



TC03573

Appeal number: TC/2013/09640

VALUE ADDED TAX – default surcharge – whether appellant liable – yes – whether there was a reasonable excuse for late payment – no – whether penalty disproportionate – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JP GLASBY LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 11 April 2014 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 18 December 2013 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal 23 January 2014.

DECISION

The Appeal

1. This is an appeal against a penalty of £862.60, imposed for the late payment of VAT for the three month period ending 31 July 2013. The penalty was imposed in accordance with s59(4) Value Added Tax Act 1994.
2. Mr Julian Wilkinson of Hart Shaw accountant's appeals on behalf of the appelland company.

The issues

3. Mr Wilkinson appeals on the following grounds:
- (1) the company is not liable for the penalty;
- (2) there was a reasonable excuse for the late payment and
- (3) the penalty is disproportionate.
4. These grounds of appeal are opposed by HMRC.

The Law

15 *Liability for the penalty*

5. Section 59 Value added Tax Act 1994 ("VATA") provides:
- (1) "...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-
- (a) the Commissioners have not received that return, or
- (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."

Reasonable excuse

6. Section 59 (7) VATA provides:

5 " 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

10 (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..

15 7. 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

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]

25 *Burden of proof*

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) [2006] ECHR 996*.

The agreed facts

30 *Payment by direct debit*

10. Section 21.3 of Notice 700 of the VAT guide (April 2012 onwards) contains the following information:

35 “HMRC recommends that you pay by Direct Debit because your payments are collected automatically from his account on the third bank working day after the extra seven calendar days following your standard due date”

The default history

11. For the period 04/13 the VAT return was due on 07 June 2013 but was not filed until 24 September 2013. The direct debit was due to be taken three business days after the 07 June. However as the return was not received in time the direct debit
5 payment was not activated. On 11 June 2013 the VAT was paid by BACS. The company overpaid by £9,657.97 leaving a credit balance on the account.

12. As the VAT was paid after the due date a surcharge liability notice was issued on 14 June 2013. The notice contained the following paragraph:

10 “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”

The current default

13. For the period 07/13 the return was due on 07 September but was not filed until 24 September. In the absence of the return the VAT was assessed to be £60,662. As
15 there had been an overpayment in the previous quarter a balancing payment was required in the sum of £52,788.09. The balancing payment was paid by BACS on 09 September. As this was the second late payment a 2% default penalty surcharge was imposed in the sum of £1,020.08.

14. The return was submitted on 24 September and the VAT liability and amount of the
20 late payment were reduced to £52,788.09 and £43,130.12 respectively. The default penalty surcharge was reduced to £862.60 to reflect the reduction in the late payment.

15. As the direct debit remained in force the sum of £116,940.06 was erroneously deducted from the company’s bank account upon submission of the returns on 24 September. HMRC later returned this payment minus the penalty of £862.60

25 **The arguments**

The appellants case

16. Mr Wilkinson submits that that there is a reasonable excuse for the late payment due to confusion regarding the amount of VAT due and the overpayments made. He
30 points out that an overpayment of VAT was paid on 09 September. He does not provide an explanation for the late submission of the return.

17. Mr Wilkinson submits that the penalty is unnecessary and disproportionate bearing in mind the overpayments made and the duplicate payment.

The respondent’s case

18. HMRC state that the VAT was paid by BACS and therefore the company were
35 not entitled to the additional three days extension afforded to direct debit payments. Accordingly the payment deadline remained as 07 September 2013. The company

would have been on notice of the due date for payment as the information was available via their website and helpline as identified in the surcharge liability notice.

19. They accept that a duplicate payment was taken in error following the submission of the return on 24 September. However they do not accept that this impacts upon the default as the error occurred after the due date and the payment was refunded. They do not accept that the penalty is unnecessary or disproportionate.

Reasons for decision

Liability for the penalty

20. For the period 07/13 the deadline for electronic payment was 07 September. Had the return been submitted on time this deadline would have been extended by a further three business days to allow for payment by direct debit. However since the return was not submitted on time the direct debit was not activated and the payment deadline reverted to 07 September. The payment was made on 11 September, after the due date, and accordingly the penalty was correctly incurred in accordance with s59(4) VATA

21. I accept that HMRC subsequently took a duplicate payment when the return was submitted on 24 September. However this payment was returned to the company subject to retention of the penalty surcharge. The duplicate payment was brought about by the late submission of the return and does not impact upon the lawfulness of the penalty.

22. For these reasons I find that the company is liable for the penalty.

Reasonable excuse

23. Mr Wilkinson has not provided an explanation for the late payment or the late delivery of the return. There appears to have been some confusion on the part of the company regarding the relevant payment date. However in such circumstances it would have been reasonable for the company to have made enquiries of HMRC before the due date and there is no evidence that they did so. I find that the information regarding the payment dates was available online and via the helpline.

24. For these reasons I find that there was no reasonable excuse for the late payment.

Proportionality

25. I accept that there had been an overpayment in the previous quarter. However the penalty was calculated in accordance with the balance of VAT owing on 07 September which took into account the overpayment made. The penalty was further reduced to take into account the amount of VAT payable upon submission of the return.

26. I accept that this was a short default period of two days. 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.

27. For these reasons I find that the penalty imposed was proportionate.

Decision

28. The company is liable for the penalty.

29. There was no reasonable excuse for the late payment.

30. The penalty imposed was proportionate.

31. The appeal against the penalty of £862.60 is dismissed.

Rights of appeal

32. 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**

RELEASE DATE: 7 May 2014