



TC01316

Appeal number TC/2011/2854

VAT- Default surcharge – reasonable excuse – proportionality

FIRST-TIER TRIBUNAL

TAX

PREFERRED REFRIGERATION LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: CHARLES HELLIER
PHILIP GILLETT**

Sitting in public in Sutton on 30 June 2011

The Appellant was not represented

Bruce Robinson for the Respondents

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DECISION

1. Absence of the taxpayer

2. The taxpayer was not represented at the time the hearing started. On 4 May 2011
5 FAS, the Appellant's representatives had written to the tribunal acknowledging notice of the hearing and saying that it would not be possible for FAS or someone from the Appellant to attend. No request for an adjournment was made.

3. We were satisfied that the Appellant had received proper notice of the hearing and in the circumstances concluded that it was just to hear the appeal in the absence of
10 representation for the Appellant.

4. Mr Robinson produced to the tribunal a skeleton argument and a bundle of copy papers. The bundle contained copy correspondence, copies of HMRC's telephone attendance notes and copies of HMRC's accounting records for the Appellant. He told us that these had not been sent to the Appellant beforehand but undertook to send
15 them as soon as practicable.

5. This appeal was classified as a basic case. In such a case either party may bring evidence to the tribunal which has not previously been disclosed to the other party. Where that happens the tribunal will consider whether the other party needs time to consider the evidence or to gather evidence in rebuttal. It helps speed the appeal if
20 papers are disclosed beforehand but it is not a prerequisite to the hearing of the appeal. In this case the papers in the bundle produced by Mr Robinson did not contain information or documents which would have taken the Appellant by surprise. It seemed to us that it was not necessary to ensure a fair hearing to adjourn the appeal to let the Appellant comment on the papers Mr Robinson produced.

25 6. The Appeal

7. The Appellant appeals against a default surcharge imposed under section 59 VAT Act 1994 of £1,220.08 in respect of its failure to pay its VAT liability for the period ending December 2010 (the 12/10 period) on time. The surcharge was 5% of the late paid VAT for the period.

30 8. The Appellant did not dispute that the tax had been received by HMRC after the due date or that there had been late payments for 06/10 and 09/09, or that the VAT return for 12/09 had been received by HMRC after the due date.

9. It appeared that, as section 59 requires as a prerequisite for the imposition of a surcharge, the Appellant had been sent surcharge liability notices creating an extended
35 surcharge period which encompassed the 12/10 period. As a result unless either the Appellant had a reasonable excuse for its default or the surcharge was "disproportionate" the appeal should be dismissed.

10. The Appellant paid the VAT for 12/09 by online BACS payment. The monies were received by HMRC on 9 February 2010, two days late.

11. VAT payments for earlier periods were also made by BACS. They were received as follows:

- (1) 09/09: 27/11/09. 20 days late
- (2) 12/09: 3/12/09. on time
- 5 (3) 3/10: 5/5/10. on time
- (4) 6/10: 9/8/10. two days late
- (5) 9/10: 5/12/10. on time

12. The 09/09 and 6/10 late payments gave rise to the sending by HMRC of surcharge notices. These notices had appended to them notes which explained the surcharge regime and that the relevant VAT had to be received by HMRC by the due date.

13. On 13 August 2010 HMRC sent the Appellant a surcharge assessment for £409.70. This was for the period 6/10. The Appellant appeared to have paid £420 on account of this surcharge on 31 August 2010. The Appellant must have been aware in August 2010 that something was going wrong with the way in which he made payments.

14. On 12 July 2011 HMRC sent the Appellant a surcharge assessment for 12/10. This was for £2,440.16, being 10% of the late paid tax for the period.

15. The £409.70 surcharge was calculated at 5%. It was at this rate because HMRC's records indicated a late payment for 3/10 (so that the relevant rate of surcharge specified by section 59 was 5% rather than 2%). In fact however, the tax for 3/10 had reached HMRC in time, even though the return had been received late. On the review conducted by HMRC before the appeal this error was recognised, and as a result the review letter reduced the surcharge for 12/10 from the 10% rate to 5% (from the original £2,440 to the amount now claimed of £1,220.). Thus the surcharge under appeal is that at 5%. No adjustment seems however to have been made to the £409.70 surcharge to reflect the fact that it should have been calculated at the 2% rate rather than the 5% rate, which would have reduced it to below the £400 threshold, below which HMRC do not in practice levy a penalty. Mr Robinson kindly undertook to ensure that this was dealt with.

16. In NAS' letter to the tribunal of 4 May 2011 they say that the Appellant misunderstood the date on which funds paid by BACS would be received by HMRC believing them to be received on the same day. Thus the payment for 12/10 was despatched electronically on 7 December 2010 (even though it was received on 9 December). They also ask for the Appellant's generally good record, and the steps it has taken to rectify matters in future to be taken into account.

Discussion

17. (a) reasonable excuse

18. When NAS say of the Appellant in their letter: “Their belief was that funds had to be sent by the 7th of the month and not that cleared funds had to be received by HMRC by the 7th” it indicated to us that the Appellant knew that online transmission of funds on a particular day did not necessarily mean that they would be received on that day, and accordingly that the Appellant’s misunderstanding relate to the requirement that the funds be received – rather than paid – on time.

19. The pattern of the Appellant’s VAT payments set out above shows that for some periods the online transmission must have been made before the due date.

20. For the 06/10 period, when the Appellant transmitted the funds on the 7th (and they were received on the 9th) the Appellant had received a default surcharge. It had paid that surcharge. Although the surcharge notice did not indicate when the funds had actually been received a reasonably diligent taxpayer would in our view either have made further enquiries of HMRC, or realised that the default arose in a period when the payment had been transmitted on the 7th, while in other periods, in which no surcharge had arisen, it had been transmitted earlier; and that that suggested that mere transmission on the 7th was not enough.

21. If the Appellant had read the notes attached to the earlier surcharge notices- as might a reasonably diligent taxpayer- it would have seen a sentence in bold type finishing with the words “**any tax due must reach HMRC by the due date**”.

22. Putting these factors together, we conclude that had the Appellant been reasonably diligent it would have realised or discovered by August 2010 that transmission on the 7th did not mean receipt on the 7th, and that receipt on the 7th was what was required.

23. We therefore concluded that the Appellant did not have a reasonable excuse for the late payment.

24. NAS point to the good payment history of the Appellant, the economic climate, and the fact that steps have been taken to put matters right. Unfortunately these issues are irrelevant to the question of whether the Appellant had a reasonable excuse.

25. Proportionality

26. Although not specifically raised by the Appellant we considered whether the surcharge should be struck down on the grounds that it was “disproportionate”. This word derives principally from the jurisprudence of the ECJ, and is not quite what it seems at first blush. The deprivation by a state of the property of an individual by the levying of a penalty which goes beyond what is necessary to achieve a legitimate aim of the state (in this case the prompt payment of VAT) is said to be disproportionate and may be struck down . But the hurdle is a high one: the individual has to show that the penalty was “devoid of reasonable foundation” or “not merely harsh but plainly unfair”.

27. In assessing whether a penalty is disproportionate in this sense the tribunals have considered the gravity of the infringement and the way in which the penalty bears on the taxpayer.

5 28. In this case the infringement is not particularly grave, but neither is it negligible. The VAT was only two days late, and in our view late because the Appellant was somewhat casual in its approach rather than deliberate or reckless. The Appellant had defaulted previously and had been warned by the 06/10 surcharge. The steps it has taken to prevent the situation arising in future may also point towards taking a less grave view.

10 29. The Appellant's VAT returns indicate that the gross margin on its activities was some £150-200K pa. Its net profit was thus likely to be considerably less and we estimated that it was likely to be somewhere in between "£32.5K and £50K pa. A penalty of £1,200 bore quite harshly on it but not overweeningly so,

15 30. We conclude therefore that the surcharge was not plainly unfair and so not disproportionate.

Conclusion

31. We dismiss the appeal.

20 32. 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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CHARLES HELLIER

TRIBUNAL JUDGE

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