



**TC01311**

**Appeal number: TC/2010/09270**

*VAT – default surcharge – proportionality – 2% surcharge of £50,089 for payment 11 days late – appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**SAINT-GOBAIN BUILDING DISTRIBUTION  
LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS (VAT)**

**Respondents**

**TRIBUNAL: KEVIN POOLE (TRIBUNAL JUDGE)**

**Sitting in public in Birmingham on 17 June 2011**

**Andrew Leach, VAT Manager for the Appellant**

**Helena Perrett, Higher Officer of HMRC for the Respondents**

## DECISION

### Introduction

1. This appeal relates to a VAT default surcharge of £50,089, levied by HMRC  
5 on the Appellant at the rate of 2% (this being the second default within a surcharge liability period) for a delay of 11 days (6 business days) in payment of the VAT due which was attributable to human error.

2. The Appellant's sole ground of appeal was that the surcharge was disproportionate and should therefore be cancelled on the basis of the principles set  
10 out in *Energys Holdings UK Limited v Revenue & Customs Commissioners* [2010] SFTD 387.

### The facts

3. The facts were uncontentious. The Appellant is the representative member of a large group of companies which makes payments of VAT through the monthly  
15 "payments on account" scheme, and has done so since 2004.

4. The Appellant's payment on account which was due on 29 August 2009 was not paid until 4 September 2009. This happened as a result of the absence (believed to be through illness) of the relevant member of staff, and the stand-in person being unfamiliar with the monthly payments scheme (which requires payments on the last  
20 working day of the month, even if paid electronically, compared to the normal arrangement for quarterly VAT payments where a further seven days is allowed after the end of the month in case of electronic payments). It is worth mentioning at this point that the Appellant's arrangements for actual payment of VAT were devolved to its three-person finance team; Mr Leach as VAT Manager had no involvement in  
25 managing the monthly payments on account beyond sending to the finance team the schedule received from HMRC setting out the amounts and due dates for payment of the payments on account which were required to be made.

5. As a result of this late payment, HMRC issued to the Appellant a surcharge liability notice dated 24 November 2009 which warned that "you may be liable to a  
30 surcharge if you are in default in respect of a prescribed accounting period ending within the surcharge period which runs from the date of this notice until 30 September 2010."

6. The Appellant did not (and still does not) dispute the correctness of this notice. It acknowledges that a mistake was made for which there was no reasonable excuse  
35 and "words were had" internally to ensure that a similar error did not occur again.

7. As a result of this episode, Mr Leach's attention was drawn to the size of the Appellant's monthly payments on account, and to the fact that they ought to be reduced. He contacted HMRC and they agreed with him. By letter dated 18  
40 December 2009, they provided an amended schedule of payments on account for the remainder of the relevant period, covering the payments due from 31 December 2009

up to (and including) that due on 31 March 2010. The Appellant's VAT accounting periods ended at the end of March, June, September and December each year.

8. Payment was duly made in accordance with that schedule. By letter dated 26 February 2010, HMRC sent to the Appellant a new schedule of payments for the following year (commencing with a payment due on 28 May 2010). The size of the monthly payments remained the same, at £2,504,498. This letter was received by Mr Leach and passed on by him through the Appellant's internal mail system to the finance team for action as appropriate.

9. Having made the last monthly payment on account on the old schedule on 31 March 2010, the Appellant submitted its VAT return for the three month period ending on that date and the appropriate balancing VAT payment. This was all done within the appropriate time limit, around the end of April 2010.

10. The next event should have been the routine payment due, under the new schedule, towards the end of May 2010. Unfortunately, however, the schedule of monthly payments commencing 28 May 2010 had gone astray and was not actioned by the finance team. It may have gone missing in the Appellant's internal mail system, or it may have arrived with the finance team and been overlooked. In any event, whatever actually happened to it, the finance team did not action the first payment due on 28 May 2010. It was only when monthly management accounts were being prepared at the start of June that they spotted the discrepancy and the finance manager called Mr Leach, wondering why the Appellant was no longer within the monthly payments regime. Mr Leach immediately arranged for the relevant amount to be paid to HMRC, but it was only received by them on 8 June 2010. This was 11 days (six business days) after the due date.

11. In due course, HMRC issued a notice dated 20 August 2010 assessing the Appellant to a 2% surcharge on the amount paid late. As the amount due was £2,504,498, the surcharge was calculated at £50,089.

12. The Appellant requested a formal review of the surcharge by HMRC. Following their confirmation of the surcharge, the Appellant appealed to the Tribunal against this surcharge. It does not claim (rightly, in my view) that a reasonable excuse can be made out for either of the two defaults. It simply argues that the surcharge should be struck down as being disproportionate to the "offence" of paying late.

### **The basic legal test**

13. The basic test set down by the law is clear, the only difficulty arises as to how it should be applied in this case.

14. The *Energys* case (which HMRC initially appealed, but later withdrew their appeal) makes it clear that an individual surcharge may be struck down by the Tribunal as disproportionate if it is found to be "not merely harsh but plainly unfair". It is the individual surcharge that is to be tested against this yardstick, not the

surcharge system as a whole. Terms such as “proportionality” and “disproportionate” are commonly used to refer to this yardstick, and I will adopt that terminology.

### **Applying the basic legal test in practice**

5 15. In deciding whether a particular surcharge is “plainly unfair”, it is rather less clear precisely what factors should be considered.

10 16. In considering the issue of proportionality, a tribunal is by definition considering whether one thing (the surcharge) is proportionate to another thing (the default for which the surcharge is imposed). Mr Leach invited me to consider the default for this purpose to consist of the non-deliberate error or oversight that was involved in making the payment late, an error or oversight that was picked up quickly and put right immediately it was picked up. He submitted that the size of the late VAT payment itself should form no part of this consideration as it had no bearing on the default. If that argument was correct, he submitted, then on any view a £50,000 penalty for an innocent human error which was discovered and rectified quickly must be disproportionate.

15 17. I cannot accept this argument. It seems to me to be axiomatic that if a very large payment has to be made, the consequences of a failure to pay it should, all other things being equal, be more serious than if the amount of the payment in question is very small; in other words, the amount of the payment which was paid late must be part of “the default” which is being considered for the purposes of proportionality. To an extent, the structure of the default surcharge system reflects this reality. I am satisfied that in considering whether the surcharge is proportionate to the default, it is appropriate to look at the full picture of the default, including:

- the amount of the delayed payment of VAT;
- 25 • the nature of the default – e.g. deliberate, entirely innocent or somewhere in between (and here, the history of compliance may also be relevant, though by definition there will be at least one past default); and
- the length of the delay – against the background of the statutory timetable.

30 18. The size of the surcharge is a known figure. Once a full picture of the default has been established, I must decide whether the former is disproportionate to the latter – or, to use the wording endorsed in *Energys*, whether the surcharge is “not merely harsh but plainly unfair”. In doing so, I should stand back and consider the whole situation in the round, including the context and purpose of the default surcharge scheme. I should also consider the size of the surcharge – as Judge Bishopp said in *Energys* at [70]:

“The absence of an upper limit may be justifiable on the basis that it is a necessary consequence of a tax-g geared penalty, though in my view there must come a time, even in the case of a large company, when that justification breaks down”.

19. As part of my overall consideration, Mr Leach referred me to the question put by Judge Bishopp in *Enersys* at [61]:

5                   “...it seems to me that a pertinent question to ask is whether, if the penalty were not determined mechanically but by a court or tribunal with the power to set any monetary penalty it chose without statutory constraint, that court or tribunal, exercising ordinary judicial discretion, would impose a penalty of as much as [£50,000] for an error of this kind.”

10           20. Mr Leach invited me to answer this question by saying that no court or tribunal, with the power outlined by Judge Bishopp, would impose a £50,000 penalty on the Appellant in this case.

15           21. In an extreme case, such as *Enersys* (involving a penalty of £131,000 for just one day’s inadvertent delay in paying £2.63 million, albeit on a fourth default), Judge Bishopp’s question is easily answered. He made it clear (at [70]) that it was the “one day’s delay” point that weighed much more heavily in his mind than the sheer size of the surcharge.

20           22. In the present case, where the (entirely inadvertent) delay was 11 days and the penalty is just over £50,000 (based on a second default involving £2.5 million of VAT), I find the answer less clear. That very fact suggests to me that I should not overturn the surcharge, and I am mindful of the comment in *Greengate Furniture Limited* [2003] VATD 18280, endorsed in *Enersys*, that it will only be in “exceptional cases” that a surcharge will be struck down on the basis of proportionality.

25           23. Mrs Perrett also referred to a number of other decisions of the First-tier Tribunal in which this point had been considered, in particular *Scotpackaging Limited* [2010] TC00759, *Crane Limited* [2010] TC00660, *Digitop Limited* [2010] TC02049, *Kaizen Search Limited* [2010] TC09331 and *Eastwell Manor Limited* [2011] TC00573. The amounts of surcharge involved in them all were small compared to the present case - £18,453 in *Eastwell Manor* and less than £7,000 in all the others. A summary of their key points is set out in the table annexed to this decision (along with similar details in relation to *Enersys* and *Greengate Furniture*). It is apparent from that table that the only case in which a taxpayer has succeeded in a proportionality argument is *Enersys*, which does quite clearly stand out from the other cases in the table when they are considered together. Whilst their views are of course not binding on me, it is always helpful to see how other tribunals have approached this question, which is consistent with the view I have formed in this case.

## Decision

40           24. After considering the amount of the surcharge in the context of the full picture of the default (including the factors set out at [17] above and after a consideration of the question posed at [19]), I do not reach the conclusion that the surcharge is “plainly unfair”.

25. For this reason, I dismiss the appeal and uphold the default surcharge.

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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**KEVIN POOLE**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 11 July 2011**

**Appendix – key features of cases referred to on proportionality**

<b>Case name</b>	<b>Amount of VAT</b>	<b>Penalty £/%</b>	<b>Days late</b>	<b>Reasons</b>	<b>Disproportionate?</b>
Greengate Furniture Limited	£33,613.90	£672.27 – 2%	6	Cash flow problems	No
	£61,736.14	£3,086.80 – 5%	12		
	£38,304.20	£3,830.42 – 10%	4		
	£48,440.52	£7,266.07 – 15%	8		
Energys Holdings UK Limited	£2,637,630	£131,881 – 5%	1	Admin mistake	Yes
Scotpackaging Limited	£9,752.11	£975.21 – 10%	36	Cash flow problems	No
	£14,566.34	£2,184.96 – 15%	30		
	£12,374.45	£1,856.16 – 15%	6		
	£11,082.74	£1,6654.91 – 15%	24		
Crane Limited	£257,525	£5,150 – 2%	1	Admin mistake	No
Digitop Limited	£9,106.07	£1,365.91 – 15%	1	Admin mistake	No
Kaizen Search Limited	£69,018.50	£6,901.85 – 10%	8 weeks (3 weeks up to time to pay deal)	Cash flow problems	No
Eastwell Manor Limited	£123,024.44	£18,453.66 – 15%	3	Cash flow problems	No