

[2012] UKFTT 159 (TC)



TC01854

Appeal number TC/2011/02911

Value Added Tax - Default surcharge – Late payment due to administrative error -- Whether reasonable excuse – No – Whether penalty disproportionately large - No

**FIRST-TIER TRIBUNAL
TAX**

ON DEMAND COMMUNICATIONS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: PHILIP GILLETT FCA
JUDGE PETER KEMPSTER**

Sitting in public at 45 Bedford Square, London WC1 on 18 July 2011

Roger Baker, Finance Director, for the Appellant

Bruce Robinson (HMRC Appeals Unit) for the Respondents

© CROWN COPYRIGHT 2011

DECISION

1. This is an appeal against a default surcharge, pursuant to s 59 VAT Act 1994, in respect of the VAT accounting period to 31 July 2010 in the sum of £18,590.67, being 5 10% of the VAT paid late of £185,906.70.
2. The Appellant does not dispute the fact that the VAT of £185,906.70 was paid in two instalments, one of £85,906.70 paid on 8 September 2010, being one day late, and a second instalment of £100,000.00 paid on 25 September 2010.
3. The Appellant accepts the surcharge of £10,000 relating to the £100,000 paid on 10 25 September 2010 but believes that the charge of £8,590.67 is unfair, being a disproportionate penalty for one day's delay.
4. Mr Baker explained that at the time of the late payment an interim Finance Director was in post and that he had been responsible for this payment. The company was cash constrained at the time but did have enough funds to pay the £85,906.70 on 15 the day prior to the payment being made, ie on 7 September 2010, the normal due date. Mr Baker also noted that the payment had been made by CHAPS, ie a same day payment, which was the company's normal practice in cases where the time of receipt was important, such as VAT payments.
5. Mr Baker said that he had asked the interim FD why the money had been paid a 20 day late and had been given to understand that there had been a problem with the banking system, but he had been unable to obtain any further information or evidence of this.
6. In his letter to HMRC of 25 November 2010 Mr Baker had suggested that the 25 interim FD had spoken to Mrs S Taylor of HMRC Debt Management Office, Worthing, with a view to negotiating a time to pay agreement "by or before 7 [September]", but the HMRC record of the conversation clearly stated that the telephone call had taken place on 8 September, ie after the due date, and Mr Baker accepted that this was correct.
7. For HMRC Mr Robinson said that there was no dispute that both payments had 30 been paid late and the only issue to resolve therefore was whether or not the Appellant had a reasonable excuse. In the view of HMRC the explanation put forward did not amount to a reasonable excuse for the late payment. He also confirmed that according to HMRC records the Appellant had not contacted HMRC until 8 September to discuss a time to pay agreement, which was after the due date.
8. Mr Baker had also raised the issue of fairness or proportionality which Mr 35 Robinson was asked to address. Mr Robinson referred to the case of *Energys Holdings UK Limited v HMRC [2010] UKFTT 20 (TC)*. He said that the HMRC view of this case was that it related to very specific facts that were very unlikely to apply in other cases and in particular that those facts were not applicable in the current case. 40 HMRC believed that the penalty in this case was appropriate and was proportionate to achieving its objectives.

Conclusions

9. Having considered the evidence and the submissions carefully we decided that the Appellant did not have a reasonable excuse for either of the late payments made on 8 September 2010 and 25 September 2010.

5 10. We also considered the question of proportionality which is discussed at length in the judgement of Judge Bishopp in the case of *Enersys Holdings UK Ltd*, as above, which was referred to by Mr Robinson. The key question in our view, as set out by Judge Bishopp in that judgement, at 41, is “The question is whether it has struck the right—a proportionate—balance between the effective and dissuasive (which in the
10 United Kingdom would more usually, I think, be described as punitive and deterrent) aims of the penalty on the one hand, and reasonableness, that is the setting of the penalty at a level which avoids excessive and unjustified harshness, on the other.”

11. The penalty in the *Enersys* case was extreme by any measure and amounted to approximately 16% of the taxpayer’s profits for the year. The penalty in the case
15 before us was not of that scale and although it may be considered harsh for a delay of only one day we have concluded that it is not disproportionate.

12. For these reasons we DISMISS the appeal and determine that the default surcharge of £18,591.31 should be upheld.

13. This document contains full findings of fact and reasons for the decision. Any
20 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)”
25 which accompanies and forms part of this decision notice.

30 **PHILIP GILLET FCA**
PRESIDING MEMBER

RELEASE DATE: 23 February 2012

35