



TC05038

Appeal number: TC/2015/02265

VAT – default surcharge – payment late by one day – whether penalty disproportionate; no – spouse illness and own breakdown – whether reasonable excuse; yes – in relation to earlier defaults only – surcharge under appeal reduced – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FUSION CARE SOLUTIONS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
LESLIE BROWN**

**Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds
on 13 January 2016**

Mr Martin Jones, Director for the Appellant

**Mrs Linda Shepherd, presenting officer of HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

1. The appeal is by Mr Martin Jones, Managing Director of the appellant company, against the default surcharge imposed of £1,283 at 15% in relation to the VAT period 10/14. The VAT payment was due on 7 December 2014, which was a Sunday, and the payment was made one day late on Monday 8 December 2014.
2. The ground of appeal is that the penalty of £1,283.04 ‘was excessive for one day late and unreasonable’.

10 The Law

3. The Tribunal is provided with the generic bundle of legislation and authorities in relation to the default surcharge regime. The legislation includes sections 59- 59A (on default surcharge), 70-71 (on mitigation of penalties), 83 (on appeal), of the VATA 1994, and regulations 25, 25A and 40 of VAT Regulations 1995 on accounting, payment and records.

The Evidence

4. In the course of making his case to the Tribunal, Mr Jones also gave evidence in response to the questions asked.
5. The appellant company was registered for VAT from 2010, and its business is in the development and maintenance of software programmes for the elderly care sector. The programmes cover a wide range of functions such as time attendance, shift rota to ensure right number of staff at the right time, care planning, client billing and so on. The company has a customer base of around 250 to 300, and provides an element of IT support to some of its customers. On entering into contract to gain access to the software programmes, customers are billed quarterly in advance. No customers pay their fees by direct debit arrangement to the appellant company.
6. Mr Jones is not involved with the technical development of products in the business, and is responsible for the financial and management aspects of the company. The company employs an accountant part-time to keep the books up-to-date, but the invoicing, and ‘credit control’ are done by Mr Jones. By ‘credit control’, Mr Jones meant chasing customers for payment, and he described it as ‘a fine line between pestering people and getting customers to pay up’. Notwithstanding the software products are designed for a special sector, the business does have competitors, and Mr Jones seems to be keenly aware that customers are able to go to a different provider.
7. The engagement of an accountant to file the company’s VAT returns means that all the returns have been filed on time.
8. The first default occurred in relation to period 07/13, and a Surcharge Liability Notice was served without any penalty being levied. The default surcharge under

appeal in respect of the period 10/14 represented the fifth default in the surcharge rolling period.

9. The history of defaults as summarised by HMRC's schedule is as follows:

Period	Amount late	Payment made	Rate	Surcharge
07/13	£7,977.22	7 instalments from 18/9/13 to 11/3/15	0% (FD)	0.00
01/14	£1,608.08	2 instalments 13/3/14 and 20/3/14	2%	0.00
04/14	£2,429.13	1 payment on 24/6/14	5%	0.00
07/14	£4,943.22	6 instalments from 10/9/14 to 20/3/15	10%	£494.32
10/14	£8,553.61	1 payment on 8/12/2014	15%	£1,283.04

5 10. In passing, Mr Jones mentioned that during his wife's protracted hospital treatments, the credit control aspect of the business did fall behind, and led to the defaults previous to the one under appeal.

11. While it was not the intention of Mr Jones to dwell further on his wife's illness, the Tribunal did ask if he would tell us more about the circumstances and timing of her hospital treatments. With evident difficulty, Mr Jones related that his wife had a lung condition that required the medical supply of oxygen from 2009/10 onwards and by 2012 she was in a wheelchair.

12. A transplant operation was scheduled for 7 July 2013, and his wife was hospitalised in a special unit in Newcastle for 6 weeks as part of the procedure. After her discharge from hospital, she needed to check in at the local hospital in Leeds (St James's) once a week, and for a period of time, Mr Jones was taking her to St James's on a daily basis for testing out special drugs. On top of the local hospital routines, at least once a month, Mr Jones had to take his wife for check up at the special unit in Newcastle, which was a fair journey from Garforth where the Joneses live.

13. Mr Jones was the sole carer of his wife throughout the prolonged period of treatments. Mr Jones was able to name the date of the transplant operation with such precision and alacrity that suggest that the date had been of great significance to the couple. We also note that the first default for period 07/13 happened in the quarter following the transplant operation. While it was not ascertained when the routine visits to the hospitals ended, it would seem to have been a pre-occupation of Mr Jones for the latter half of the year 2013.

14. On being asked whether his wife's condition had improved after the operation, Mr Jones replied, 'Yes, massively' and that by early 2014, it was possible to leave her for a while on her own. It would seem that the care for his wife had required an almost constant presence of Mr Jones until early 2014.

15. By the time Mrs Jones got better in early 2014, Mr Jones informed the Tribunal very briefly that he was himself suffering from depression by early 2014 and had to receive counselling.

5 16. The Tribunal did not press for further details. It was evident that it had been an extremely testing and draining period for Mr Jones; one could infer the acute strain on Mr Jones as the sole carer of his wife over her prolonged treatment period, and of the stress and anxiety that the whole period would have brought.

Discussion

10 17. The Tribunal cannot entertain the appellant's appeal on the ground of proportionality in relation to 10/14. It is well established by case law that the default surcharge regime does not infringe the principle of proportionality by imposing the same amount of penalty, even when a payment is late only by one day.

15 18. The scaling in the default surcharge regime is not by reference to the number of days a payment is made late, but by the number of defaults in a surcharge rolling period, which gives rise to an escalating percentage of surcharge rate, at 2%, 5%, 10% and 15%, in proportion to the number of defaults in a rolling period.

20 19. While the Tribunal cannot accept Mr Jones's ground of appeal on proportionality, we nevertheless find that the appellant had a reasonable excuse for the VAT payments being late in relation to VAT periods 01/14 and 04/14, which was the time immediately after the prolonged period of Mrs Jones's hospital treatments and when Mr Jones himself clearly suffered from some sort of breakdown.

25 20. The Tribunal accepts Mr Jones's evidence as credible. He did not consider his wife's illness, nor of his own depression, as relevant to his appeal, and was reluctant to refer to the period for multiple reasons. We appreciate his efforts in giving us enough detail to reach the conclusion that he did have a reasonable excuse for the defaults in relation to VAT periods 01/14 and 04/14.

30 21. We so decide because these two VAT periods followed immediately after the intensive and protracted period of caring for his wife. We have taken cognizance of the fact that throughout the period of his wife's illness, not only was Mr Jones the sole carer of his wife, but that he continued to be the only or principal person responsible for the management aspect of the business. We have also taken into account that there were no defaults in the latter half of 2013 during the post-operation period, nor was there any appeal against previous defaults.

35 22. From evidence given, the appellant depends on Mr Jones to perform the credit control by being 'on top' to chase up payments from customers. The business is not on cash accounting for returning VAT, so the output VAT can become due with reference to the date of invoicing even if payment is not received. We conclude that the prolonged strain from events of 2013 came to a crisis point for Mr Jones himself in early 2014. On this basis we consider that the appellant had a reasonable excuse
40 for failing to pay its VAT liabilities on time for the two periods 01/14 and 04/14.

23. In relation to the defaults for periods 07/14 and 10/14, the Tribunal is unable to discharge the defaults on the basis that the reasonable excuse that obtained for the earlier defaults in 01/14 and 04/14 did not continue into these later periods. We need not ascertain whether Mr Jones was by then better to arrive at this conclusion. We so
5 decide on the basis that a taxpayer with a responsible attitude to his duties as a taxpayer would have taken steps to deal with the situation, one way or the other, if he himself was unable to deal with it.

24. The periods 01/14 and 04/14 did not attract any liability as the surcharge on each occasion fell below the *de minimus* amount of £400. By discharging these two
10 earlier periods on the ground of reasonable excuse, the surcharge liabilities for the subsequent periods 07/14 and 10/14 fall to be re-calculated at 2% and 5% respectively.

25. The surcharge liability for 07/14 at 2% of £4,943.22 will therefore become £98.86, and will be waived for being below the *de minimus* £400.

15 26. The surcharge liability for the period 10/14 under appeal at 5% of £8,553.61 will become £427.68.

27. The amount of surcharge liability already paid of £494.32 for 07/14 is available for offset against the re-calculated liability of £427.68 for 10/14, leaving a balance of credit of £66.63, which may be repayable.

20 **Decision**

28. For the reasons stated above, the appeal was allowed in part, and the surcharge for the period 10/14 is reduced to £427.68.

29. 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
25 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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**DR HEIDI POON
TRIBUNAL JUDGE**

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