



TC03070

Appeal number: TC/2012/07744

VAT default surcharge - payment received by HMRC four days late - Appellant overlooked that the extended date for electronic payment shortened due to bank holiday - whether in the circumstances a penalty of £11,932.55 was unfair and disproportionate - no - whether reasonable excuse - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STORAGE EQUIPMENT SAFETY SERVICE LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 ROLAND PRESHO**

**Sitting in public at Kings Court Royal Quays Earl Grey Way North Shields on
04 June 2013**

Mrs. Deborah Wheatley for the Appellant

Mrs. Rosalind Oliver Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. Equipment Storage Safety Service Limited (“the Appellant”) appeals against a
5 default surcharge of £11,932.55, imposed for its failure to submit, in respect of its
VAT period ended 30 March 2012, by the due date, payment of the VAT due.

2. The point at issue is whether or not the Appellant has a reasonable excuse for
making late payment.

Background

10 3. The Appellant’s principle business activity is the provision of warehouse
racking and shelving compliance inspection services for health and safety regulations.

4. Prior to the default in 03/12 the Appellant had previously defaulted on VAT
payments in period 09/10 when a VAT Surcharge Liability Notice was issued and
again in periods 06/11, 09/11 and 12/11 when VAT default extension notices were
15 issued.

5. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994
requires a VAT return and payment of VAT due on or before the end of the month
following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations
1995].

20 6. The due date for the Appellant’s 03/12 period was 30 April 2012. The due date
is extended by seven days where payment is made electronically except where this
falls on a bank holiday or weekend when the due date is deemed to be the last
previous working day. The Appellant’s return was received late by HMRC on 8 May
2012. The amount due under the return was £79,550.37. Payment of the VAT due was
25 received by HMRC by electronic transfer of funds on 8 May 2012. The 7 May 2012
was a bank holiday Monday and therefore the due date for payment was the last
previous bank working day, Friday 4 May 2012

7. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in
relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as
30 being in default if he fails to make his return for a VAT quarterly period by the due
date or if he makes his return by that due date but does not pay by that due date the
amount of VAT shown on the return. The Commissioners may then serve a surcharge
liability notice on the defaulting taxable person, which brings him within the default
surcharge regime so that any subsequent defaults within a specified period result in
35 assessment to default surcharges at the prescribed percentage rates.

8. 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 after the issue of a VAT Surcharge

Liability Notice, the specified percentage is 2% and the percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

9. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment, which gave, rise to the default surcharge(s). Section 59 (7) VATA 1994 sets out the relevant provisions : -

10 (7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above, satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

15 (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 then 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 ..’

20 10. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

Appellant’s Case

25 11. The Appellant does not dispute that its VAT return and payment for the period 03/12 was due on 4 May 2012, or that HMRC received the return and payment on 8 May 2012.

30 12. Mrs Wheatley for the Appellant explained that she had inexplicably overlooked the fact that 7 May 2012 was a bank holiday and had filed the company’s VAT return and made payment of the VAT liability effectively ‘one working day late’, payment reaching HMRC on 8 May 2012.

13. Mrs Wheatley said that the surcharge imposed was totally disproportionate to the delay in payment that had occurred.

HMRC’s Case

35 14. Ms Oliver for HMRC said that the Appellant’s VAT Period 03/12 had a statutory due date of 30 April 2012. Because payment was made electronically the VAT should have been received by 4 May 2012 and was therefore four days late.

15. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice

for period 03/11 and further surcharge default notices for periods 16/11, 09/11 and 12/11. The information contained on the reverse of each Notice states:

5 ‘Please remember your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.’

16. The requirements for submitting timely electronic payments can also be found -

- 10 • In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

15 17. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

18. Therefore the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

Conclusion

20 19. As the Upper Tribunal recognised in *Total Technology (Engineering) Limited* [2012] UKUT 418, the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no, discretion for HMRC to relieve a surcharge once imposed. In *Total Technology*, although the VAT payment had only been one day late the Tribunal held that a penalty of £4,260.26 was not disproportionate. The case established the VAT

25 default surcharge penalty regime did not “amount to a breach of convention rights”, as had been argued in that case and there is nothing in the regime which leads to the conclusion that its architecture is in any way fatally flawed. Surcharges are imposed by applying a scheme of calculation, which does not involve a breach of the principle of proportionality.

30 20. The Upper Tribunal said that there must be some upper limit on the penalty for a default which was proportionate, although it did not suggest what that might be, given that all the circumstances of the default must be taken into account. In the earlier case of *Energys Holdings UK Ltd* [2010] UKFTT 20 (TC), (see below) in certain circumstances a penalty could be regarded as “not merely harsh but plainly

35 unfair” and therefore disproportionate.

21. The Tribunal in *Total* said that it is therefore open to Tax Tribunals to consider individual default surcharges without having first concluded that the default surcharge regime as a whole is disproportionate. However in assessing whether a penalty in any particular case is disproportionate, the Tribunal must be astute not to substitute its

own view of what is fair for the penalty, which Parliament has imposed. The Tribunal should show the greatest deference to the will of Parliament when considering the application of the VAT default surcharge scheme.

25. By way of further background to the Tribunal’s reasoning in *Total*, the Tribunal referred to what Simon Brown LJ had said in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26], setting out the test for assessing proportionality -

“... it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference.”

The Tribunal observed that the “not merely harsh but plainly unfair” test set a high threshold which must be surmounted before a Tribunal could find that a penalty, correctly levied on the taxpayer by statutory provisions set by Parliament, should be struck down as disproportionate.

26. In the case of *Energys*, due to a human error, the relevant return was submitted and payment made one day late. This resulted in a 5% penalty amounting to just over £130,000. Judge Colin Bishop held that the penalty was wholly disproportionate to the gravity of the offence. It was not merely harsh but plainly unfair and in the absence of any justification it could not be saved by the State’s margin of appreciation. As he said, penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the underlying aims of the VAT Directive by imposing a disproportionate burden on a defaulting trader and distorting the VAT system as it applies to him.

27. The VAT default surcharge regime penalty is structured in a way that can it be readily understood and applied with scaled penalties that are intended to be commensurate with the default. Nevertheless there may be occasions when a strict application of the regulations leads to the imposition of a penalty so high as to be disproportionate.

28. Although the Appellant regards the penalty as unfair, a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of

each other. It is then open to the taxpayer to show whether a reasonable excuse exists for the late payment.

29. Is the penalty disproportionate? The penalty imposed on the company was £11,932.55. The delay was four calendar days, or as the Appellant says only one working day. There must of course be a proportionate upper limit to a penalty and the penalty is certainly substantial. However it cannot be described as “devoid of reasonable foundation” (*Total*). It is significantly below and cannot be compared with the penalty of £130,000 imposed in *Energysys*. It does not approach the level which the Tribunal described in *Energysys* as ‘unimaginable’. In our view it cannot be said to be within a range which could be regarded as entirely disproportionate.

30. Was there a reasonable excuse for the late payment? The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment. Because there had been several earlier defaults the Appellant would have been aware of the financial consequences of a further late payment and should have ensured that the VAT payment was made in good time to reach HMRC no later than close of banking on 4 May 2012. The Appellant overlooked the fact that the following Monday was a bank holiday. That is unfortunate for the Appellant but an oversight or a mistake, albeit honestly made is not a reasonable excuse. The Appellant would or should have been aware that when payment is made electronically and the payment date falls on a bank holiday or weekend, the due date is deemed to be the last working day beforehand.

31. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal’s view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant’s late submission of its return and late payment of VAT for the 03/12 period.

32. The appeal is accordingly dismissed and the surcharge upheld.

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

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 21 November 2013