



TC03929

Appeal number: TC/2014/01320

VAT default surcharge – payment made late – Appellant overlooked payment – whether reasonable excuse – no – whether penalty unfair – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANTHONY ROSE

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 30 May 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 notification of Appeal dated 2 March 2014, and HMRC's Statement of Case received on 9 April 2014, the Appellant submitting no response.

DECISION

The Appeal

1. Anthony Rose ('the Appellant') appeals against a default surcharge of £70.82 imposed by HMRC on 22 November 2013, in respect of the VAT period ended 30 September 2013, for his failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 10% of the VAT due of £708.28.

2. The point at issue is whether the Appellant has a reasonable excuse for making late the payment.

10 Background

3. The Appellant has been in the VAT default surcharge regime from period 03/11 and prior to the default under appeal had defaulted in periods 03/12, 12/12, 03/13 and 06/13.

15 4. The Appellant was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg. 25(1) and Reg 40(1) VAT Regulations 1995.]

5. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for electronic filing and payment.

6. In respect of the default in period 09/13 as payment was made electronically the due date was 7 November 2013. The return was received on 22 November 2013 and the VAT payment in two instalments on 15 November 2013 and 22 November 2013.

7. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge. Section 59 (7) VATA 1994 sets out the relevant provisions : -

30 '7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

35 (a) the return or as the case may be, 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

40 (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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 in question.

8. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

Appellant's contentions

9. The Appellant does not dispute that his VAT payment for the period 09/13 was late.
10. The Appellant's grounds of appeal in his letter to HMRC appealing the penalty were:

"I have received a VAT surcharge demand from you and a threatening letter. I do not agree with this demand and I don't think its right that you should be sending threats to me, a regular and consistent payer of my tax and VAT.

It appears that you have applied a surcharge of £70.82 for the simple reason that I was a little late with my VAT payment.

I am a freelance writer and sole proprietor and away a lot on business and while I pay my VAT on time almost all the time, it is possible that it might have let it slip by a week or two, but I don't agree that's it's reasonable for you to apply a draconian surcharge.

No other business that I know of is allowed to make such unreasonable demands and get away with it and I don't see why, just because you're H M Revenue & Customs that you should allow to be act in such a high-handed manner.

I am obviously doing my best, as I always have done since registering for VAT, to pay my full VAT always and on time, and in the circumstances I would be grateful if on this occasion you would call off the cavalry."

11. In his Notice of Appeal the Appellant said:

"As a freelance writer and sole proprietor and away a lot on business, I pay my VAT on time regularly, but on this occasion, due to pressure of work, the payment simply slipped my mind.

I made up for it of course once it had been brought to my attention but I felt it was unreasonable to apply such a draconian surcharge to an extremely minor and unintended default.

I accept that it would have been perfectly reasonable to apply an interest surcharge on the VAT due of £708.28.

At the current official bank rate for the period between the payment due, i.e. 7 November and the payment made, i.e. 22 November, that would amount to £0.15.

I would be quite happy to offer to pay the interest due but to apply such a draconian surcharge of £70.82 is way out of all proportion to what amounts to an administrative slip on my part.”

HMRC's contentions

5 12. The Period 09/13 had a due date of 7 November 2013 for electronic VAT Payments and Returns. The VAT return was not received on time. The Appellant paid his VAT electronically. The tax due was £708.28. Payment of the amount due was received by HMRC on 22 November 2013, 15 days late. As the payment was received late the surcharge was correctly imposed.

10 13. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 02/12 V160 Surcharge Liability Notice and subsequent V161 default notices.

14. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

15 *‘Please remember: 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, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000’.*

20 15. The reverse of each notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

The requirements for submitting timely electronic payments can be found-

- 25
- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
 - On the actual website www.hmrc.gov.uk
 - On the E-VAT return acknowledgement.

16. The surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4), payment having been received by HMRC after the due date.

30 17. The surcharge for the period 09/13 is the sixth default in the current surcharge regime and the fourth consecutive default for the Appellant. HMRC contend that the Appellant does not pay his VAT regularly. In addition the Appellant would have been aware of the consequences of failing to submit payment by the due date for this period, which in this instance is a financial penalty of £70.82 being 5% of the
35 outstanding VAT at the due date, having defaulted in the previous five periods receiving surcharge notices accordingly.

18. The Appellant maintains that as a freelance writer and sole proprietor that he is away a lot on business. HMRC contend that as a conscientious business person and being aware of his work lifestyle, the Appellant should put in place measures to ensure that returns and payments are submitted to HMRC by the due date.
- 5 19. The Appellant states that due to pressure of work "the payment slipped my mind" and that it was an administrative error. Notice 700/50 Default Surcharge s6.3, which represents HMRC's understanding of the legislation, specifically excludes genuine errors/mistakes as providing a reasonable excuse for the removal of a surcharge issued in accordance with Section 59(4) VATA 1994.
- 10 20. Within the grounds of appeal the Appellant states that the surcharge is draconian and that it is out of all proportion to the administrative slip.
21. HMRC refer to the decision in the case of *Total Technology (Engineering) Ltd* in the Upper Tribunal which creates a binding precedent on appeals before the First-tier Tribunal considering issues of proportionality when they are raised.
- 15 22. The *Total Technology* case centred on a payment being made one day late triggering the imposition of a default surcharge which the company argued was disproportionate. In his judgement Upper Tribunal Judge Mr Justice Warren found that:
- 20 HMRC's decision to charge Total Technology (Engineering) Ltd a default surcharge for the late payment was correct;
 The default surcharge regime itself does not infringe the principles of proportionality; and
 The surcharge imposed on Total Technology (Engineering) Ltd did not infringe the principle of proportionality.
- 25
23. HMRC contend the above judgement supports HMRC's position that the default surcharge regime itself is proportionate and that HMRC was correct in charging a default surcharge in respect of the late payment for the accounting period 09/13.
- 30 24. The Appellant states that at the current official bank rate for the period between the due date of 7 November 2013 and when payment was made on 22 November 2013 would amount to £0.15.
- 35 25. HMRC maintain that surcharges issued under VATA 1994 s.59 are a penalty based solely on the amount of VAT paid after the due date, no matter the length of delay, and should not be held in comparison to interest rates which may be payable in respect of other heads of duty, nor monies loaned by financial institutions.
26. The default surcharge is calculated by reference to the number of previous defaults and the amount of VAT paid late. It is not intended to reflect any loss to HMRC.

Conclusion

27. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

5 28. The Appellant's ground of appeal is that payment of the VAT due was overlooked. Unfortunately this is not a valid ground of appeal and does not constitute a reasonable excuse for the late payment.

29. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is
10 determined by the number of defaults in any surcharge liability period.

30. The burden of proof is on the Appellant to show that he has a reasonable excuse for the late payment of VAT for the period 09/13. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

31. The Appellant says that the surcharge is unfair and does not reflect any loss to
15 HMRC. For the reasons submitted by HMRC and set out above, this is not a ground of appeal which can be considered by the Tribunal.

32. The appeal is accordingly dismissed and the surcharge upheld.

33. 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
20 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.

25

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

30

RELEASE DATE: 18 August 2014