



TC02765

Appeal number: TC/2012/00057

*VAT – default surcharge – Section 59 Value Added Tax Act 1994 – mistake
- reasonable excuse - proportionality – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MR JOHN HOBSON t/a
RUBICON DEVELOPMENTS**

Appellant

- and -

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

Respondents

**TRIBUNAL: MR G. NOEL BARRETT LLB (Presiding Member)
MR A REDDEN FCA**

Sitting in public at Phoenix House Rushton Avenue Bradford on 25th March 2013

Mr M Faulkes BSc (Hons) MRICS Surveyor, for the Appellant

Mrs N Newham of HM Revenue and Customs, for the Respondents

DECISION

Introduction

5 1. This is an appeal against a default surcharge of £9,335.45 for late payment of VAT by the due date (7th September 2011) for the quarter ending 31st July 2011. The surcharge has been charged at 15% of the VAT outstanding on 30th September 2011.

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The Law

2. *Regulation 40(2) of the Value Added Tax Regulations 1995* states:

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“Any person required to make a return shall pay the Controller such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return”

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3. The provisions of *Section 59(1) (a) and (b) of the Value Added Tax Act 1994 (VATA)* operate such that a person shall be regarded as being in default for that period:

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“ If, by the last day on which a taxable person is required.....to furnish a returnthe Commissioners have not received that return or..... have received that return but have not received the amount of VAT shown on the return.....”

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4. Where a default occurs and HMRC serves a surcharge liability notice (SLN), then if any further defaults are made by the taxable person before the expiry of the first anniversary of the last day of the period referred to in the default surcharge notice, then the taxable person becomes liable to a surcharge being the greater of the specified percentage or £30

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5. The specified percentages are set out in *Section 59 (5) VATA*:

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“(a) in relation to the first such prescribed period the specified percentage is 2%
(b) in relation to the second such period the specified percentage is 5%
(c) in relation to the third such period the specified percentage is 10%
(d) in relation to such period after the third the specified percentage is 15%”

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6. *Section 59(7) VATA* provides that the taxable person shall not be liable to the surcharge and shall not be treated as having been in default;

“If a person.....satisfieson appeal a tribunal that in the case of a default which is material to the surcharge....”

“(b) there is a reasonable excuse for the return or the VAT not having been so despatched.”

5 7 *Section 59(7) VATA* allows a trader to appeal to the tribunal, the onus is placed on the trader to satisfy the tribunal that either;

10 “ the payment 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 there is a reasonable excuse for the VAT not having been despatched on time.”

15 8 If the trader satisfies the tribunal on either of these grounds then the trader will be treated as not being in default in respect of the accounting period in question.

9 *Section 71(1) VATA* provides that:

20 “(a) an insufficiency of funds to pay any VAT is not a reasonable excuse: and

25 (b) where reliance is placed on any person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.”

30 10 HMRC sends each SLN to the taxable person with notes advising what a default is and the consequences which will flow from further defaults. Those notes also advise the taxable person to contact HMRC’s local Debt Management Unit if they expect to have difficulty paying VAT on time.

35 ***The Evidence and our Findings of Fact***

11 We were able to read the documentary evidence and also heard oral evidence from Mr Faulkes on behalf of the Appellant

40 12 Mrs Newham appearing on behalf of HMRC confirmed that the Appellant had a lengthy history of making VAT defaults and had first entered the default surcharge regime on 16th June 2006.

45 13 As a result of continuing defaults by the Appellant the surcharge period was extended and the surcharge specified percentage, after more than three defaults, reached and remained at 15%.

14 The facts as to the serving of the SLN, the Appellants previous
defaults, the due dates, and the subsequent failure by the Appellants professional
advisors Carter Towler LLP, Chartered Surveyors to pay the Appellants VAT for
the period 31st July 2011, were not disputed by the Appellant's representative.

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15 15. We accept Mr Faulkes explanation that as a result of the Appellant's
historical VAT defaults, Carter Towler LLP, as his property portfolio managing
agents, agreed to assist the Appellant to ensure prompt future payment of VAT
monies. Carter Towler LLP agreed with the Appellant and his Bank that they
would make direct transfers to pay VAT due to HMRC from their office, out of
monies collected by Carter Towler LLP from the Appellant's tenants.

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15 16 Mr Faulkes explained further that unfortunately the payment made by
Carter Towler LLP, for the period ending 31st July 2011, which should have been
received by HMRC by 7th September 2011, was made by a BACS transfer, not to
HMRC, but to a Rubicon Development bank account, (this being one of the
Appellant's associated companies). We find that this was purely a mistake on the
part of Carter Towler LLP.

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17. We further accept, that the error was not discovered until 22nd
September 2011, when Mr Faulkes enquired of Rubicon Development's bank as
to the credit balance held on their account, which was far higher than he
anticipated it ought to have been and that it was not until Mr Richard Parker of
Carter Towler LLP's accounts team investigated the matter when he returned
from holiday on 26th September 2011, and reported the administrative mistake to
Mr Faulkes on the 28th September 2011, that the error was corrected by means of
a BACS payment to HMRC that same day.

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18. Because of the Appellants previous defaults the late payment resulted
in a surcharge at a specified percentage of 15% being levied on the Appellant,
which Mr Faulkes suggested was unreasonable and payment of which would
cause hardship to Carter Towler LLP in the nature of staff redundancies. He
accepted however that a mistake would not normally be accepted as a reasonable
excuse for late payments.

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19 Mr Faulkes fully accepted responsibility for Carter Towler LLP's error
and offered to pay "a reasonable amount of interest" on the late payment.

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20 Mrs Newham drew the tribunal and the Appellant's representative's
attention to *Section 71(1)(b) VATA*:

45 "(b) where reliance is placed on any person to perform any task, neither the
fact of that reliance nor any dilatoriness or inaccuracy on the part of the person
relied upon is a reasonable excuse."

21 Mrs Newham submitted and we accept that just because a tax payer
has arranged for another person to be responsible for payment of his VAT on
time, that that does not discharge the tax payer from the responsibility of ensuring
that it is in fact paid on time

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22 Mrs Newham confirmed and again we accept that this was the
Appellants 17th default; that the sales return for the quarter in question amounted
to £450,389 which she indicated “seemed” to be the average figure looking at
previous quarters returns and we accept her submission that the surcharge in the
sum of £9,335.45 was not significant in that context.

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23 Mrs Newham noted and we accept Mr Faulkes own admission that;
“Carter Towler LLP, as the Appellants property portfolio managing agents,
agreed to assist the Appellant to ensure prompt future payment of VAT monies.”

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24 We were also asked to have regard to the fact that the print out of the
BACS payment run provided by the Appellant’s representative, was actually
signed as authorised by two members of Carter Towler LLP, which again we
note and accept.

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Reasonable Excuse

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25 This was a costly mistake by Carter Towler LLP, but the fact remains
that they were professional Chartered Surveyors and had been appointed to the
particular task by the Appellant, specifically to ensure that the Appellants VAT
payments were paid on time. As such they had a professional duty of care to the
Appellant.

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26 Although this appeal is brought on behalf of the Appellant, by Carter
Towler LLP, the default is in law the Appellant’s default. It is not the case that
any separate appeal lies on behalf of the Appellants professional representatives.

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27 We must follow the established law as it stands in *Section 71(1) (b)*
VATA

28 Carter Towler LLP’s mistake must be attributed to the Appellant; it is
established law that a tax payer cannot rely on the acts or omissions of a third
party to establish a reasonable excuse.

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29 We do not therefore accept that the Appellant has a reasonable excuse
for the late payment of VAT.

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Proportionality

5 30 Mr Faulkes in part submitted that the amount of the surcharge imposed was disproportionate to Carter Towler LLP’s mistake and cited the hardship it would cause Carter Towler LLP and offered on the part of Carter Towler LLP to pay a reasonable amount of interest instead.

10 31 The question of whether or not this tribunal has the power to determine whether or not a particular penalty, (as decided upon by Parliament), is or is not proportionate to the particular “default” was examined recently in great detail by the Upper Tribunal in the case of *HMRC v Total Technology (Engineering) Limited [2012] UKUT 418 (TCC)*.

15 32 In that case the payment was only one day late; previous defaults had been due to innocent errors; the tax payer had an excellent compliance record prior to the first of the defaults; the amount of the penalty was £4,260.26 and the tax payers profits were around £50,000 per year

20 33 Mr Justice Warren and Judge Bishopp said at page 26 para 81:

25 “.....the VAT default surcharge regime penalises only the failure to deliver a return and to make payment of the tax owed by the due dateIt is to be noted that the penalty does not increase as time goes by: the penalty is for failure to do something by a due date, not a penalty for a continuing failure to put right the original default.....”

30 34 At page 31 para 99 they concluded:

35 “In our judgment there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are however some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed.”

40 35 In this particular case we do not find that the surcharge is disproportionate in either the context of the number of defaults by the tax payer or as to the amount of the surcharge in relation to the quarterly sales.

Decision

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36 In the circumstances we dismiss the appeal.

37 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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**G. NOEL BARRETT LLB
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 25 June 2013

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