



**TC03652**

**Appeal number: TC/2014/00261**

*VAT default surcharge – Appellant erroneously told by accounts manager that payment had been made - whether reasonable excuse - no - whether penalty disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ICAL FIRE SAFETY LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL S CONNELL**

**The Tribunal determined the appeal on 15 April 2014 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 9 January 2014 and HMRC's Statement of Case submitted on 27 January 2014, the Appellant submitting no Reply.**

## DECISION

### The Appeal

5 1. Ical Fire Safety Limited ('the Appellant') appeals against a default surcharge of £1,041.09 imposed by HMRC on 11 October 2013, in respect of the VAT period ended 31 August 2013, for its failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £6,940.65.

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

### 10 Background

3. The Appellant has been in the VAT default surcharge regime from period 05/12.

15 4. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg. 25(1) and Reg 40(1) VAT Regulations 1995.]

5. In respect of the default period, as payment was made by cheque the due date for payment was 30 September 2013. The return was received late on 7 October 2013 and the VAT payment on 23 October 2013.

20 6. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge. Section 59 (7) VATA 1994 sets out the relevant provisions : -

25 ' (7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge -

30 (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

35 (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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.'

7. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

40 '(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.'

5 Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

8. The onus of proof rests with HMRC to show that the surcharge was 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 of the balance of probabilities.

10 Appellant's contentions

9. The Appellant does not dispute that its VAT payments for the period 08/13 was late.

15 10. The Appellant's grounds of appeal are that they were informed by their previous accounts clerk that the VAT had been paid on time. They discovered that this was not true when carrying out routine checks after the accounts clerk had left the company. Until then, they genuinely believed the VAT had been paid on time.

11. The Appellant says that the surcharge is harsh and unfair, particularly because they are a small company.

20 12. The Appellant also says that it has now put in place a new system to ensure that VAT due is paid on time and that the system is working effectively.

HMRC's contentions

13. The Appellant entered the Default Surcharge Regime following a default in period 05/12. It then defaulted in periods 11/12, 02/13, and again in period 05/13 prior to the default period under appeal.

25 14. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 05/12 Surcharge Liability Notice.

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

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*"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".*

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16. 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).
17. The requirements for submitting timely payments can in any event be found-
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- 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](http://www.hmrc.gov.uk)
  - On the E-VAT return acknowledgement.
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18. With regard to the Appellant's grounds of appeal, it is specifically stated in s 71(1)(b) VATA 1994 that any reliance on a third party (in this case the accounts clerk) to submit the VAT return or payment on time is precluded from providing a reasonable excuse. The Directors of the company therefore have ultimate responsibility for the timely submission of the VAT return and payment of any tax due thereon.
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19. Although the Appellant says that it has now put in place a new system to ensure that VAT due is paid on time, the payment for period 11/13 was not received until after the due date of 7 January 2014 (as paid electronically). It was received by HMRC on 8 January 2014, one day late, resulting in the issue of a further default surcharge.
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20. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellant made no contact with HMRC prior to the due date for payment and did not make any request for a time to pay arrangement
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21. 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. The Appellant says that the surcharge is harsh and unfair. The case of *Total Technology (Engineering) Limited v HMRC*, heard in the Upper Tribunal held that:
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- 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
  - 2) The Tribunal found that the VAT default penalty regime does 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:
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- (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'

5 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. HMRC say that the penalty is determined by the number of defaults and amount paid late. The penalty is therefore commensurate with the default.

Conclusion

10 22. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

23. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period.

15 24. The burden of proof is on the Appellant to show that it has a reasonable excuse for the late payment of VAT for the period 08/13. In the Tribunal's view, for the reasons argued by HMRC, that burden has not been discharged.

20 25. The Appellant says that the surcharge is unfair. Again, for the reasons submitted by HMRC and set out in paragraph 21 above, this is not a ground of appeal which can be considered by the Tribunal.

26. Although the Appellant has taken steps to ensure that future VAT payments will be paid on time and that since then there have been no penalties. This in any event is not a ground of appeal, but the Appellant's statement is incorrect; there have in fact been further defaults.

25 27. The appeal is accordingly dismissed and the surcharge upheld.

28. 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.

35 **MICHAEL S CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 28 May 2014**

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