TC02899

Appeal number: TC/2013/00068

VAT default surcharge - payment made one day late - Proprietors of Appellant company not available to authorise payment - whether reasonable excuse - no - whether penalty disproportionate - no appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEW RIVER RETAIL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
JO NEILL

Sitting in public at 45 Bedford Square, London WC1 on 18 April 2013

Stephen Sylvester Group Financial Controller of the Appellant

Chris Jacobs officer of HM Revenue and Customs, for the Respondents

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DECISION

The Appeal

1. New River Retail Limited ('The Appellant') appeals against a default surcharge of £10,657.72 imposed by HMRC on17 August 2012, in respect of the VAT period ended 30 June 2012 for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 2% of the VAT due of £532,886.01

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

Background

3. The Appellant Company has been VAT registered since January 2011. The business activity is commercial property ownership and lettings.

4. The company had previously defaulted on VAT payments in the 09/11 period.

5. The company was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires the Appellant to furnish VAT returns and pay the outstanding VAT on or before the end of the month following each calendar quarter. [Reg. 25(1) and Reg 40(1) VAT Regulations 1995]. The due date for the 06/12 period was 07/08/12 as payment was made electronically. The return was received on 08/08/12 and the Direct Debit payment on 13/08/12.

6. 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. If payment is by direct debit. HMRC will automatically collect payment from the businesses bank account three bank working days after the extra seven calendar days, following the standard due date.

7. The onus of Proof rests with HMRC to show that the surcharges were 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 on the balance of probabilities.

Appellant's Contention

8. The Appellant does not dispute that its VAT payment for the period 06/12, due on 31/07/12 was late. It is agreed that the payment if made electronically was due on, 07 August 2012 but did not reach HMRC until 13 August 2012.

9. The appeal against the surcharge for period 06/12 was made on 5 December 2012. The stated Grounds of Appeal were as follows:

    1. The VAT return was submitted online on the morning of 8th August, less than one day late.

    2. The VAT payment was the largest payment the company had made.

    3. Because of the amount of VAT due the payment had to be signed off by either the Group Financial Controller or Finance Director. There was however, no one available in the office with the necessary authority. The Group Financial Controller was on paternity leave and the Finance Director was out of the office.

    4. The Appellant has now updated its internal controls so the situation will not happen again. 4.

    5. The charge of £10657.12 is excessive and equivalent to a 700% interest rate.

    6. The Appellants payment record with HMRC on all taxes is good and timely and this should be taken into account.

HMRC's Contention

10. The Period 06/12 had a due date of 7 July, 2012 for electronic VAT Payments and Returns. The VAT Return was received electronically by HMRC one day late on 8 August 2012. The company paid their VAT by way of a direct debit which was received by HMRC on 13 August, 2012. As the payment was received after the due date (07 August 2012), the surcharge was correctly imposed.

11. In the earlier default, period 09/11 (September 2011), the statutory due date was 31 October 2011. The period 09/11 VAT return was due electronically by 7 November 2011 and received on 8 November 2011. The amount due on the tax return was £22,887.32. The payment was received by direct debit on 11 November 2011, one day late. As the payment was late there was a First Default and the Appellant entered the Default Surcharge Regime.

12. The potential financial consequences attached to the risk of further default should have been known to the Appellant from this point on given the information printed on the Surcharge Liability Notice.

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

> *"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'.

14. The Appellant made no contact with HMRC prior to, or on the due date of 07 August 2012.

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).

16. The Company was aware of the requirements for submitting returns and making payments on time and so should have ensured that the correct signatories were available to sign off and make a timely return and payment.

17. The requirements for submitting timely electronic payments can in any event be found-

- 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.

18. 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 for the Period 06/12.

19. Notice 700/50 (December 2011) section 6.3, (the notice represents HMRC's policy and understanding of the relevant legislation) states that HMRC consider that genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses for surcharge purposes. The fact that the requisite signatories were not available to authorise the return and payment is not a reasonable excuse

20. The Directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

21. The Appellant says that the surcharge is entirely disproportionate to the delay which has occurred. The case of *Total Technology (Engineering) Limited v HMRC* which considered the issue of proportionality, was heard in the Upper Tribunal, when it was held that:

    1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
    2) The default surcharge penalty in that case did not breach EU law on the principle of proportionality.

3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:

(a) The number of days of the default
(b) The absolute amount of the penalty
(c) The 'inexact correlation of turnover and penalty'
(d) The 'absence of any power to mitigate'

4) The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality

Conclusion

22. At the end of the hearing the Tribunal reserved its decision.

23. The Appellant company was aware of the due date for Direct Debit payments. The absence of the Group Financial Controller and Finance Director was foreseeable and the business should have ensured the correct signatories were available.

24. The Tribunal finds that the payment was made late and therefore the surcharge for period 06/12 is correct.

25. The Tribunal also finds there was no reasonable excuse for late payment of VAT for this period.

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

27. 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.

MICHAEL S CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 20 September 2013