to whether the surcharge is excessive, as the Upper Tribunal said in *Total Technology*, there is nothing in the VAT default surcharge regime which leads to the conclusion that its architecture is fatally flawed or that it infringes the principle of proportionality. The
10 Tribunal in that case recognised that the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no discretion for HMRC to relieve a surcharge once imposed. It concluded that there must be some upper limit on the penalty for a default which was proportionate, but it did not suggest what that might be, given that all the
15 circumstances of the default must be taken into account.

32. The Tribunal said in *Total Technology* that it is open to Tax Tribunals to consider individual default surcharges without having first concluded that the default surcharge regime as a whole is disproportionate. However in assessing whether a penalty in any particular case is disproportionate, the Tribunal must be astute not to
20 substitute its own view of what is fair, for the penalty which Parliament has imposed. The Tribunal should show the greatest deference to the will of Parliament when considering the application of the VAT default surcharge scheme.

33. By way of further background to the Tribunal's reasoning in *Total Technology*, the Tribunal referred to what Simon Brown LJ had said in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26], setting out the test for assessing
25 proportionality –

30 “... it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show
35 such deference.”

34. The Tribunal observed that the “not merely harsh but plainly unfair” test set a high threshold which must be surmounted before a Tribunal could find that a penalty, correctly levied on the taxpayer by statutory provisions set by Parliament, should be
40 struck down as disproportionate.

35. In the case of *Energys Holdings UK Limited*, due to a human error, the relevant return was submitted, and payment made one day late. This resulted in a 5% penalty amounting to just over £130,000. Judge Colin Bishopp held that the penalty was wholly disproportionate to the gravity of the offence. It was not merely harsh but

plainly unfair and in the absence of any justification it could not be saved by the State's margin of appreciation. As he said, penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the underlying aims of the VAT Directive by imposing a disproportionate burden on a defaulting trader and distorting the VAT system as it applies to him. It is possible to envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate.

36. Although the Appellant regards the penalty as unfair a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of each other.

37. The penalty imposed on the company was £2,006.55. The delay was one day but the penalty would have been the same if the delay had only been significantly longer. There must of course be a proportionate upper limit to a penalty. The penalty is certainly substantial but cannot be described as "devoid of reasonable foundation". It is significantly below and cannot be compared with the penalty of £130,000 imposed in *Energysys*. It does not approach the level which the Tribunal described in *Energysys* as 'unimaginable'. In the Tribunal's view it cannot be said to be within a range which could sensibly be regarded as entirely disproportionate.

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

39. 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: 18 August 2014

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