



**TC03510**

**Appeal number: TC/2011/09977**

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

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ATLANTIC INTERIORS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOANNA LYONS  
MRS SHAMEEM ACKTAR**

**The Tribunal determined the appeal at the Tribunals Centre Cardiff on 27 February 2014 without a hearing under the provisions of Rule 29(1) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 having first read the Notice of Appeal dated 24 November 2011 and HMRC's Skeleton argument dated 17 February 2014.**

**© CROWN COPYRIGHT 2014**

## DECISION

### Introduction

5 1. This is an appeal against a VAT penalty surcharge amounting to £420.67 for the period 07/11.

### Determination without a hearing

10 2. This case was listed for an Oral hearing at the Tribunals Centre Cardiff on 27 February 2013. Mr Ashley-Collins contacted the Tribunal in advance of the hearing date stating that he wished the case to be determined without a hearing. HMRC also consented to this application and did not attend the hearing.

3. The Tribunal must “hold a... hearing before making a decision unless (a) each party has consented to the matter being decided without a hearing; and (b) the Tribunal considers that it is able to decide the matter without a hearing”. Rule 29 (1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

15 4. Upon reading the correspondence we were satisfied that both parties had consented to the appeal being determined without a hearing and that we are able to decide the case without a hearing.

### The issues

5. Mr Ashley-Collins appeals on the following grounds:

- 20 (1) there was a reasonable excuse for the late payment;  
(2) the penalty is disproportionate.

6. These matters are disputed by HMRC.

### The law

#### *Liability for the penalty*

25 7. 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...

30 (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.

10 *Reasonable excuse*

8. 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

(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..

9. 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*

10. 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) VATA does not take into account the period of the default.

11. 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 period 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*

12. 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* [2006] ECHR 996.

5 **The agreed facts**

*The default history*

13. The schedule of defaults is not disputed and is summarised below:

10 (1) The period 07/10 – the first default – The payment was due on 07 September and was paid by BACS on 13 September 2010. No default surcharge was imposed but a surcharge liability notice was issued on 17 September 2010.

15 (2) The period 01/11 – The second default - The payment was due on 07 March 2011 and was paid by BACS on 10 March 2011. 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.

20 (3) The period 04/11 – no default - On this occasion payment was made by BACS on 07 June 2011 and was received on 09 June 2011. A default surcharge of 5% was imposed but this was removed by letter dated 09 August 2011. The letter was accompanied by a VAT information sheet which contained the following information

“allow enough time for payment to reach HMRC;s bank account by the due date. ...CHAPS is the only method of same day payment. Other methods take at least three working days to reach HMRC’s bank account”.

25 *The surcharge under appeal 07/11*

14. For the period 07/11 the VAT, amounting to £8,413.52, was due on 07 September 2011 and was received by BACS on 09 September 2011. The penalty was originally imposed at the rate of 10%. However this was subsequently reduced to 5 % following a successful appeal against the surcharge imposed for the period 04/11 (above).

30

**The Arguments**

*The appellant’s case*

15. Mr Ashley-Collins states that the late payment was made due to difficulties experienced in navigating the HMRC website. He states that he paid the VAT online on 07 September 2011 and assumed that his payment would be received the same day.

35

*The respondent’s case*

16. HMRC accept that Mr Ashley-Collins authorised his bank to pay the VAT on 07 September. However state that prior to December 2011, BACS payments were

taking three working days to clear. The company had been specifically informed of this in their acceptance letter dated 09 August 2011.

### **Reasons for decision**

#### *Reasonable excuse*

5 17. We accept that Mr Ashley-Collins experienced difficulties navigating the HMRC website. However in such circumstances it would have been reasonable for him to have contacted HMRC to request assistance in making payment. There is no evidence to suggest that he sought any such assistance.

10 18. We accept that Mr Ashley-Collins paid the VAT online on 07 September. However it was not reasonable for him to have assumed that immediate payment would be made to HMRC as he had been advised on 09 August 2011 that the BACS payments were taking three working days to clear.

15 19. For these reasons we do not find that there was a reasonable excuse for the late payment.

#### *Proportionality*

20 20. We accept that the payment was made only two days after the due date. However the imposition of the surcharge does not depend upon the period of the delay, s59(1) (b) VATA. The case of *Total Technology (Engineering) Ltd* (above) the Upper Tribunal found the default surcharge regime to be proportionate notwithstanding that it did not take into account the period of the default.

21. For these reasons we find the penalty imposed to be proportionate.

### **Decision**

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

25 23. The penalty imposed was proportionate.

24. The appeal against the VAT default surcharge of £420.67 is dismissed.

### **Rights of appeal**

30 25. 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

**JOANNA LYONS  
TRIBUNAL JUDGE**

5

**RELEASE DATE: 23 April 2014**