



TC03687

Appeal number: TC/2014/00717

VAT – Default Surcharge – penalty – whether properly imposed – whether proportionate

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CM & SJ BORDERS, G BORDERS & S BORDERS Appellant
t/a EAGLE & CHILD INN & CENTRAL BEACH CLUB

- and -

THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 03.06.2014 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 03.02.2014 (with enclosures), HMRC’s Statement of Case submitted on 15.05.2014 (with enclosures), HMRC’s Amended Statement of Case submitted on 28.05.2014, the Appellant’s letter dated 12.02.2014 (with enclosures) and the Appellant’s Reply dated 30.04.2014.

DECISION

5 1. The Tribunal decided that the Notice of Assessment of Surcharge in the amended sum of £502.12 in respect of VAT due for the period 01.06.2013 to 31.08.2013 was properly imposed.

2. The appeal is dismissed.

3. The Tribunal found that the VAT Return for the period 01.06.2013 to 31.08.201 was received by the Respondents on time. The due date for payment was 07.10.2013 for electronic payments; payment was received by the Respondents in three payments via the Faster Payments Service namely £5,000.00 and £12,106.33 on 08.10.2013 and £8,000.00 on 21.10.2013 i.e. one day late and fourteen days late respectively.

4. A Surcharge Liability Notice was initially issued in the sum of £1,255.31 being calculated at 5% of the of the Assessed tax due; subsequently this has been reduced to £502.12, being 2% of the Assessed tax due, as a consequence of the removal of a Surcharge for an earlier period. The Appellants remained in the Surcharge Liability regime after that removal.

5. The Tribunal further found that there was no reasonable excuse for the late payment of VAT for the period ended 31.08.2013. In particular it has been noted that the Appellants seek to argue that they did not have an insufficiency of funds but a shortage of funds.

6. Insufficiency of funds is excluded from providing reasonable excuse for default under Section 71(1)(a) of the VAT Act 1994.

7. The Tribunal notes that the Appellants submit that two of their Bank accounts were overdrawn but there were nevertheless overdraft facilities which would have enabled them to make timely payments of the VAT due on 07.10.2013. They therefore had money available to the business to meet its VAT obligations and this defeats their argument that they had a shortage of funds.

8. In any case the Tribunal classifies a Shortage of funds as an Insufficiency of funds which is precluded as an argument for reasonable excuse by Section 71(1)(a) of the VAT Act 1994.

9. The fact that the Appellant's first payment was only one day late does not assist in the pursuit of this appeal. The law is clear and all payments must be made in a timely manner if the Surcharge Penalty regime is to be avoided. The Appellants will have been aware of the significance of that regime as a result of the Notice served on them following their default in the period ended 31.05.2013.

10. The Appellants made no contact with the Respondents prior to the due date for payment in any attempt to negotiate a Time to Pay arrangement.

11. Attending to duties such as catering and endeavouring to “generally run the business” do not constitute a reasonable excuse.

12. The Respondents have properly observed that it is reasonable to expect a reasonable and competent business person, mindful of their obligations to the VAT regime and in the same or similar circumstances, to have made payment by the due date using all funds available to them. The exercise of reasonable foresight and of due diligence and a proper regard for the fact that the VAT would become due on a particular date would have avoided the default.

13. In so far as the Appellant has argued that the imposition of the penalty was unfair or disproportionate the Tribunal has applied the decision in the case of *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). Such an argument is unsustainable in this Tribunal.

14. 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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**WDF COVERDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 5 June 2014