



**TC01845**

**Appeal number TC2011/07140**

**VAT – DEFAULT SURCHARGE – *Appellant failed to submit its VAT return on time– did the Appellant have a reasonable excuse – No – Appeal dismissed***

**FIRST-TIER TRIBUNAL  
TAX**

**ASSIETTE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Michael Tildesley OBE**

**Sitting in public at Tribunals Service (SSCSA), Ground Floor, Trend House, 10a  
Newport Road, Lincoln LN1 3DF on 4 January 2012**

**The Appellant did not appear**

**Mrs Nadine Newham, Presenting Officer and Miss Joanna Bartup for HMRC**

## DECISION

### The Appeal

- 5 1. The Appellant appealed against a surcharge assessment dated 17 June 2011 in the sum of £668.28.
2. The Appellant informed the Tribunal that it had ceased trading on 31 December 2011 and did not intend to attend the hearing. The Appellant, however, requested the Tribunal to consider the Appeal in its absence.
- 10 3. The Tribunal decided to hear the Appeal in the Appellant's absence in accordance with rule 33 of the Tribunal Rules 2009.
- 15 4. The Appellant contended that the imposition of a surcharge was inequitable and disproportionate having regard to the fact that it always paid the VAT in full (albeit late on occasions). The Appellant pointed out that the disputed VAT payment left its bank account prior to the due date. HMRC did not receive the payment on time because it did not operate a fast payment service. In those circumstances the Appellant believed that it was wrong for HMRC to penalise it for a late payment receipt which was caused by HMRC's failure to operate a modern banking system as used by the majority of businesses in the country.

### Facts Found

- 20 5. The Tribunal finds the following facts:
- (1) The Appellant owed VAT in the sum of £4,455.23 in respect of period ending 30 April 2011.
- (2) The Appellant's bank account showed that the amount of £4,455.23 was paid out to HMRC on 7 June 2011 by means of a bill payment (BACS transfer).
- 25 (3) HMRC received the payment of £4,455.23 in its bank account on 9 June 2011.
- (4) The due date for the Appellant's VAT return for the period ending 30 April 2011 was 31 May 2011 which was extended to 7 June 2011 in respect of electronic returns.
- 30 (5) The Appellant's return for the period ending 30 April 2011 was two days late.
- (6) The Appellant made late returns in five of the six quarterly periods prior to the period ending 30 April 2011. HMRC served the Appellant with a surcharge liability notice for each default which reminded the Appellant of its obligation to
- 35 make VAT returns by the due date.
- (7) HMRC withdrew the surcharge imposed for the Appellant's default for quarter ending 31 October 2010 despite the fact that the Appellant was two days late with the return. HMRC when it withdrew the surcharge provided the Appellant with written guidance on how to avoid a default surcharge. At

paragraph 6 of the guidance HMRC advised the Appellant to check with its bank to see how long it would take to process electronic payments. Also HMRC advised that it was unable to accept faster payments.

5 (8) In the view of the Appellant's history of late returns, the Appellant was liable to a surcharge of 15 per cent of the outstanding VAT for its default with the return for the period ending 30 April 2011 which equated to a penalty of £668.28.

### Reasons

6. Section 59 of the VAT Act 1994 requires the Appellant to furnish VAT returns and pay the outstanding VAT within one month of the relevant accounting period.  
10 The Appellant failed to pay the VAT owing by the due date for the accounting period ending 30 April 2011. As the Appellant was subject to a surcharge liability notice throughout the relevant accounting period it was liable to pay a surcharge at the rate of 15 per cent of the VAT due, namely £668.28.

7. The Appellant can avoid the default surcharge if it can satisfy the Tribunal on  
15 balance of probabilities that either it had a reasonable excuse for not furnishing the VAT return on time or it despatched the payment at such time and in such manner that it was reasonable to expect that it would be received by HMRC by the due date.

8. A defence of reasonable excuse is strictly construed by the legislation. Insufficiency of funds and reliance on the default of others cannot in law constitute a  
20 reasonable excuse. In order to establish a reasonable excuse the Appellant has to show that it exercised reasonable foresight and due diligence and having a proper regard for the fact that VAT would become due on a particular date.

9. The facts found showed that the Appellant was aware of its obligations to make VAT returns by the due date. The Appellant had a history of non-compliance with its  
25 legal obligations. At the time of making its payment for the quarter ending 30 April 2011 the Appellant knew or should have known that HMRC did not accept faster payments. The Appellant when remitting its payment for the said quarter used the bill payment system rather than CHAPS which would have guaranteed a same day payment. The Tribunal finds that the Appellant took a risk that its payment would not  
30 be received by HMRC by the due date. The Tribunal is satisfied that the actions of the Appellant were not those of a prudent business person exercising reasonable foresight and due diligence and having a proper regard for the fact that VAT would become due on a particular date.

10. The Tribunal finds that the penalty of 15 per cent of the VAT owed was equitable  
35 having regard to the nature of the Appellant's default in the context of its history of non-compliance. The Appellant did not receive a financial penalty for its first two defaults, and thereafter the sizes of the penalties imposed were calculated on escalating scale until the maximum of 15 per cent was reached after the third default in the surcharge period.

40 11. The Tribunal holds that the Appellant did not have a reasonable excuse for not furnishing the VAT return on time for the period ending 30 April 2011. The Tribunal

is also satisfied that the Appellant did not dispatch the payment at such time and in such manner that it was reasonable to expect that it would be received by HMRC by the due date. The Tribunal dismisses the Appeal and confirms the surcharge assessment in the sum of £668.28.

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12. 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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**TRIBUNAL JUDGE**  
**RELEASE DATE: 22 February 2012**

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