



TC03286

Appeal number: TC/2012/6143

VAT – default surcharge – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HAIR DEVELOPMENT LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHARLES HELLIER
CHARLES BAKER**

Sitting in public at 45 Bedford Square WC1B on 22 July 2013

The Appellant was not represented

Miss H J Jones for the Respondents

DECISION

The Absence of the Appellant.

1. At the time set for the hearing of the appeal nobody was present to represent the appellant. At our request our clerk telephoned the appellant company and was told that Mark Burns, its managing director, who had written to the tribunal making the company's appeal, was away.
2. Miss Jones told us that about two weeks before the hearing she had sent a copy of the bundle to the appellant and had mentioned the hearing date.
3. We were satisfied that the appellant had received proper notice of the hearing and that it was just in the circumstances to proceed in the absence of representative for the appellant.

The appeal

4. The appellant appeals against a default surcharge under section 59 VAT Act 1994 assessed by HMRC for the late payment of VAT for the period ending 29 February 2012 (the "02/12") period).
5. Section 59 provides for the imposition of a surcharge in respect of a default. A default is a failure to deliver a return on time or to pay VAT due on time. If a taxpayer defaults HMRC may serve a "surcharge liability notice" specifying a period (a "surcharge period") of 12 months starting at the end of the period for which the default was made. If within that 12 months the taxpayer defaults again then (a) it becomes liable to a penalty and (b) the surcharge period may be extended so that it ends 12 months after the period of the latest default. And so on. The penalty is a percentage of the overdue VAT for the period. The percentage is 2%, 5%, 10%, or 15% according as the default is the 1st, 2nd, 3rd, or 4th or subsequent default in the surcharge period.
6. Subsection 59(7) provides:

“(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) 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
 - (b) there is a reasonable excuse for the return or 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 in question (and, accordingly, any surcharge liability notice the service of which depended on that default shall be deemed not to have been served).

7. In his letter of 30 May 2012 to the tribunal Mr Burns says:

“I would like to lodge a final appeal against the default surcharge. I had this payment set for April the 5th using online banking (faster payments) via Barclays and unfortunately it was not made before the banking close of day. Due to Easter bank holidays the next working day was April 10th 2012 and I made an immediate same day payment for the full amount and it was indeed received by HMRC on 10th April. I understand and appreciate that deadlines have to be set and met but this was 1 working day, caused by us missing the bank cut off by 70 minutes.”

“...Is the fine the same if you are 1 day late or 100 days late?”

8. The papers in the bundle presented to us by HMRC showed that:

(1) A surcharge was assessed for the 02/11 period but was cancelled by HMRC after representations from the appellant;

(2) A surcharge was assessed for the 05/11 period. The appellant wrote to HMRC appealing the surcharge, but on 26 August 2011 HMRC wrote declining to cancel the assessment. No appeal to the tribunal was made against this assessment.

(3) When the surcharge assessment under appeal (02/12) was received by the company it wrote to HMRC on 23 April 2012 saying: “We explained that our auditor spoke to your office advising that the payment will be a few days late. Unfortunately we have not been able to get hold of him to confirm the time and date he called you....I however wish to appeal against this charge because the VAT [return]was submitted on 21 March 2012 and the payment made by bank transfer on 10/04/12.””

9. There is in this no contention that the payment was in fact made on time or that the other requirements for the imposition of the surcharge were not met.

Reasonable Excuse

10. We considered first whether any of the evidence before us would permit us to find that the appellant had a reasonable excuse for its failure to pay its VAT on time in either the 05/11 or the 02/12 periods. We considered the earlier period because, had the evidence disclosed a reasonable excuse in relation to that period it may have had the effect of reducing the rate of surcharge applicable to the later period.

The 05/11 period.

11. The letter of 25 July 2011 discloses no excuse for the late payment. We cannot therefore find that there was a reasonable excuse for the delay.

The 02/12 period

12. The appellant's letter of 23 April 2012 speaks of some conversation between the appellant's auditor and HMRC. It gives no hint as to whether the conversation took place before or after the payment was due or whether HMRC had agreed to wait for a later payment. It thus does not enable us to conclude that the appellant had a reasonable excuse on any such ground.

13. The appellant's letter of 30 May 2012 explains that the cut off was missed by 70 minutes, but does not provide any reason – any excuse – for the deadline being missed. Had the appellant provided evidence that, for example, it had had a power cut, or a member of staff had been taken suddenly ill, we may have been able to conclude that it had a reasonable excuse. In the absence of any evidence we cannot so conclude.

14. We conclude that it was not shown that the appellant had a reasonable excuse for its failure to pay on time in either period.

Other matters

15. The appellant asks if the charge is the same whether the delay is one day or 100. The answer is Yes. That is what Parliament has said in section 59.. The penalty is not intended as compensation for late payment or to encourage payment as soon after the due date as possible, but to penalise failure to pay by the due date.

16. In this question and in its grounds of appeal there is a suggestion that the penalty is unfair.

17. The circumstances in which a surcharge is imposed and its amount are set by statute. The statute gives us jurisdiction to consider whether the conditions for imposition of the charge have been met and whether the charge has been correctly calculated. It gives us no power otherwise to change or mitigate the charge.

18. However, in circumstances in which the charge is not “proportionate” to the gravity of the infringement we have a power and duty to set the charge aside (see *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC)) But for a penalty to be disproportionate in this sense it must be the case that the charge is wholly unfair. In this case we accept that the charge bears heavily on the appellant – no doubt Parliament intended that it should be a weighty burden – but we do not regard it as wholly unfair.

19. Thus we do not consider that the matters to which the Appellant refers can justify any interference with the penalty.

Conclusion

20. We dismiss the appeal.

Right of Appeal

21. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2014