



TC04795

Appeal number: TC/2015/02689

VALUE ADDED TAX – default surcharge – late payment of VAT – daily restriction on total payments from bank account – whether reasonable excuse – no – proportionality – whether disproportionate in trader’s circumstances – need for evidence – insufficient evidence to show that disproportionate – held, not disproportionate – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GAYSHA LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN CLARK
IAN ABRAMS**

**Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 1
December 2015**

Michelle Sloane, The Khan Partnership LLP, for the Appellant

Lynne Ratnett, Officer, HM Revenue and Customs, for the Respondents

DECISION

- 5 1. The Appellant (“Gaysha”) appeals against the decision of the Respondents (“HMRC”), confirmed on review, to impose a VAT default surcharge in respect of Gaysha’s VAT period 10/14.

The background facts

2. The evidence consisted of a bundle of documents. There was no witness evidence. From the evidence we find the following background facts.
- 10 3. Gaysha is a building and contracting company. Its turnover for 2013-2014 was £4.6 million, having grown from £1.5 million in 2012-13. At some point subsequent to the VAT accounting period to which the present appeal relates, it changed to the cash accounting basis for computing its liability to VAT.
- 15 4. On 4 December 2014 Gaysha filed its return for the VAT period 10/14 electronically; this was before the due date of 7 December 2014 (which was a Sunday).
- 20 5. Gaysha’s payment of VAT for that period was also due by 7 December 2014; as it made its payments by means of the Faster Payments scheme, the due date was not brought forward due to that date falling on a Sunday. The amount payable was £88,764.30.
6. Under the terms of its banking arrangements with Lloyds TSB Bank PLC, Gaysha is subject to a limit on the amount of payments from its bank account on any one day. That limit is £100,000. If that amount is reached, Lloyds TSB rejects any further payments which Gaysha attempts to make.
- 25 7. The opening balance in the bank account on Friday 5 December 2014 was £209,190.95. On that day, Gaysha made a series of payments to its employees, subcontractors and suppliers, and the limit was reached. The balance at the end of that day was £98,187.78.
- 30 8. As a result, Gaysha was not able to make payment of the £88,764.30 VAT due to HMRC on 5 December 2015.
9. On 8 December 2015, the first business day after 5 December 2015, Gaysha’s Finance Manager attended work early. This was to ensure that the payments were processed and in HMRC’s bank account before the start of the business day.
- 35 10. As the maximum single transaction amount allowed by Lloyds TSB is £25,000, four separate payments were made within a ten minute period. These were:
- 08.33 - £25,000;

- 08.36 - £25,000;
- 08.38 - £25,000;
- 08.40 - £13,764.30.

11. On 12 December 2014 HMRC issued a notice of assessment of default
5 surcharge to Gaysha. The amount of the surcharge, calculated at the rate of 10 per cent, was £8,876.43.

12. On 16 February 2015, HMRC wrote to Gaysha, referring to a written
10 communication from Gaysha's accountants, and explaining that direct communication between HMRC and Gaysha's agents could only take place if Gaysha completed the authorisation form 64-8. HMRC informed Gaysha that they did not consider that it had a reasonable excuse for the default for period 10/14. They stated that s 71(1)(a) of the Value Added Tax Act 1994 ("VATA 1994") specifically excluded insufficiency of funds from being a reasonable excuse for the late payment of VAT. The only
15 concession which they were able to give was if a time to pay arrangement had been made before the due date. There was no evidence that Gaysha had contacted HMRC in relation to any problem with its 10/14 payment.

13. By a letter dated 17 February 2015 Gaysha requested a further review of the decision to impose the default surcharge for the period 10/14.

14. In their reply dated 9 March 2015, HMRC indicated that an internal review had
20 been conducted on receipt of the original letter dated 6 January 2015 from Gaysha's accountants. The HMRC Appeals and Reviews Officer explained that while Gaysha was not entitled to a second review, she had exceptionally looked at the information in Gaysha's letter in case this would allow agreement to be reached between it and HMRC.

25 15. The Officer pointed out that the fact of payments to staff and to HMRC both being due on Friday 5 December was foreseeable; therefore HMRC would have expected Gaysha to have made arrangements with its bank to ensure that its VAT liability would be paid by the due date, for example by making a CHAPS payment. Although Gaysha had recently changed to cash accounting for VAT, this change had
30 occurred after the surcharge had been incurred and in a period for which no surcharge had been raised. It followed that a previous surcharge notice could not be taken off following that change in Gaysha's VAT accounting procedure.

16. On 2 February 2015 Gaysha's legal representatives gave Notice of Appeal to HM Courts and Tribunals Service.

35 **Arguments for Gaysha**

17. Ms Sloane submitted that Gaysha had a reasonable excuse for the late payment of the VAT due for period 10/14, so that under s 59(7) VATA 1994 it should be held

not to be liable to surcharge for that period; further, the penalty was manifestly unfair and disproportionate.

5 18. HMRC had imposed the surcharge despite Gaysha's payment of the VAT at the earliest point that this could be done in the light of the restrictions imposed by its bank.

10 19. Ms Sloane emphasised that there was no fixed maximum penalty under s 59 VATA 1994. She referred to s 71 VATA 1994, which stated that an insufficiency of funds to pay any VAT due was not a reasonable excuse. In relation to the burden of proof, she agreed with the position as set out by HMRC. This was that the burden of proof fell on HMRC to establish that Gaysha failed to make payment on time, and that the surcharge had been calculated correctly; once they had done so, the burden then moved to Gaysha to demonstrate that it had a reasonable excuse for any such failure. The standard of proof was the ordinary civil standard of the balance of probabilities.

15 20. Gaysha submitted that it was not liable to the surcharge, on the basis that it had a reasonable excuse. It had been unable to pay the VAT due on 5 December 2014, given that it had already made payments to its staff, subcontractors and suppliers on that day, and as a result its bank limit had been reached. As a consequence, it had been unable to make payment in respect of the VAT due. However, it had sufficient funds in the bank. At no point did Gaysha deliberately intend to withhold the VAT due to HMRC. Accordingly, it had corrected the position immediately on the very next working day on its own initiative without any intervention by HMRC. Gaysha considered this to be a reasonable excuse and contended that the surcharge should be discharged.

25 21. In addition or in the alternative, Gaysha submitted that the surcharge was disproportionate and manifestly unfair and should therefore be discharged. It relied on the findings in *Energys Holdings UK Limited v Revenue and Customs Commissioners* [2010] UKFTT 20 (TC), TC00335, in which the Tribunal had concluded that where a penalty was "not merely harsh but plainly unfair", the Tribunal was entitled to come to the conclusion that a penalty was disproportionate and should therefore be discharged. Ms Sloane referred to *Equoland* (Case-272/13) at [35] and [44] and submitted that the surcharge and fixed nature of the default surcharge system was wholly disproportionate and a breach of EU law.

35 22. She stressed that Gaysha was not seeking to argue that the whole surcharge regime was disproportionate; its argument was that the penalty on the facts of Gaysha's case was disproportionate. She referred to *Energys* at [55], and in particular to the final sentence of that paragraph. She referred also to [69]-[70], and to the facts in *Energys*. Gaysha's case was similar.

40 23. The surcharge imposed on Gaysha was equivalent to an annual rate of interest of 3,760 per cent. This bore no relationship to HMRC's loss of money for one day. Gaysha was not saying that the penalty was interest, but simply that this was a good comparison and appropriate measure of that penalty.

24. Ms Sloane referred to the HMRC discussion document published on 2 February 2015 entitled “HMRC Penalties: a Discussion Document”. In commenting on VAT default surcharge, HMRC were accepting in paragraph 4.7 that the current system did not differentiate between payments that were a day late and payments which were many months late.

25. She accepted that the Tribunal did not have any jurisdiction over whether the penalty was unfair.

26. Ms Sloane referred to *Neil Garrod v Revenue and Customs Commissioners* [2015] UKFTT 0353 (TC), TC04537 at [51]-[67]; in the latter paragraph, Judge Mosedale concluded that she did have jurisdiction to consider the public law matter. At [68]-[87] she concluded that she was able to address the legality of secondary legislation, having considered the cases of *Oxfam* and *Noor* and concluded at [79] that there was nothing in either case to preclude this.

27. On the basis of the decision in *Garrod*, Ms Sloane submitted that the Tribunal had jurisdiction to consider public law issues, such as whether the decision of HMRC to impose the surcharge was lawful and whether the surcharge was disproportionate and unfair; she further submitted that in Gaysha’s circumstances it was disproportionate and wholly unfair. Gaysha had put the position right as soon as this had been possible.

20 Arguments for HMRC

28. Mrs Ratnett pointed out that there was no dispute about the surcharge itself.

29. It had been argued for Gaysha that it had a reasonable excuse, on the basis that it was subject to a limit on the payments that could be made from its bank account on any one day. HMRC’s response was that Gaysha had chosen to pay others but not to pay the VAT to HMRC on that day; this had been a conscious decision. Gaysha had been aware of the daily payment limits.

30. Default surcharges did not constitute interest charges and therefore it was inappropriate to make comparisons with interest rates. The lateness of payment was a question of fact, despite Gaysha’s attempts to put the position right.

31. In HMRC’s submission, the Tribunal had no jurisdiction to say that the default surcharge was unfair. Mrs Ratnett referred to *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TC) at [58], in which the Upper Tribunal had made clear that the First-tier Tribunal had no general jurisdiction to consider matters of fairness.

32. HMRC contended that the default surcharge imposed on Gaysha was not disproportionate. The matter of proportionality and the relevant case law had been comprehensively discussed in the Upper Tribunal case of *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). Mrs Ratnett referred to the Upper Tribunal’s decision at [99]-[100]. At [101]-[102]

the Upper Tribunal had considered the position in the light of the particular facts and concluded that it was not disproportionate.

5 33. Gaysha had relied on *Energys* at [69] in support of its contention that the surcharge was not merely harsh but plainly unfair. In HMRC’s submission, the surcharge in the present case was not wholly disproportionate; it amounted to £8,876.43 and could not be characterised as “harsh and plainly unfair”.

34. Gaysha had referred to the HMRC Discussion Document. This was merely a consultative document on the possibility of future changes. In the present case it was necessary to look at the current legislation, s 59 VATA 1994.

10 35. Mrs Ratnett submitted that the surcharge had been correctly issued at the rate of 10 per cent in view of the previous surcharges incurred by Gaysha, which had been within the default surcharge regime since VAT period 01/12; Gaysha had provided no reasonable excuse for the late payment.

15 36. HMRC requested that the Tribunal should find that the default surcharge of £8,876.43 for Gaysha’s VAT period 10/14 was correctly charged, and that there was no reasonable excuse for the failure to pay on time the VAT due for that period. HMRC asked that the appeal should be dismissed.

Discussion and conclusions

20 37. We accept Mrs Ratnett’s submission that there was no dispute as to the surcharge itself, ie the fact that it had been incurred and the basis on which it had been calculated. The two questions raised by Ms Sloane’s submissions are those of reasonable excuse and proportionality of the surcharge in Gaysha’s particular circumstances.

Reasonable excuse

25 38. We deal first with the issue of reasonable excuse, since if Gaysha can show that it had such an excuse, the default surcharge falls away and there is no need to address Ms Sloane’s alternative (or additional) submission. This follows from s 59(7) VATA 1994, on which Gaysha relies, and the relevant parts of which state:

30 “(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (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 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,

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 . . .”

5 39. That sub-section makes clear that it is for the trader to satisfy HMRC or the Tribunal that there is a reasonable excuse for the failure to pay the VAT within the appropriate time limit.

10 40. Ms Sloane did not refer to the letter from Gaysha’s accountants dated 6 January 2015, in which they explained that funds which had been due to clear Gaysha’s account by close of business on Friday 5 December 2014 to enable full payment to HMRC “did not complete”, therefore leaving Gaysha unable to meet the VAT payment deadline. They explained that the awaited cleared funds had been available for full and final settlement of the VAT liability on the morning of Monday 8 December 2014, and the transaction had been processed as a matter of urgency at 8.30
15 am on that same day.

20 41. Ms Sloane acknowledged that under s 71(1)(a) VATA 1994, insufficiency of funds to pay any VAT due was not a reasonable excuse. It appears to us that this was the reason why she made no reference to the accountants’ letter. Without more evidence to support an argument such as that raised in *Commissioners of Customs and Excise v Steptoe* [1992] STC 757 (CA), that this was due to some underlying major issue affecting Gaysha’s financial position at the time when it was due to pay the VAT, the accountants’ argument amounts to a plea based solely on insufficiency of funds for Gaysha to be able to make payment, and s 71(1)(a) prevents this from being taken into account in deciding whether Gaysha had a reasonable excuse for the
25 failure.

42. The basis of Gaysha’s submission that it has a reasonable excuse is the daily limit on the total payments permitted from its bank account. Having made a series of other payments from its account on 5 December 2014, it had reached the limit and therefore was unable to make payment of the VAT due to HMRC.

30 43. Although we appreciate that there were probably sound commercial reasons for making these other payments to subcontractors, suppliers and so on, the effect of Gaysha’s decision to make those payments was to put itself into a situation (subject to the further question considered below) in which it would not be able to make payment of the VAT to HMRC by the due date. We accept Mrs Ratnett’s submission that
35 Gaysha’s decision to make these other payments to the relevant persons and not to make payment to HMRC for the VAT liability must have been a deliberate decision.

40 44. The other question which arises, and on which there is no evidence before us, derives from the payment method adopted by Gaysha. As shown by the copy bank statements in the document bundle, it used Faster Payments to make payments of the VAT to HMRC on 8 December 2014; the amounts and timings are set out above. We accept Gaysha’s evidence that on 5 December 2014 it was unable to make payment to HMRC because of the daily limit. However, the time limit for Gaysha to make

payment had not yet been reached. The following information about payment of VAT appears on the GOV.UK website:

“Ways to pay

5 Make sure your payment will reach HM Revenue and Customs’ (HMRC) bank account by the deadline. You may have to pay a surcharge if you don’t pay on time.

...

Same or next day

- online or telephone banking (Faster Payments)
- 10 • CHAPS

...

15 If the deadline falls on a weekend or bank holiday, your payment must arrive in HMRC’s bank account on the last working day before it (unless you pay by Faster Payments.)”

“How long it takes

Payments made by Faster Payments (online or telephone banking) will usually reach HMRC on the same or next day, including weekends and bank holidays.”

20 45. The daily payment limit had been reached on Friday 5 December 2014. However, there is no evidence to indicate whether or not it would have been possible for any Faster Payments to have been made on 6 or 7 December 2014. Although making such payments on 7 December 2014 might have run the risk that their receipt in HMRC’s bank account would be delayed to the following day and so would arrive
25 after expiry of the 7 December time limit, it appears to us that payments made on 6 December 2014 could well have had a reasonable chance of arriving in HMRC’s bank account on 7 December and so avoiding late receipt by HMRC.

30 46. It also appears to us that, subject to any evidence to the contrary that might have been adduced, if any Faster Payments had been made on 6 or possibly 7 December 2014, this would have been on days for which the full daily transaction limit was likely to be available.

35 47. As we have stated, it is for Gaysha to satisfy us that there was a reasonable excuse for its failure to pay the VAT on time. We find that its decision to make other payments using up the daily transaction limit on 5 December 2014 rather than making payment of the VAT to HMRC was deliberate. The question of possible payments being made either on 6 or 7 December 2014, at a stage when the constraints of the daily transaction limit may well not have been in point, has not been addressed in the evidence. It is therefore impossible for us to establish whether there would have been anything to prevent special arrangements from being made for the Finance Manager
40 to deal with the payments over that weekend, although we acknowledge that this may have involved practical difficulties.

48. Our conclusion on the question of reasonable excuse is that Gaysha has not satisfied us that it had a reasonable excuse for the late payment of VAT for the period 10/14.

Proportionality of the surcharge

5 49. Ms Sloane’s additional or alternative argument was that the surcharge imposed on Gaysha was disproportionate. In support of the proposition that the Tribunal could consider this question, she relied on *Garrod*. However, we do not consider it necessary to call into question whether Tribunals are able to examine the proportionality of a surcharge in an appellant’s particular circumstances. In *Total*
10 *Technology* at [101]-[103], the Upper Tribunal considered precisely that question in relation to that company’s circumstances. At [102], the Upper Tribunal commented:

15 “And even if the penalty is more than would be imposed if it were a matter for the decision of a tribunal, the amount of the penalty does not approach the sort of level which Judge Bishopp described as unimaginable in *Enersys*.”

20 50. We are satisfied that the Upper Tribunal in *Total Technology* left it open to First-tier Tribunals to consider whether a default surcharge imposed on a trader in its particular circumstances is disproportionate. The Upper Tribunal said nothing in *Total Technology* to call into question the basis on which the Tribunal in *Enersys* had approached that issue.

51. Thus as a matter of principle we are able to consider whether the default surcharge imposed on Gaysha is disproportionate.

52. However, in order to consider that question, it is necessary for us to be satisfied that there is evidence to support the proposition of disproportionality.

25 53. In *Enersys*, detailed information was provided to the Tribunal concerning the trader’s financial circumstances. At [44], the Tribunal recorded the details given:

30 “44. The penalty was, he said, also grossly disproportionate when compared to the appellant’s financial circumstances. It represented almost 16% of its profits for the entire year; was equivalent to its earnings on turnover of more than £15 million, or about two months’ sales; and amounted to 44% of its corporation tax liability for the whole year.”

35 In our view, the circumstances in *Enersys* may be described as exceptional, and any trader seeking to argue that its circumstances are similar must carry a substantial evidential burden if it is to have any prospect of achieving this.

40 54. In the present case, we have very little information concerning Gaysha’s financial circumstances. We have set out the turnover details at the beginning of this decision. There is nothing from which we are able to establish Gaysha’s profits, or its earnings on turnover, or the level of its corporation tax liability. Thus we are unable to carry out an exercise comparable to that undertaken in *Enersys*.

55. If an appellant seeks to question the proportionality of a surcharge, it is essential for that appellant to provide evidence of its financial circumstances in order for the Tribunal to decide, on the basis of that evidence, whether or not the surcharge is disproportionate in those circumstances.

5 56. We do not consider that Gaysha has done so in the present appeal. It is not
sufficient simply to allege that a surcharge is disproportionate; seeking to make a
comparison of the surcharge and an equivalent interest rate does not amount to an
examination of the extent to which that surcharge is or is not disproportionate in the
trader's particular circumstances. Nor does the size of the surcharge appear
10 particularly great when viewed against the limited information provided as to
Gaysha's turnover. In the absence of anything to show the contrary, we find that the
surcharge imposed on Gaysha in respect of the late payment of VAT for period 10/14
was not disproportionate.

57. We therefore find that:

- 15 (1) The default surcharge of £8,876.43 for period 10/14 was correctly
charged;
- (2) There was no reasonable excuse for the failure to pay the VAT for that
period by the due date;
- (3) The surcharge was not disproportionate.

20 58. On the basis of those findings, we dismiss Gaysha's appeal.

Right to apply for permission to appeal

59. 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
25 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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**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 23 DECEMBER 2015

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