



TC04527

Appeal number: TC/2013/06106

*VAT - default surcharge - late payment - whether disproportionate - no -
whether reasonable excuse for delay - no - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CASHMORES TRADE SUPPLIES LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ASHLEY GREENBANK
MR MOHAMMED FAROOQ**

**Sitting in public at Nottingham Justice Centre, Carrington Street, Nottingham
on 8 July 2015**

The Appellant did not appear and was not represented

Mrs Lisa Saxton, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Cashmores Trade Supplies Limited against the imposition
5 of a default surcharge in the amount of £1,474.99 for the period ended 31 March
2013.

Hearing

2. The Appellant did not appear at the hearing and was not represented.

3. It was evident from the Tribunal's file that notice of the hearing had been given
10 to the Appellant on 12 May 2015 to the address shown in the Notice of Appeal.

4. The Appellant had made an application on 20 May 2015 to postpone the hearing
on the grounds that Mr McLean, a director of the Appellant, had arranged to travel to
Finland on that day. HMRC had objected to the postponement. The reasons which
HMRC gave for objecting to the postponement were that the appeal was originally
15 lodged with the Tribunal on 15 August 2013. The Tribunal had previously granted a
postponement of a hearing that had been due to take place on 3 December 2014 at the
Appellant's request, but with the agreement of HMRC. Any further postponement
would have put HMRC to additional cost and expense.

5. The postponement was refused by a judge on the basis that Mr McLean had
20 booked his travel after giving his "dates to avoid" to the Tribunal for this hearing and
had given no reason why it was necessary for him to travel.

6. We were satisfied that it was in the interests of justice to proceed to determine
the appeal in the Appellant's absence. The Appellant had been given proper notice of
the time and date of the hearing and had been provided with the documentation
25 presented to the hearing. One postponement had already been granted at the
Appellant's request. Another postponement had been refused by a judge. A further
delay would not be in the interests of the efficient administration of justice.

Facts

7. The Appellant has been in the default surcharge regime since December 2007.
30 We were referred to a schedule of the Appellant's defaults under the regime since the
period 12/07. Prior to the period in question, 13 surcharge liability notices had been
issued to the Appellant. One of these surcharge notices, for the period 06/10, had
subsequently been withdrawn. So there had been 12 previous defaults during the
period for which the Appellant was within the regime.

8. The late payment default surcharge in question relates to the period 03/13. The
35 Appellant accounts for VAT quarterly. It files its returns and pays its tax
electronically. Accordingly, the due date for the return for that period and any
payment of tax was 7 May 2013. The Appellant submitted its return on 27 April

2013. The payment of the tax due, £9,833.00, was not received by HMRC until 8 May 2013.

9. HMRC's records indicate that the payment was made by the Faster Payments Service.

5 10. HMRC issued a late payment default surcharge notice to the Appellant on 17 May 2013 in the amount of £1,474.99. The surcharge was calculated at 15% of the tax due because of the Appellant's default history.

11. By a letter dated 30 May 2013, but not received by HMRC until 10 June 2013, Mr McLean requested the cancellation of the surcharge. In his letter, Mr McLean states:
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“..we have tried extremely hard to pay within the time scale and, as far as we are concerned, we have achieved that. The payment in question could only have been held up because of the bank holiday. Our company cannot afford to pay amounts like this.”

15 12. A review of the imposition of the surcharge was undertaken by HMRC. HMRC confirmed the imposition of the surcharge in a letter dated 24 July 2013. The Notice of Appeal was made to the Tribunal on 15 August 2013.

The applicable legislation

13. Under regulations 25(1) and 40(2) Value Added Tax Regulations 1995 (SI
20 1995/2518), where a taxpayer makes quarterly returns, the return must be made and the tax payment is due on or before the end of the month following the end of the relevant quarter. Where, however, the taxable person files returns and pays tax electronically, HMRC allow a further seven days from the end of the month next following for filing and payment.

25 14. Section 59 Value Added Tax Act 1994 (“VATA 1994”) sets out the default surcharge regime. Under section 59(1), a taxable person is regarded as 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.

15. Section 59(2) provides for HMRC to issue a surcharge liability notice
30 specifying a period during which any further default will be subject to a surcharge. If the taxable person then defaults within the liability notice period, under section 59(4) VATA 1994, the taxable person is liable to a surcharge at a specified rate of the outstanding VAT for the prescribed accounting period or, if greater, £30.

16. The specified rates are 2% for the first default in the surcharge liability notice
35 period, 5% for the second default, 10% for the third default and 15% for all subsequent defaults (section 59(5)).

17. Under section 59(7), where the taxpayer can establish that the return or the VAT was dispatched at such time and in such manner that it was reasonable to expect that it

would be received by HMRC within the relevant time limit or a reasonable excuse for the default giving rise to the surcharge in question, the taxpayer will not be liable to the surcharge.

18. Under section 71(1) VATA 1994, neither an insufficiency of funds to pay the VAT, nor any reliance on a third party, nor any dilatoriness on the part of a third party so relied upon, can form a reasonable excuse.

The parties' arguments

19. The Appellant's arguments are set out in the Notice of Appeal and in the correspondence with HMRC. They are in summary as follows.

10 (a) It was unreasonable to impose a surcharge for a payment that was only one day late where the delay was caused by the bank holiday.

(b) Before the default in the period 03/13, the Appellant had made returns and payments on time for almost twelve months. This improved compliance record is not reflected in the level of penalty.

15 (c) The surcharge of nearly £1,500 is disproportionate when the payment was made only one day late.

(d) The Appellant cannot afford to make the payment.

20. In response, HMRC submit that it is the Appellant's responsibility to ensure that payments are made on time. The bank holiday was not an unforeseen event. The Appellant should have taken steps to ensure that the payment was received by HMRC on time.

21. HMRC also say that it is not clear that the bank holiday affected the payment. The payment was due on Tuesday 7 May 2013. The bank holiday fell on Monday 6 May 2013. The payment was made by the Faster Payments Service. HMRC receive payments under the Faster Payments Service on any day including weekends and bank holidays. The speed of the payment is dependent upon the taxpayer's bank. However, the Faster Payments Service usually allows payments to be made on the same day or, in some cases, one day later. This would suggest – although there is no evidence on this point – that the Appellant did not give instructions to its bank until either Tuesday 7 May or Wednesday 8 May.

22. The level of penalty is set out in statute. HMRC has no discretion to mitigate the level of the surcharge. The relevant percentage is set out in section 59(5) VATA 1994 and is determined by the number of defaults and no other factor. The surcharge was correctly calculated in accordance with the law.

35 23. The default surcharge regime does take account of previous timely payments. Section 59 VATA 1994 provides that, if a default occurs, the taxpayer remains within the regime until there had been no defaults for a continuous 12 month period. A taxpayer falls out of the regime when there have been no defaults for a 12 month period.

Discussion

24. The Appellant has not disputed that the payment was received late by HMRC. Nor has the Appellant questioned the calculation of the surcharge.

25. Most of the issues that the Appellant has raised amount to an argument that the surcharge is unfair and disproportionate: the payment was received only one day late; no account is taken of the Appellant's more recent complaint VAT record; and that there is no discretion to mitigate a surcharge once it is imposed.

26. These aspects of the default surcharge regime and its effect on an individual taxpayer are discussed in the decision of the Upper Tribunal in *Commissioners for HM Revenue and Customs v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). In that case, the Upper Tribunal found that none of the issues results in the default surcharge regime being non-compliant with the principle of proportionality by which national measures adopted by EU Member States in exercise of their powers relating to VAT are to abide. Nor was it in breach of a taxpayer's rights under Article 1 of the First Protocol to the European Convention on Human Rights. We refer in particular to the discussion of the various aspects of the default surcharge regime in [85] to [105] of the Upper Tribunal decision.

27. The Upper Tribunal did accept that there may be cases where the fact that the default surcharge regime does not incorporate a maximum penalty could, in individual cases, result in a level of default surcharge which might be regarded as unconscionable or to adopt the language used in other cases "not merely harsh but plainly unfair" (see Simon Brown LJ in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26]). However, the level of the surcharge in this case does not, in our view, even begin to approach such limits.

28. For these reasons, and following the decision of the Upper Tribunal in the *Total Technology* case, we take the view that Appellant's arguments do not form a basis of challenge to the level of surcharge imposed in this case under any of the above principles.

29. As we have noted above, HMRC does not have discretion to mitigate the level of any surcharge once it is imposed. The Appellant does, however, have a defence to the imposition of a surcharge if it can be shown that the payment was dispatched at such time and in such manner that it was reasonable to expect that it would be received by HMRC within the relevant time limit or if it had a reasonable excuse for the late payment.

30. There is no evidence to show that the Appellant gave instructions to its bank at a time at which it would have been reasonable to expect that the payment would be received by HMRC within the relevant time limit.

31. Furthermore, in our view, none of the matters raised by the Appellant amount to a reasonable excuse for late payment of the tax.

(a) The Appellant had been in the regime for some considerable time and was fully aware of the consequences of a default; the bank holiday, on 6 May 2015, if it was a factor in the late payment, was not an unforeseeable event.

5 (b) An insufficiency of funds to pay any tax due is not of itself a reasonable excuse (section 71(1) VATA 1994). Although the case law does permit of the possibility that other events that give rise to an insufficiency of funds can amount to a reasonable excuse (see *Customs and Excise Commissioners v Steptoe* [1992] STC 757), there is no
10 evidence of any such events in this case.

Decision

32. For the reasons that we have given above, we dismiss this appeal.

Right to appeal

15 33. 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
20 “Guidance to accompany a decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ASHLEY GREENBANK
TRIBUNAL JUDGE**

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RELEASE DATE: 15 JULY 2015