



TC04206

Appeal number: TC/2103/07026

VAT – Default Surcharge – Whether Time to Pay Agreement in place – Proportionality – HMRC v Total Technology (Engineering) Ltd applied – Appeal dismissed.

PROCEDURE – Wasted Costs – failure to by accountant to inform Tribunal of non-attendance and late request for postponement – Accountants directed to pay HMRC’s wasted costs of postponed hearing.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ENVIRONMENTAL PRACTICAL SOLUTIONS LTD Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN BROOKS
 MR SIMON BIRD**

Sitting in public at Eastgate House, Newport Road, Cardiff on 15 December 2014

The Appellant did not appear and was not represented

Lee Morris, of HM Revenue and Customs, for the Respondents

DECISION

5 1. Environmental Practical Solutions Limited (“EPS”) appeals against the following VAT default surcharges imposed as a result of the late payment of VAT:

- (1) £1,333.23 in respect of its 06/12 VAT accounting period;
- (2) £5,206.93 in respect of its 09/12 VAT accounting period;
- (3) £81,39.77 in respect of its 12/12 VAT accounting period; and
- (4) £15,5511.52 in respect of its 03/13 VAT accounting period

10 2. In a letter to the Tribunal, dated 11 December 2014, which referred to the hearing “scheduled for 15 December 2014”, Llyr James, Chartered Accountants of 25 Bridge Street Carmarthen, EPS’s accountants, wrote that neither they nor their client would attend the hearing but made submissions in relation to the appeal.

15 3. It was clear from that letter that EPS and its representative had been notified of the hearing. As we considered it was in the interests of justice to do so we proceeded to hear the appeal in the absence of EPS in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber Rules) 2009 (the “Tribunal Procedure Rules”).

Law

20 4. Under the VAT Regulations 1995 a VAT return must be submitted and payment made to HM Revenue and Customs (“HMRC”), “on the last day of the month next following the end of a period to which it relates”. However, as in the present case, where returns are submitted electronically HMRC allows an additional seven days after the end of the calendar month when payment would normally fall due (together
25 with a further three days when the VAT is collected by direct debit) for submission of the return and payment.

30 5. Section 59 of the Value Added Tax Act 1994 (“VATA”) provides that a person who has not submitted a VAT return or paid the VAT by the due date shall be served a liability notice. If having received a liability notice a subsequent VAT return or
35 payment is not submitted or paid by the due date he shall be liable to a surcharge equal to the “specified percentage of his outstanding VAT for that prescribed accounting period”. Under s 59(5) VATA the “specified percentage” rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default the specified percentage this is 2% which increases to 5%, 10% and 15% for the second, third and fourth default respectively.

6. However, if the Tribunal is satisfied that there was a reasonable excuse for the late payment of VAT s 59(7) VATA provides that:

... he shall not be liable to the surcharge ... and shall be treated as not having been in default in respect of the 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).

5 7. The legislation does not provide a definition of a “reasonable excuse” which is “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2008] STC (SCD) 536).

10 8. Additionally, a taxable person is not liable to a default surcharge if he has a “time to pay” arrangement with HMRC provided that the arrangement is made before the date when the VAT is “due and payable” (see s 108 Finance Act 2009).

Facts

15 9. EPS was required make a payment to HMRC of the £67,824.15 VAT shown on its 03/12 VAT return by 7 May 2012. According to HMRC records there were no telephone calls received on behalf of EPS to request a time to pay arrangement for 03/12. However, payment was made in eight instalments of £8,478.01 on 11 May 2012, 18 May 2012, 28 May 2012, 1 June 2012, 8 June 2012, 15 June 2012, 22 June 2012 and 28 June 2012. As payment was not made on time a liability notice was served on EPS by HMRC on 18 May 2012.

20 10. Payment of EPS’s 06/12 VAT liability of £66,661.61 was due by 7 August 2012. On that day Mr Adrian Stewart, the managing director of EPS, made a telephone call to HMRC. A transcript of the conversation records that Mr Stewart was asked if he was calling to make a payment. It continues:

25 Mr Stewart – I am calling to make a payment arrangement ... for the period 1 April 2012 to 30 June 2012 and what I am proposing is making ten payment of £6666.15.

HMRC – Right Okay unfortunately I won’t be able to accept that. You’ve had many payment arrangements and I think last time you were told that no arrangements will be able to be made.

30 Mr Stewart – Oh right I spoke to Mrs Iqbal on Monday 10 May what I made a payment arrangement right payment of £8,478.01 which we have completed.

HMRC – I understand that

Mr Stewart – and that is the last conversation really I’ve had.

35 HMRC – and it was stressed that no agreeing to request on ... no time to pay arrangements would be made in the future.

Mr Stewart – Well I have a request and I’d like to make ten if I could please.

HMRC – Yeah unfortunately I won’t be able to accept it.

Mr Stewart – Right so where do I go from here then?

HMRC – I don't know but it just says no more time to pay to be given on this case clearly because you've had many.

11. However, although an arrangement was not agreed with HMRC payment of the 06/12 liability was made by EPS in seven instalments of £6,666.16 on 9 August 2012, 28 August 2012, 31 August 2012, 7 September 2012, 13 September 2012, 20 September 2012 and 27 September 2012 followed by a cheque payment of £19,998.49 on 5 October 2012.

12. As payment had not been received by HMRC by the due date a surcharge of £1,333.23, calculated at 2% of the VAT due, was issued on 17 August 2012.

13. EPS was required to make VAT payment of £104,138.78 in respect of its 09/12 VAT accounting period by 7 November 2012. However payment of £34,138.78 was received by HMRC on 8 November 2012 followed by payments of £40,206.93 and £29,793.07 on 4 December 2012 and 16 January 2013 respectively. A surcharge of £5,206.93, calculated at 5% of the VAT outstanding as at 7 November, was issued on 16 November 2012.

14. In its 12/12 VAT accounting period the amount payable to HMRC shown on EPS's VAT return was £81,396.61. This was to be paid by 7 February 2013 but was paid in two instalments, the first of £41,396.61 was received by HMRC on 8 February 2013 and the second, of £40,000, was received by HMRC on 18 February 2013. A surcharge of £8,139.66, calculated at 10% of the VAT outstanding as at 7 February 2013, was issued on 15 February 2013.

15. EPS was required to pay £103,410.15 VAT in respect 03/13 VAT accounting period. This was due on 7 May 2013. However, payments of £43,410.15, £30,000 and £30,000 were received by HMRC on 8 May 2013, 10 May 2013 and 13 May 2013 respectively. A surcharge of £15,511.52, calculated at 15% of the VAT outstanding at the due date, was issued on 17 May 2013.

16. Following a review by HMRC surcharges that had been imposed on EPS for accounting periods 02/09, 06/10, 09/10 and 12/10 were withdrawn as a time to pay arrangement had been requested by EPS and agreed with HMRC before the due date for payment. Llŷr James, EPS's accountants, were notified that these surcharges had been withdrawn in a letter from HMRC dated 25 November 2013.

Discussion

17. HMRC contend that the surcharges were correctly issued in accordance with the legislation as payments were received after the due date and, in the absence of any time to pay arrangements, should be upheld.

18. However, the letter of 24 June 2013 from Llŷr James to HMRC, attached to its Notice of Appeal, states that Mr Stewart contacted HMRC in respect of a payment plan for the periods 06/12 and 09/12. It also refers to the 12/12 liability being fully met by 18 February 2013 with the first payment being only a day late but it is accepted that a liability notice should have been issued for this period. It is also

accepted that EPS is therefore liable to a surcharge, albeit at 2% not 15%, for its 03/13 VAT accounting period.

19. In the letter to the Tribunal of 11 December 2014, to which we refer in paragraph 2 above, Llŷr James make the following submissions on behalf of EPS:

5 (1) that a time to pay arrangement was requested by EPS for its 03/12 VAT
accounting period and that this is apparent from the transcript of the telephone
conversation that Mr Stewart had on 10 May 2012 with Mrs Iqbal of HMRC to
which he referred in the 7 August 2012 conversation and which is confirmed by
10 the transcript. This “casts doubt” on later statements by HMRC that they have
no record of calls requesting time to pay arrangements in subsequent periods.
Also, “it is clear from the history” where HMRC have withdrawn surcharges
that they are “not always aware” of when agreements are in place.

(2) that it is disproportionate to impose a surcharge where payments were
only a day late (in 09/12, 12/12 and 03/13) and two days late (in 06/12); and

15 (3) that EPS is pro-active in seeking to agree terms to pay its VAT liability
and in 06/12, 09/13, 12/13 and 06/14 and 09/14 had paid on time.

20. No evidence was advanced of any matter which could constitute a reasonable
excuse for the late payment of VAT by EPS. Therefore, in the absence of any
evidence of a reasonable excuse, as payments were not made on time, it is necessary
20 for us consider whether a time to pay arrangement was in place before the due date for
03/12 payment and the issue of proportionality in respect of the 09/12, 12/12 and
03/13 VAT accounting periods.

21. We accept that Mr Stewart did have a conversation with Mrs Iqbal of HMRC on
10 May 2012 and that a time to pay arrangement was discussed. However, for this to
25 preclude a liability to a surcharge from arising it is clear, from s 108 of the Finance
Act 2009, that the request for a time to pay arrangement must be made before the date
when the VAT is “due and payable”. For the 03/12 VAT accounting period that date
is 7 May 2012. As the telephone conversation was on 10 May 2012 it follows that the
surcharge for that period was properly imposed on EPS.

30 22. The Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Total
Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), a decision which is binding
on us, considered the issue of proportionality in relation to the default surcharge
regime in some depth. It decided that the VAT default surcharge regime viewed as a
whole does not suffer from any flaw which renders it non-compliant with the
35 principle of proportionality and, as in *Total Technology*, the fact that a payment of
VAT was only be a day late does not render the surcharges disproportionate or
invalid.

Conclusion

40 23. We therefore dismiss the appeal and confirm the surcharges in the amounts
stated in paragraph 1, above.

Wasted Costs

24. This appeal was originally listed for a hearing in Cardiff on 6 June 2014. However, when that hearing was due to commence there was nobody present to represent EPS. Therefore the clerk to the Tribunal telephoned Llŷr James (EPS's
5 accountants and representatives) and was told that although the firm was aware that hearing was listed to take place that day in Cardiff those responsible for the conduct of the proceedings were not in the office or available. A postponement was then requested to obtain further information relevant to the appeal.

25. Mr Lee Morris of HMRC, who was present at that hearing, informed the
10 Tribunal that he was in a position to proceed with the hearing but did not object to a postponement being granted.

26. In the circumstances, having regard to the overriding objective contained in rule 2 of the Tribunal Procedure Rules to deal with cases "fairly and justly", we decided that to postpone the hearing. However, we considered the failure by Llŷr James to
15 either attend the hearing or at the very least contact the Tribunal by email or telephone to request a postponement when fully aware of the date and time for which the hearing was listed to be wholly unreasonable and considered it appropriate to make a wasted costs order.

27. As rule 10 of Tribunal Procedure Rules provides that such an order may only be
20 made after giving the paying party an opportunity to make representations under we directed HMRC to provide a schedule of their wasted costs of and incidental to the postponed hearing of 6 June 2014 to the appellant and the Tribunal and that Llŷr James be given an opportunity to make representations immediately prior to the re-listed hearing of the appeal as to why a wasted costs order should not be made
25 against the firm.

28. HMRC provided a costs schedule to the Tribunal on 9 July 2014 setting out its costs of £322.00 for the hearing listed on 6 June 2014. Despite being given the opportunity to do so no representations were received from Llŷr James as to why the firm should not pay HMRC's wasted costs.

30 29. In the circumstances we DIRECT:

(1) The Respondents wasted costs of the adjourned hearing in this appeal listed for 6 June 2014 are summarily assessed in the sum of £322.00.

(2) Llŷr James shall, within 28 days of the release of this decision, pay the Respondents £322.00.

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Right to Apply for Permission to Appeal

30. 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 Rules. 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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**JOHN BROOKS
TRIBUNAL JUDGE**

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RELEASE DATE: 30 December 2014