



**TC05536**

**Appeal number: TC/2016/04652**

*VAT – default surcharge – late payment of VAT – whether reasonable  
excuse for late payment- no - whether disproportionate – no - appeal  
dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRIAN HATTAM and EILEEN MARY HATTAM      Appellant**  
**t/a EDF (UK)**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT**

**The Tribunal determined the appeal on 5 December 2016 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 30 August 2016 (with enclosures), and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 14 October 2016.**

## DECISION

5 1. This is an appeal against a default surcharge in respect of the VAT accounting period 12/15 in the sum of £704.35 being 10% of the tax due for that period.

2. The appellants have been registered for VAT since 1 April 1993 and carry on a business of engineering design services. The appellants have been in the default surcharge regime from period 12/13 onwards and with the exception of period 12/15 the appellants have failed to submit their VAT returns by the respective due dates. It is not disputed that for the period 12/15 payment of VAT was effected by Faster Payment and that was received on 19 February 2016. The due date for payment was 12 days earlier.

3. On 26 May 2015 the appellants wrote to HMRC in the following terms:-

15 “It is accepted that the return was submitted late due to pressure of work and absence. We do feel, however, that the 10% surcharge is excessive for a delay period of only 1 week. We would appreciate a review of this penalty and correspondence as to your decision regarding this.”

4. In fact the due date for submission of the return was 7 February 2015 so the return was submitted timeously. Unfortunately the payment was not.

5. The appellant has been within a surcharge period for the purposes of Section 59 Value Added Tax Act 1994 (“VATA 1994”) from period 12/13 onwards and therefore their previous history of defaults meant that the default for this period was calculated at the rate of 10%. Section 59(7) VATA 1994 provides as follows:-

25 “(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(a) ...

(b) there is a reasonable excuse for the return or VAT not having been so despatched, he shall not be liable to the surcharge ...”.

6. The meaning of reasonable excuse in this context is well established. In *The Clean Car Co Ltd v Customs & Excise Commissioners* [1991] VAT TR 234 HH Judge Medd QC said:-

35 “It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a reasonable trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

7. As I indicate above, the appellants primary ground of appeal was that the delay was as a result of pressure of work and absence. The appellants are a very small engineering operation and Mr Hattam deals with VAT matters and is often away for

long periods carrying out technical installation work. Although the return for the period was submitted on time, it was only on his return to business that it had been noted that the VAT due had not been collected via the direct debit mandate. He contacted the VAT office by telephone and was told the original mandate had been cancelled. Full payment was made that day by Faster Payment BACS. The appellants had no fulltime office staff because they cannot afford the costs thereof. Mr Hattam argues that the 10% surcharge for a payment which is only 12 days late is both unfair and unreasonable.

8. As long ago as 16 June 2015, HMRC had written to the appellants pointing out that a direct debit payment for the period 03/15 had been returned unpaid as the bank had stated that the direct debit instruction had been cancelled. On 19 June 2015 the appellants had responded to HMRC explaining that the direct debit had been stopped at that time. Accordingly there was no direct debit in place for period 03/15 and the payments for 06/15 and 09/15 were not paid by direct debit either but rather by Faster Payment. Those payments were on time although the returns were late so the surcharge period was extended but the rate of surcharge was not increased.

9. The fact that the previous two defaults had triggered no monetary liability for the penalty does not change the fact that the appropriate percentage is 10%.

10. I do not consider that the appellants have established a reasonable excuse for the delay. I agree with Judge Tildesley in *Schola UK Ltd v HMRC* 2011 UKFTT 130 (TC), which although not looking at VAT, indicates that in considering a reasonable excuse the Tribunal must consider the actions of the appellants from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence whilst also having proper regard for their responsibility under the Tax Acts.

11. In this case, although the person submitting the tax return may not have known that the direct debit had been cancelled, that person undoubtedly should have known since it had been cancelled for the previous three periods. I accept that the appellants are a small business but nevertheless they should have known that they require to prioritise payment of VAT on time and indeed submitting VAT returns on time. The individual charged with submitting the return should have been made aware that the direct debit had been cancelled and that payment should have been made by Faster Payment as in the previous periods. The failure to do so does not amount to a reasonable excuse.

12. Like many other taxpayers the appellants have argued that the default surcharge regime is unfair and a burden on business. However, the Upper Tribunal in *HMRC v Trinity Mirror plc* 2015 UKUT 421 (TCC) made it explicit that because the amount unpaid is the objective factor by which the amount of surcharge varies, there is not a flaw in the system. In this case the penalty amounts to less than 2% of the total value of sales net of VAT, being £56,612.

13. HMRC drew my attention to *Garnmoss Ltd t/a Parham Builders* 2012 UKFTT 315 (TC) at paragraph 12 which reads:-

“What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes ... But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus this default cannot be ignored under the provisions of subsection (7).”

5 14. For all these reasons I find that the payment was late and there was no reasonable excuse for that late payment. The penalty has been correctly calculated in accordance with the relevant legislation and I therefore confirm the penalty in the sum of £704.35. The appeal is dismissed.

10 15. 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)”  
15 which accompanies and forms part of this decision notice.

**ANNE SCOTT  
TRIBUNAL JUDGE**

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**RELEASE DATE: 7 DECEMBER 2016**