



TC04506

Appeal number: TC/2014/06713

VALUE ADDED TAX – default surcharge – late payment of return – whether reasonable excuse – whether unfair - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EUROGUARD TECHNICAL SERVICES LTD Appellant

- and -

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

**TRIBUNAL: JUDGE AMANDA BROWN
 MS SANDI O’NEILL**

**Sitting in public at Fox Court, 20 Grays Inn Road, London WC1X 8HN, on 13
May 2015**

No appearance by or on behalf of the Appellant

Mrs Rita Pavely, Officer of HM Revenue and Customs, for the Respondents

DECISION

- 5 1. The Appellant company is appealing a late payment default surcharge issued pursuant to s59 Value Added Taxes Act 1994 of £3074.20 for the period 11/13, calculated at the rate of 15%.

Hearing

- 10 2. At the hearing, there was no appearance by or on behalf of the Appellant. It was evident from the tribunal file that a notice of hearing had been sent to the Appellant on 20 February 2015 to the address shown on the Notice of Appeal. However, the Tribunal also asked the clerk to telephone the Appellant. The clerk informed the Tribunal that he had called the Appellant and had been told by the personal assistant to Mrs Keegan (director of the Appellant and signatory of the Notice of Appeal) that Mrs Keegan was aware of the hearing; that she was in London on the day of the hearing but was not proposing to attend or be represented at the hearing. The Tribunal was satisfied in the circumstances that the Appellant had proper notice of the date and time of the hearing.

- 20 3. The Tribunal was satisfied that it was in the interests of justice to proceed to determine the appeal in the Appellant's absence. In addition to the matters set out in paragraph 2 above, the Tribunal took into account that Mrs Pavely was present and had prepared for the hearing; she confirmed that she had sent to the Appellant the skeleton argument and bundle of documents. The Tribunal further considered that unnecessary postponements or adjournments on the day are inconsistent with the public interest in judicial efficiency.

25 Out of time

4. The late payment default surcharge was issued to the Appellant on 17 January 2014. By letter dated 27 January 2014 the Appellant's Managing Director, wrote 'appealing' the issue on the surcharge liability notice asking that the surcharge be waived.

- 30 5. A review was carried out and by letter dated 24 February 2014 the liability notice was upheld. A further review was requested on 3 March 2014 (and within the 30 day statutory appeal period) by reference to certain additional information. On 30 July 2014 HMRC wrote advising that no further review was possible but that they had considered the additional information but the surcharge was to be upheld. The time to appeal was expressly extended to 30 days from the date of that letter (ie to expire on 35 29 August 2014).

- 40 6. On 17 December 2014 the Appellant appealed to the Tribunal; at that time the appeal was over 3 months late. The Appellant explained the delay as a consequence of having not received the letter of 30 July 2014 until a second copy was sent on 4 December 2014.

7. HM Courts and Tribunal Service informed the Appellant that the out of time application would be considered at the hearing.

8. At the hearing the Tribunal were informed that HMRC did not object to the out of time application. It was apparent that the Appellant had not received the letter dated 5 30 July 2014 because, following debt enforcement action, the Appellant had written to HMRC by letter dated 8 October 2014 indicating that she awaited a response to the further request for review. A further copy of the letter dated 30 July 2014 had been sent to the Appellant and an appeal had then been promptly submitted.

9. In the circumstances pursuant to rule 5 First Tier Tribunal (Tax Chamber) Rules 10 2009 the Tribunal grants the Appellant an extension of time to submit its appeal to 17 December 2014.

The facts

10. The Appellant company has what can only be described as a history of persistent default in connection with its payment of VAT returns. The Tribunal was shown the 15 Appellant's default history for periods 11/08 onwards. It revealed that in the period from 11/08 to 08/13 (the period prior to the current default) the Appellant had failed to pay its quarterly VAT by the due date on no less than 18 occasions; in fact, on time payment had been received only twice in the 5 year period.

11. The Appellant submits its VAT returns electronically and as a consequence the 20 due date for submission for period 11/13 was 7 January 2014. The return was duly submitted by the Appellant's accountant on 6 January 2014. The due date for payment by Faster Payment Service is also 7 January 2014. The Appellant's payment was not, however, received until 8 January 2014.

12. As a consequence of the default history the Appellant was liable to a surcharge 25 calculated at 15%. This is a matter of which the Appellant would have been well aware as the previous 14 default surcharges were also at the 15% rate. The surcharge liability extension notice, that was acknowledged by the Appellant to have been issued with each of the previous surcharge notices, clearly states the percentage to be applied to any further default arising in the period covered by the liability notice.

13. From the correspondence sent by the Appellant to HMRC, and by reference to the 30 Notice Appeal, it appears that the circumstances of the default for 11/13 were that the director of the Appellant company had been on holiday over the Christmas period only returning to work on 8 January 2014. The director claims that she only realised on her return to work that the VAT payment had been due (her accountant having 35 rendered the return on her behalf by the due date). She immediately authorised the payment to be made on her return and has established that there was sufficiency of funds to have made the payment by the due date.

Relevant legislation

14. Pursuant to regulations 25(1) and 40(1) Value Added Tax Regulations 1995 where 40 a taxpayer is on quarterly returns the tax payment is due on or before the end of the month next following each quarter end. Where however, the taxpayer files its returns and pays electronically HMRC allow a further 7 days from the end of the month next following for such electronic filing and payment.

15. Section 59 Value Added Taxes Act 1994 sets out the default surcharge regime. By section 59(1) a person shall be considered to be in default for any period in which HMRC have not received the return or payment by the last day on which the return and payment was required. Section 59(2) provides for HMRC to issue a surcharge liability notice specifying a period during which any further default will be subject to a surcharge. Pursuant to s59(4) a surcharge will be issued at a prescribed rate (2% for the first default in the surcharge liability notice period, rising to 5% for the second, 10% for the third and 15% for all subsequent defaults) in respect of defaults within the liability notice period. By virtue of s59(7) where the taxpayer can establish a reasonable excuse for the default giving rise to the surcharge in question the taxpayer will not be liable to the surcharge.

16. There is no statutory definition of what a reasonable excuse is, only what it is not. No reasonable excuse is established with respect to insufficiency of funds or reliance on a third party. Case law has focused on establishing whether the actions of a taxpayer are those of a reasonably conscientious business.

Parties' contentions

17. The Appellant's director has accepted in correspondence that it is the Appellant's responsibility to ensure VAT is paid on time, that she understands why surcharges are issued but claims that this was an oversight for which the Appellant should not be liable.

18. The Appellant contends that it has been established that there was no insufficiency of funds and that since the payment was only a day late a surcharge of £3074.20 is unfair.

19. HMRC contend that the Appellant had been under the default surcharge regime from period 11/08 onwards and knew the potential financial consequences attached to the risk of further default. That information was clearly set out on the surcharge liability notice.

20. HMRC accept, in the circumstances of the present case, that the late payment arose as a consequence of a genuine mistake on the part of the Appellant. However, HMRC maintain that genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses. The Tribunal was referred to the judgement in *Garnmooss Limited t/a Penham Builders [2012] UKFTT 315 (TC)* in this regard.

21. HMRC contend that it is reasonable to expect a reasonably diligent taxpayer, aware they are in the default regime, to put measures in place to ensure they meet their legal obligations to submit future payments on time. The Appellant was aware that she would be on holiday over the Christmas period, this was not an unexpected event.

22. As regards the assertion that £3074.20 was an unfair penalty for being a single day late, HMRC referred the tribunal to the cases of *Total Technology (Engineering) Ltd [2012] UKUT 418* and *Trinity Mirror PLC [2014] UKFTT 355* concerning the proportionality of the default surcharge regime. HMRC considered that the judgement in *Total Technology* the Upper Tribunal should be that which guided this Tribunal. HMRC contended that the factual situation considered was more akin to that considered in the present case. *Total Technology* determined that the default surcharge regime itself did not infringe the EU principle of proportionality though

there may be individual circumstances in which the imposition of a surcharge might be disproportionate.

23. HMRC quite fairly brought to the Tribunal's attention the judgement of the First-tier Tribunal in *Trinity Mirror*. In that case the Tribunal had determined that the application of a 2% penalty in circumstances in which, by reference to the level of turnover, had generated a £70,000 penalty for a second default, where the default was late payment by a single day, and in the context of an otherwise good compliance history, was disproportionate. HMRC contended that the factual basis of that decision was far removed from the present case (it was also noted that the matter was on appeal to the Upper Tribunal). HMRC contended that the surcharge in this case was not unfair or disproportionate.

Discussion

24. The jurisdiction of the Tribunal in a case such as this, by reference to the guidance of the Upper Tribunal in *Total Technology*, is limited. The Tribunal can determine either that, in all the circumstances the issue of a default surcharge it is wholly disproportionate to the gravity of the 'offence' and thereby not merely harsh but plainly unfair; or that a reasonable excuse for the default has been established. Only in one of these circumstances may the Tribunal discharge the surcharge.

25. In the Tribunal's view, the Appellant did not give sufficient priority to its statutory obligations regarding the payment of VAT. The Appellant's director knows and acknowledges that she was aware she was in the default regime and what the consequences were. She was on an extended Christmas break. 7 January 2014 was a Tuesday and 4 working days after the end of the New Year bank holiday. The Tribunal considers that any diligent taxpayer cognisant of its statutory obligations and in the default regime should have considered that payment of VAT was a propriety to have been addressed or planned for in advance of going on holiday. Whilst the failure to have done so may have been genuine it cannot be considered to give rise to a reasonable excuse.

26. As regards the alleged unfairness the Tribunal does not consider that a surcharge of 15% which is a culmination of a series of failures to pay VAT returns is wholly disproportionate or plainly unfair.

Decision

27. It is clear to the Tribunal that on 19 occasions including the period under appeal in a period of just over 5 years the Appellant has failed to pay its VAT within the period laid down even if that failure was only for a short period. The surcharge of £3074.20 has been levied by HMRC in respect of the period has been correctly calculated as 15% of the tax due for that period as reported by the Appellant on its VAT return for the period. The Appellant paid little or no heed to its statutory obligation to make payment by the due date. There can be no reasonable excuse in the circumstances and its magnitude reflects the persistent default and failure of the Appellant.

28. The Appellant's appeal is dismissed.

29. 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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**AMANDA BROWN
TRIBUNAL JUDGE**

RELEASE DATE: 2 July 2015

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