



TC01913

Appeal number: TC/2011/00637

VAT: penalty surcharge; extra statutory concessions correctly applied; alleged delays in banking cheques for VAT; calculation of penalty; Appellant claims unaware of inclusion in the penalty surcharge regime

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OC2 LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE CHRISTOPHER HACKING
MEMBER: DEREK ROBERTSON**

Sitting in public at City Exchange, 11, Albion Street, Leeds on 31 May 2011

Mr David O'Connell a director of and for the Appellant

**Mrs Rosalind Oliver, a presenting officer on behalf of HM Revenue and
Customs, for the Respondents**

DECISION

The appeal

1. This was an appeal against a decision of the Respondents confirmed on review on 9 November 2010. The decision concerned the imposition of a penalty surcharge of £633.01 which arose as a result of the Appellant's late payment of value added tax for the quarter 01/04/2010 to 30/06/2010 (period 06/10). The payment was due on 31/07/2010 but was not received until 13/08/2010.

The Appellant's contentions

2. It is of the essence of the Appellant's appeal that the Respondents were not entitled to impose a 10% penalty surcharge as it had not been previously informed that it was within the penalty surcharge regime. Accordingly, argues the Appellant, the Respondents have failed to follow their own procedures and the penalty is unlawful.

3. That the payment in question was in fact late is not disputed by the Appellant.

4. The Appellant further complains that *"All VAT throughout 2009 and at the beginning of 2010 was paid via a cheque, not electronically. OC2 feel it is unfair for the HMRC to impose a surcharge liability notice for 03/09, 12/09, and 03/10 because OC2 have no control over when the HMRC banked these corresponding cheques. If the HMRC have banked cheques beyond the due dates, this is not OC2's fault"*

5. The Appellant raises a yet further matter in its Notice of Appeal, namely that as a company with *"general sales of less than £150K in the years 2009 and 2010 the imposition of a 10% surcharge is unlawful given HMRC rules."*

6. Finally the Appellant states in its Notice of Appeal *"OC2 acknowledges only one default in its trading history"*

The relevant law

7. The law concerning the penalty surcharge system is to be found at section 59 Value Added Tax Act 1994.

8. Section 59(1) provides that where the Commissioners have not received a return or payment of VAT due by their respective due dates a person shall be regarded as being in default of the period concerned

9. By section 59(2) the Commissioners may serve on a taxable person in default for a prescribed accounting period a surcharge liability notice which specifies the surcharge period which will end on the first anniversary of the last day of the prescribed accounting period concerned. This surcharge liability period may be extended in the event of a further default before the expiry of the original or any extended surcharge liability period (section 59(3) VATA).

10. The combined effect of sections 59(4) and 59(5) VATA is to provide for a increasing scale of penalties assessed on the VAT due where there has been default within a surcharge period in respect of which one or more penalty surcharge notices have been served. The specified percentages of the outstanding tax referred to in section 59(5) are as follows:

In relation to the first prescribed accounting period 2%

In relation to the second such period 5%

In relation to the third such period 10%

In relation to each such period after the third such period 15%

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10. In the context of this appeal it is to be noted that section 59(7) VATA provides as follows:

“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 –

(a) the return or, as the case may be, 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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).”

Consideration of the appeal

11. Contrary to the Appellants’ assertions the Revenue presented a Schedule of Defaults which indicated that in respect of the accounting periods 03/09, 12/09, 03/10 and 06/10 the Appellant was in default of its obligations with respect to the submission of its returns and/or payment of VAT due.

12. Specifically:

For the period 01/01/2009 to 31/03/2009 (03/09) the due date for the return and any tax due was 30/04/2009. The return was received by the Revenue together with the return on 19/05/2009 some 20 days late.

For the period 01/10/2009 to 31/12/2009 (12/09) the due date was 31/01/2010. The return together with the tax due was not received until 01/04/2010 some 2 months late.

For the period 01/01/2010 to 31/03/2010 (03/10) the due date was 30/04/2010. The return was received on time on 30/04/2010 but the tax due was not received until 04/06/2010 some 35 days late.

5 For the period 01/04/2010 to 30/06/2010 the due date was 31/07/2010. The return was received in time on 23/07/2010 but the payment made through the BACS system was not with the Revenue until 13/08/2010.

10 13. The Revenue's systems indicate that in each of the above cases a surcharge document was issued on stated dates. Copies of each of the surcharge liability notices (and surcharge liability extension notices) were exhibited to the Revenue's appeal bundle. The Appellant did not dispute the fact that the notices had been sent to it nor in relation to any of the defaults did it contend that there was a reasonable excuse for the same other than the fact that the banking of its cheques in those cases where cheque payments were made was not within its control so that any delay due to late presentation of cheques would amount to a reasonable excuse.

15 14. On behalf of the Revenue Mrs Oliver explained that as an extra statutory concession the Revenue does not immediately impose a penalty on the occasion of a first default. For this reason the 03/09 period default attracted no penalty. A further concession applied in cases where the penalty payable does not exceed 20 £400. This was the case for the second default by the Appellant for the period 12/09 which would have attracted a 2% penalty but as the tax due would have been £338 no penalty was charged. Similarly for the third default the Appellant escaped liability as the penalty, now 5%, was below the concessionary threshold at only £33.75. It was only with the fourth default where the tax due was 25 £6,330.13 and the applicable rate 10% that a penalty of £633.01 became payable.

30 15. Mr O'Connell appears to have been under the impression that companies with a turnover of less than £150,000 per annum were not to be charged a default penalty or (and this remains unclear to the tribunal) that the rate of penalty should be reduced from 10% to 2%. There is no statutory provision to this effect. In her address to the tribunal Mrs Oliver on behalf of the Revenue said that the Revenue would consider allowing a concessionary default charge of 0% to a company whose turnover was less than £150,000 in its first year of trading where there had been a default in that year. This would not apply to the 35 Appellant as the first of its defaults was not within its first year of trading and in any event the default charge was in fact levied at 0% for the first default in the period 03/09.

40 16. Mr O'Connell had contended that he had no knowledge of the fact that his company was within the default regime. This is not in the finding of the tribunal credible given the fact that default surcharge notices and extension notices were in each case sent to the company's address at 114 Wellington Street, Leeds. When the company had first registered for VAT or shortly thereafter a letter had been sent to it on 24 January 2008 under the heading "Helping Business to get it right" drawing attention to further publications and websites available to assist 45 companies in dealing with their tax related obligations. Attached to this was a

