



TC03280

Appeal number: TC/2012/09316

VAT – default surcharge – reasonable excuse – serious illness of administrator – proportionality -2 days late – held – reasonable excuse for earlier of two periods – but not for later period - penalty not disproportionate by reference to Total Technology.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ARMKOR LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE RACHEL SHORT
MRS JO NEILL**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 20 January 2014

Mr Mike Beaty–Pownall and Mr Tony Lynam for the Appellant

**Mrs Lynne Ratnett, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal against a VAT default surcharge at 15% for the two
5 accounting periods 11/2009 and 03/2010 amounting to £15,030.91 in total. The
appeal was made outside the statutory time limit, but with HMRC's agreement the
Tribunal extended the time limit for the making of the appeal which was therefore
treated as made in time.

The Facts

10 2. The Appellant was incorporated in 2006 and at the relevant time had
approximately six employees, including, until November 2011, an administrator who
dealt with all of the company's tax affairs. The company's turn over was £1.2m in the
2010 – 11 tax year and increased to £2m for the 2011 – 12 tax year.

15 3. For the 09/11 period the VAT was due to be paid on 7 November 2011 but was
not paid until 9 December. For the 03/12 period the VAT was due to be paid on 7
May 2012 but was not paid until 9 May 2012. For both periods the VAT return itself
was made on time. The VAT due for the 09/11 period was £36,337.40 and for the
03/12 period was £83,868.73. A pre payment of VAT had been made for the 03/12
20 period amounting to £20,000 at the end of March 2012. A default surcharge had also
been levied for the 12/11 period but HMRC had accepted that the taxpayer had a
reasonable excuse for late payment for that period. The default surcharges amounted
to £5450.61 for the 09/11 period and £9580.30 for the 03/12 period.

25 4. The administrator dealing with the Appellant's tax affairs became seriously ill
in April 2011, was diagnosed with lung cancer and died suddenly in late November
2011. Despite her illness the administrator continued to work for the Appellant until
shortly before her death and until just before she died it was hoped that she would be
able to return to work for the company. In late November 2011 the Appellant brought
in a replacement administrator, but some of the responsibilities which had formerly
30 been with the old administrator were passed to Mr Lynam, as director of the company,
including the responsibility for actually making VAT payments to HMRC. Mr Lynam
has a disabled daughter and this put additional pressure on him when he was assuming
these additional duties after the death of the administrator.

The Law.

35 5. The relevant legislation is set out in s 59 Value Added Tax Act 1994 ("VATA
1994") which sets out the circumstances in which a default surcharge notice can be
issued and the specified percentages at which the surcharge should be charged for the
prescribed accounting period for which a taxpayer is in default.

40 6. The definition of a reasonable excuse is set out at s 71 VATA 1994 and
specifically excludes an insufficiency of funds or reliance on a third party from being
a reasonable excuse.

The Arguments

7. The Appellant claims that for the period 09/11 there is a reasonable excuse for late payment, as that term is described in HMRC's own guidance at Notice 700/50. HMRC have accepted that a reasonable excuse exists for the following period (12/11), apparently on the basis of the administrator's death, and the same logic should apply to this period. The administrator's death at the end of November was unexpected and as a result to company struggled to make its VAT payments on time.

8. Concerning the 03/12 period, the company had taken on a new administrator but both Mr Lynam and Mr Beaty-Pownall had been involved in providing additional support and training to the new member of staff and it had taken time for the new employee to get up to speed with the company's processes. At the time of the 03/12 VAT payment in early May, there was a misunderstanding on Mr Lynam's part about who was responsible for making the payment. Mr Lynam did not realise that he needed to make this payment until after the due date. In respect of the £20,000 pre payment made in March, Mr Lynam said that he was unclear what this related to, he was under the impression that this was a payment of corporation tax.

9. In respect of both periods and the penalties charged the Appellant argues that the VAT surcharge is disproportionate on the basis of the arguments set out in the *Total Technology* decision (*HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418(TCC)) because the penalty is not proportionate to the gravity of the offence.

10. In response, HMRC argued that the illness of the Appellant's administrator was not an unforeseen or unexpected event. It is primarily the responsibility of the directors to ensure that the VAT payment was made on time. Given the illness of the administrator, which was known about from April 2011, the Appellant should have ensured that the company officer who was authorising the payments took steps to ensure that they were made on time. For both periods, but particularly by May 2012, the Appellants should have had procedures in place to ensure that the VAT payments were made on time. The directors had not taken reasonable care to ensure that these payments were made on time.

11. As for any argument concerning disproportionality, by reference to the factors considered in the *Total Technology* decision, HMRC considered that the default surcharge regime itself does not infringe the principles of proportionality and the surcharge actually applied on the Appellant did not infringe the principle of proportionality. In particular the amounts and penalties, were not, unlike the *Energys* case, (*Energys Holdings (UK) Limited* [2010] UKFTT 20(TC)) levied by reference to "out of the ordinary amounts".

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Decision

12. Having considered the evidence of both parties, the Tribunal agrees with the Appellant that for the 09/11 period the illness and unexpected death of the administrator should be treated as a “reasonable excuse” for late payment of the VAT and that the default surcharge penalties for that period should be removed. The administrator died unexpectedly at the end of November and this payment was due on 7 November, at which stage the administrator was seriously ill, although still expected to return to work. While we agree that the officers of the company have a primary responsibility to ensure that VAT payments are made on time, in these circumstances we consider that there was significant disruption to the small team working for the Appellant due to this illness of a key employee and that even a conscientious businessman might struggle in these circumstances.

13. However, the Tribunal agrees with HMRC that by May 2012 the Appellant should have arranged its new procedures to ensure that VAT payments were made on time and that the Appellant was not acting as a reasonably prudent business person in failing to ensure that it was clear who was responsible for making these payments. The Tribunal has concluded for these reasons that the Appellant does not have a reasonable excuse for late payment for the 03/12 VAT period.

14. Any arguments concerning disproportionality are only relevant to the 03/12 period on this basis. The Tribunal takes from the *Total Technology* decision that while in principle the VAT default surcharge regime is not intrinsically disproportionate, nevertheless it is possible for the regime to produce a disproportionate result in some cases. As stated in that decision:

“It is possible to envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate. One might, however expect UK courts and Tribunals to be cautious in the extreme in saying that national legislation has overstepped the mark in setting the level of penalty”

The question for the Tribunal is whether this is one such case. As we understand it, the Appellant’s basis for suggesting that the penalty is unfair here is because the penalty was only two days late and because the penalty represents an unfair proportion of the company’s profits.

15. On the question of proportionality to the company’s profits, the penalty levied on the amount of tax outstanding as at the due date amounted to £9,580.30. While that might appear a significant amount, we do not consider that it approaches the levels which were considered “harsh and unfair” in the *Energys* decision, where the penalty of £131,881 amounted to 16% of the firm’s annual profits or the equivalent of two month’s sales.

16. As regards the relative triviality of the error, the Tribunal would point out that unlike the *Total Technology* decision, this Appellant does not have an excellent compliance record, the Appellant has paid VAT late on a number of previous occasions. The Tribunal would also refer to the conclusions in that decision that since

the over all aim of the VAT surcharge regime is to ensure that taxpayers pay their VAT by the due date, it is not disproportionate to the aim of the legislation that penalties should arise when payment is made only a few days late.

5 17. We have considered whether, given the relatively large amount of VAT due for the 03/12 prescribed accounting period, the penalty is disproportionate because there is a lack of correlation between the turn over of the trader and the size of the penalty, as was concluded in *Energys*. On the basis of the increasing profitability of the Appellant from late 2011 through 2012, we do not think it is correct to say that this penalty is out of line with the Appellant's on going level of profit and /or turn over.
10 Unlike in the *Energys* decision, this penalty has not been charged for a period in which the VAT due was unusually high.

18. For these reasons, the Tribunal agrees with HMRC that the penalties for the 03/12 period should stand.

15 19. 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)"
20 which accompanies and forms part of this decision notice.

**RACHEL SHORT
TRIBUNAL JUDGE**

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