



TC06646

Appeal number: TC/2018/01079

*VAT – default surcharge – properly imposed – no reasonable excuse –
surcharge proportionate - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLEAR CUT CONSULTING LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 15 July 2018 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 7 February 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 27 March 2018 and various correspondence between the parties.

DECISION

Introduction

1. This is a VAT case. It concerns the default surcharge. The appellant has been assessed to a surcharge of £1,372.93 (the “**Penalty**” or “**Surcharge**”). This is for the period of 08/17 and is calculated at 15% of the VAT due in that period of £9,270.
2. The appeal has been brought out of time. The respondents (“**HMRC**”) have raised no objections to such late appeal. I am content that HMRC is not prejudiced and have therefore decided to deal with this appeal.

The Default Surcharge regime

3. There is no dispute about the relevant law relating to the default surcharge regime.
4. Judge Bishopp has given a brief description of that regime in his decision in *Energys Holdings* [2010] UKFTT 20 TC0335

“The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence.”

5. Service of a second (and subsequent) surcharge liability notice has a secondary effect of extending the surcharge liability period for a further year with effect from the end of the period in respect of which the second (or subsequent) notice was served.
6. Where a taxpayer has a reasonable excuse for the default under appeal, or for a default which is material to the surcharge under appeal, he is not liable to the surcharge under appeal (which is itself a material default), nor is he treated as having been in default in respect of the default which is material to the surcharge under appeal.

Reasonable excuse

7. The test I adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

"The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

Proportionality

8. A summary of the principles relating to proportionality is set out below:
 - (1) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method.
 - (2) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context.
 - (3) In the context of its application to penalties, the principle of proportionality is that:
 - (i) penalties may not go beyond what is strictly necessary for the objective pursued; and
 - (ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty.
 - (4) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force.
 - (5) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" or "not merely harsh but plainly unfair".

Evidence and findings of fact

9. From the papers before me I find the following facts:
 - (1) The appellant has been registered for VAT since November 2013, its business being activities in employment placement agencies.
 - (2) The appellant has been in the default surcharge regime since the period 08/15.

(3) The appellant's preferred method of payment has consistently been via the Faster Payment Service ("FPS").

(4) The period 08/15 had a due date of 7 October 2015 for electronic payments and electronic VAT submissions. The return was received on 7 October 2015 and payment was received on 8 October 2015 by FPS.

(5) The period 02/16 had a due date of 7 April 2016 for electronic payments and electronic VAT submissions. The return was received on 6 April 2016 and payment was received, against by FPS on 8 April 2016.

(6) The period 08/16 had a due date of 7 October 2016 for electronic payments and electronic VAT submissions. The return was received on 3 October 2017 and payment was received on 10 October 2017 by FPS.

(7) The period 02/17 had a due date of 7 April 2017 for electronic payments and electronic VAT submissions. The return was received on 29 March 2017 and payment was received on 13 April 2017 by FPS.

(8) The period 08/17 had a due date of 7 October 2017 for electronic payments and electronic VAT submissions. That date was a Saturday. The return was received on 6 October 2017 and payment was received on 9 October 2017 by FPS.

(9) The appellant had been issued with surcharge liability notices in respect of the aforesaid periods. Such surcharge liability notices include the statement:

"By law you **must** submit your VAT return and make sure that payment of the VAT due has cleared to HMRC's bank account by the due date".

(10) The appellant's agent requested a review of HMRC's decision to issue the Surcharge on 9 November 2017. The outcome of this review was that the Surcharge was upheld. A second request for a review was subsequently made which was rejected on the basis the legislation only obliges HMRC to undertake one review. The appellant's agent subsequently appealed to the Tribunal on 7 February 2018

Burden and standard of proof

10. The burden of proof rests with HMRC to show that the Surcharge was correctly imposed. If so established, the onus then rests for the appellant to demonstrate that it has a reasonable excuse and/or the Surcharge is disproportionate. The standard of proof in each case is on the balance of probabilities.

Appellant's grounds of appeal

11. The grounds of appeal identified in the Notice of Appeal are that:

"The client has asked us to appeal the penalty raised on the basis that it is excessive in comparison to the error. The clients return was filed on time but the deadline for the submission and payment fell on a Saturday. The client made the payment on the Saturday but due to the banking system

this was not able to be received by you until Monday. Whilst we understand the system the fact that the client made the effort to pay you on the due date but could not should be taken into account when assessing his penalty and he feels a bit agitated when he made the penalty on the due date and received a substantial penalty for late payment despite his efforts. No consideration seems to have been made for this when assessing his case”.

12. HMRC submits that the appellant has no reasonable excuse.

(1) A combination of information provided on a surcharge liability notice and on its website makes clear that it is incumbent on an appellant when using the FPS to check the bank's transaction limits and processing times before making a payment. This is notwithstanding that elsewhere in that literature HMRC say:

“If the deadline falls on a weekend or bank holiday, your payment must arrive in HMRC’s bank account on the last working day before it (unless you pay by Faster Payments)”.

(2) The appellant had been in the default surcharge regime for some time and was well aware of the obligation to file and pay the VAT on time and the consequences of failing to do so.

(3) The appellant had submitted most if not all of the VAT returns on time but had been consistently one or two days late with payment. The appellant, for the period under consideration (the “**Default Period**”), was fully aware of the amount due and could have initiated payment on the same day (i.e. the Friday).

(4) The amount is not excessive.

Discussion

13. The appellant has been in the default surcharge regime for four quarters prior to the Default Period.

14. In each of those periods the returns were received on time. However, in each of those periods, payment of the VAT was made late.

15. The same is true for the Default Period. The return was submitted (and received by HMRC) on 6 October 2017 (a Friday) but payment was not initiated until the following day (Saturday 7 October) and not received by HMRC until the Monday (9 October).

16. No reason has been given by the appellant for this pattern of late payments.

17. The surcharge liability notice given to the appellant for the default periods makes it expressly clear that a taxpayer needs to ensure that HMRC has cleared funds by the due date for payment.

18. HMRC's literature is less clear. The extract therefrom at [12(1)] above suggests that (if taken at face value) payment by FPS is excepted from the general rule that where the due date for payment is a weekend, payments must be received by HMRC on the last working day before it.

19. But HMRC accept that a payment made on a weekend by FPS can be a good payment. In other words had the appellant's payment been received by HMRC on 7 October then it would have been treated as a timely payment even though 7 October is on a weekend.

20. And HMRC's literature does go on to say that a taxpayer should check its bank processing times before making a payment.

21. The appellant (through its agent) accepts that it understands the system. It also considers that its effort to pay on time should exonerate it from the penalty

22. I'm afraid I do not agree with its agents. It is incumbent generally for a taxpayer to ensure that it pays its tax on time. HMRC have published a raft of literature explaining this to taxpayers generally and how it might go about doing so. In the case of this appellant, that general position is supplemented by the fact that it had received surcharge liability notices for several VAT periods prior to the Default Period telling it that it had to ensure that payment was made to HMRC in cleared funds on or before the due date for payment.

23. A reasonable taxpayer, conscious of and intending to comply with its obligations regarding tax would have checked with its bank to ensure that payment initiated by FPS on a Saturday would be guaranteed to arrive in HMRC's bank account on the same day. There is no evidence that it did so. If the bank had been unable to provide that unequivocal guarantee, a reasonable taxpayer would have initiated payment on the previous day. Or indeed sometime prior to that. The appellant's system of taking things to the wire as regards payment is the real reason why it has been in the default surcharge regime for five quarters. I appreciate that it might have cash flow issues. No evidence has been adduced suggesting this as a reason for late payment. But in any event, an insufficiency of funds per se is statutorily prohibited from being a reasonable excuse.

24. The appellant could readily have calculated the surcharge to which it would be liable if it failed to pay the VAT for the Default Period on time. So it knew the financial consequences of failing to meet the payment deadline. If the Surcharge was as financially important to it as its grounds of appeal implies, then it would have made every effort to ensure that payment was made on a timely basis.

25. It is my view that the appellant is the author of its own misfortune. It knew about the regime. It knew that it had to pay on time. It could calculate the consequences of failing to do so. It has no reasonable excuse for the late payment.

26. I also find that the surcharge is proportionate. It is not large in absolute terms. In relative terms, it comprises just 2.9% of the turnover of the appellant in that quarter. It is a long way from being not merely harsh but plainly unfair.

Decision

27. In light of the above I dismiss this appeal.

Appeal rights

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 a Company a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
RELEASE DATE: 19 July 2018