



TC03470

Appeal number: TC/2012/09435

Value added tax – default penalty surcharge for late payment – whether there was a reasonable excuse for late payment – no – appeal refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**PETER MONTIQUE & LISA MORTON
t/a SPAR CONVENIENCE**

Appellants

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 23 August 2013 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 letter of appeal dated 30 September 2012 and HMRC's undated Statement of Case (with enclosures)

Introduction

1. This is an appeal against a default surcharge of £222 imposed for the late payment of VAT for the three month period ending 31 March 2011. The VAT was due on 07 May 2011 and was paid in two instalments on 09 May 2011 and 31 August 2012.
2. This was the appellant's eighth default within the surcharge liability period and a default penalty was applied at the rate of 15 % of the tax due.
3. Mr Peter Montique appeals on behalf of the business.

The issue

4. Mr Montique appeals on the grounds that there was a reasonable excuse for the late payment. This is contested by HMRC

The Law

5. In so far as it relates to the present case Section 59 of the Value Added Tax Act 1994 ("VATA") provides :
- (1) ...If, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period...
- (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,...
- then that person shall be regarded for the purposes of this section as being in default in respect of that period....
- (4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—
- (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
- (b) has outstanding VAT for that prescribed accounting period,
- he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.
- (7) If a person who ...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—
- (b) there is a reasonable excuse for the .. VAT not having been so despatched, ...he shall not be liable to the surcharge.
6. The burden of proving that there is a reasonable excuse rests with the taxpayer.

7. The legislation does not define the term “reasonable excuse”. Case law has established that a reasonable excuse “*is a matter to be considered in the light of all the circumstances of the particular case*”. *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

5 **The facts**

The default history

8. The schedule of defaults was not disputed. The first default occurred for the period 09/07. There were seven subsequent defaults due to late payments and one default due to the late submission of the return. The late payments occurred for the periods; 03/08, 06/09, 09/09, 03/10, 06/10, 12/10 and the late return was submitted for the period 12/08. The applicable late payment surcharge had risen to 15%.

9. The schedule shows that late payments were made by a variety of different methods including cheque, CHAPS and BACS.

10. For the period 03/10 the payment was made by cheque. Mr Montique sought a review of this penalty which was refused on 24 September 2010. An advice sheet regarding electronic payments was attached to this letter and contained the following paragraph.

Check with your bank to see how long it will take them to process electronic payments. Please note that HMRC does not participate in the BAC’s faster payments service.

11. For the periods 06/10 and 12/10 the payments were made by BACS. The default surcharge notice for the period 12/10 contained the following notice

Please remember you 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

The period 03/11

12. The VAT for the period 03/11 amounted to £1,480.05 and was due on 07 May 2011. Most of the VAT, amounting to £1,465, was paid by BACS on 09 May 2011. At that time HMRC were not part of the faster payments service. The remaining £15.05 was paid on 31 August 2012. By that time HMRC had joined the faster payments service and payment was made by that method.

13. Mr Montique sought a review of the penalty which was refused on 20 September 2012. The letter of refusal included a document entitled “top tips on how to avoid VAT surcharges”. (“the top tips notice”)

The arguments

The appellant's case

5 14. Mr Montique states that he paid the VAT online by BACS on 07 May 2011 and believed that his payment had been received by HMRC on the same day. He formed this view because payment was immediately debited from his account and he was advised by his bank, Nat West, that the payment would be made within two hours. He has not provided any additional evidence in support of his case.

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15. Mr Montique states that HMRC did not clearly advise him that BACS payments took three working days to arrive in their account. He was not on notice of this until he incurred the surcharge. The top tips notice was not sent to him until after the default had occurred.

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The Respondent's case

16. HMRC state that at the time of the default they were not part of the Faster payments service and BACS payments were taking three working days to clear. They point out that Mr Montique was specifically advised of this in their letter of 24 September 2010.

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17. They submit that Mr Montique should have been aware of the payment deadlines due to the number of previous defaults.

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Reasons for decision

Findings of fact

30 18. I find that Mr Montique was advised of the payment deadlines in HMRC's letter of 24 September 2010 as a copy of the letter has been provided. I find that the top tips notice was not sent to Mr Montique until after the due date because it is dated 11/11.

35 19. I accept that Mr Montique instructed his bank to make the VAT payment by BACS on 07 May 2011. However I do not accept that he was specifically advised by his bank that payment would be received by HMRC within two hours because he has not provided any evidence in support of this assertion.

Reasonable excuse

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20. I accept that Mr Montique genuinely believed that payment had been properly made on 07 May 2011 as the payment left his account on that date.

45 21. However the electronic payment was made on the last possible date for payment and Mr Montique would have been aware of the consequences of late payment in view of the previous defaults. In these circumstances it would have been reasonable for him to have contacted his bank or HMRC for clarification regarding the payment deadline in accordance with the advice given in relation to the earlier defaults. There is no evidence to suggest that Mr Montique sought any such clarification.

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22. I accept that Mr Montique was not familiar with the time taken to make BACS payments and did not receive the top tips notice until after the due date. However I find that he was clearly notified that HMRC were not part of the faster payments service in their letter of 25 August 2010. Accordingly I do not find that Mr Montique was misinformed or misled by HMRC regarding the payment deadlines.

23. For these reasons I am not satisfied that there was a reasonable excuse for the late payment.

10 **Decision**

24. There was no reasonable excuse for the late payment of VAT.

25. The appeal against the VAT penalty surcharge of £222 is refused.

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Right of appeal

26. 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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**JOANNA LYONS
TRIBUNAL JUDGE**

RELEASE DATE: 4 April 2014

