



TC03480

Appeal number: TC/2014/00115

VALUE ADDED TAX – default surcharge – whether reasonable excuse for late payment – no – whether penalty disproportionate – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PHILLIP NEIL PETCHEY

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 25 March 2013 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 29 December 2013, HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 29 January 2014 and the Appellant's Reply dated 20 February 2014.

DECISION

The Appeal

1. This is an appeal against a default penalty surcharge of £359.58, imposed for the late payment of VAT for the three month period ending 31 August 2013.

The issues

2. The appellant appeals on the following grounds:
- (1) There was a reasonable excuse for late payment and
 - (2) The penalty imposed is disproportionate.
3. These matters are disputed by HMRC.

The law

Liability for the penalty

4. Section 59 (1) Value added Taxes Act 1994 (“VATA”) provides
- “...If, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period...
- (b)) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,...
- then that person shall be regarded for the purposes of this section as being in default in respect of that period.
- (4) if a taxable person on whom a surcharge liability notice has been served—
- (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
- (b) has outstanding VAT for that prescribed accounting period,
- he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.
5. Section 59 (7) VATA provides:
- " If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies ..a tribunal that, in the case of a default which is material to the surcharge—

(a) ... 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

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(b) there is a reasonable excuse for the ... VAT not having been so despatched,

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..

10 6. The legislation does not define the term “reasonable excuse”. It has been held to be “a matter to be considered in the light of all the circumstances of the particular case” *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

Proportionality

15 7. The default occurs if the payment is made after the due date for payment S59(1) VATA. The penalty imposed in accordance with S59(4) and (5) does not take into account the period of the default.

20 8. The issue of proportionality was considered by the Upper Tribunal in the case of *Total Technology (Engineering)Ltd V HMRC [2012] UKUT 418 (TCC)*. The Upper Tribunal acknowledged that the default surcharge regime did not take into account the number of days of the default. However it was decided that this did not

“lead to the conclusion that the Default Surcharge regime infringes the principle of proportionality”.^[105]

Burden of proof

25 9. HMRC has the burden of proving that the penalty has been incurred. The taxpayer has the burden of proving that there was a reasonable excuse. *Jussila v Finland 73053/01 ECHR*.

The agreed facts

30 10. Mr Petchey is barrister with a busy practice. He has been successfully filing paper returns for many years. He relied upon the arrival of the paper return to remind him to file the return and pay the VAT on time.

11. In August 2010 paper returns were replaced with a requirement to file online. HMRC’s website contains the following information :

35 “When you enrol for VAT online services you can also arrange to receive free email reminders to let you know when your VAT returns are due, which HMRC strongly recommends you do otherwise you won’t receive a prompt from HMRC and you’ll have to set up your own reminder system”

12. The default history was not contested and can be summarised as follows:

5 (1) Period 05/12 – default one – The return was due on 30 June 2012 and electronic payment was due on 07 July 2012. The return was filed on 23 July 2012 and the VAT was paid the same day. No penalty was incurred but a surcharge liability notice was issued. The surcharge liability notice contained the following paragraph

“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 .. or the National advice service”

10 (2) Period 11/12 - default two - The return was due on 31 December 2012 and electronic payment was due on 07 January 2013. The return was filed on 18 January 2013 and the VAT was paid the same day. A surcharge of 2 % was applied. However, because this was less than £400, HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months. The reminder paragraph quoted above was also contained on the notice.

15 (3) Period 05/13 - default three - The return was due on 30 June 2013 and electronic payment was due on 07 July 2013. The return was filed on 09 July 2013 and the VAT was paid the same day. A surcharge of 5 % was applied. However, because this was less than £400, HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months.
20 The surcharge liability notice contained the following paragraph

“Pay your VAT on time – don’t rely on HMRC to remind you”.

25 13. For the period 08/13 – default four - the return was due 30 September 2013 and electronic payment was due on 07 October 2013. The return was filed on 21 October 2013 and the VAT was paid the same day. . The VAT amounted to £3,595.80 and the penalty, of £359.58, was calculated at the rate of 10 % of the tax due.

The Arguments

Reasonable excuse

30 14. Mr Petchey states that he was accustomed to receiving quarterly paper returns from HMRC which also served as a filing reminder. However the advent of online filing meant that he was not longer prompted to file the return. He states that the late payment for the period 08/13 occurred because HMRC did not remind him to file the return. He was also affected by the pressure of work.

35 15. HMRC accept that Mr Petchey did not receive a reminder. However they submit that he had the opportunity to register for free e-mail reminders but did not do so. In support of their case they refer to the information provided on their website and the advice given in the previous surcharge liability notices.

Proportionality

40 16. Mr Petchey submits that the penalty is disproportionate in the circumstances when considering the length of the delay and the fact that he is a small business. He points out that large corporations are treated more favourably by HMRC.

17. HMRC submit that the penalty has been imposed in accordance with the legislation taking into account the amount of the late payment and the number of defaults. In support of their case they refer to the decision in the case of *Total Technology (Engineering) Ltd (above)* in which the structure of the default surcharge regime was found to be proportionate.

Reasons for decision

Reasonable excuse

18. I accept that Mr Petchey made a genuine miscalculation as to filing date as he did not receive a reminder in the form of the paper return. However the previous defaults appear to have arisen in identical circumstances. In each case HMRC advised Mr Petchey of proactive steps he could take to avoid incurring similar surcharges, including contacting the helpdesk and registering for free e-mail reminders. It would have been reasonable in the circumstances for Mr Petchey to have accessed these services but he does not appear to have done so.

19. For these reasons I am satisfied that there is no reasonable excuse for the late payment.

Proportionality

20. I accept that this was a short default period. However the penalty was correctly imposed in accordance with S59 (4) VATA (above) which does not take into account the period of the default. In the case of *Total Technology (Engineering) V HMRC (above)* the Upper Tribunal considered this aspect of the legislation and did not find it to be disproportionate.

21. I acknowledge that Mr Petchey is operating as a small business. However the penalty imposed is calculated in proportion to the level of his income and the number of previous defaults. I also take into account that this was Mr Peachey's fourth default but only the first occasion on which a surcharge was imposed.

22. For these reasons I am satisfied that the penalty imposed is proportionate.

Decision

23. There was no reasonable excuse for the late payment of VAT.

24. The penalty imposed was proportionate.

25. The appeal against the VAT penalty surcharge of £359.58 is dismissed.

Rights of appeal

26. 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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**JOANNA LYONS
TRIBUNAL JUDGE**

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RELEASE DATE: 9 April 2014

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