



TC03072

Appeal number: TC/2012/04935

VALUE ADDED TAX – Default surcharges imposed for late payments – whether “reasonable excuse” – whether disproportionate – No – VATA 1994, Section 59 and 71 – Appeal Refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BALTIC RECRUITMENT SERVICES LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE QC
 ROLAND PRESHO FCMA, CGMA**

Sitting in public at North Shields on 18 September 2013.

Mr Routledge, Solicitor, Controlled Tax Management Limited for the Appellants

Mrs Oliver, Solicitor, Revenue Offices for the Respondents

DECISION

5 The Appellant company challenges the imposition of surcharges in respect of four late payments of VAT. The VAT periods to which these relate are 03/11, 06/11, 09/11 and 12/11. The hearing focussed on whether there was a *reasonable excuse* for the delay in making all or any of the payments, and also whether the surcharges were disproportionate having regard to the profits of the company and the short delays in two cases.

10 The Facts

1. The timetable of late payments noted in the Respondent's Statement of Case is not disputed. On two occasions the delays were for only two and three days. The accuracy of the calculation of the four surcharges was not challenged.

2. The only witness to give evidence was Mr Les Worthy, the present Finance Manager of the company. However, at the material time he was acting for another company in the group of which the Appellant is a member. Mr Worthy's evidence was, therefore, substantially hearsay, gleaned from colleagues' accounts, correspondence, and other records available. This was emphasised in cross-examination. For whatever reasons none of the executives managing the Appellant company at the material time gave evidence.

3. Mr Worthy adopted the terms of his Witness Statement and elaborated on it to an extent in evidence. The company is in business as a specialist recruitment agency, placing mainly Eastern European workers in employment. The company prepared accounts on a "cash" basis i.e. recording receipts as and when they were received, until about September 2011, when a standard accounting system was introduced. (This involved changing from manual records to a "SAGE" system). The party responsible for maintaining the companies' accounting records was Lee Mason, the then Financial Controller, who resigned shortly after the series of late payments and penalties came to the notice of those persons controlling the company group. In the Appellant company's Skeleton Argument, para 20, it is stated that "... a single employee ... who had immediate responsibility for paying liabilities to the Respondents kept the issue of late payment from the relevant company officials"

4. It was stressed by Mr Worthy that there had been no other instances of default or irregularity in the Appellant's tax and accounting records. When those controlling the Group became aware of outstanding sums due to the HMRC, immediate payment had been made, funded from other companies within the Group.

5. We found Mr Worthy a credible and reliable witness. However, given that his involvement was indirect and, indeed, subsequent to the periods of default, he was not, perhaps, the best witness available to explain the detailed circumstances of the Appellant company's defaults.

Submissions

6. At the outset of the hearing Mr Routledge referred to his Skeleton Argument. He submitted primarily that there was a *reasonable excuse* for each of the late payments here in terms of Section 59 VATA. Those controlling the Appellant company were unaware of their employees' failure. Once they had become aware of the default, there was immediate payment. No other financial irregularity had been discovered and the companies' records of payments to HMRC was unimpeachable.

7. *Separatim* Mr Routledge argued that the amount of the penalties in total was *disproportionate*. The total approximated to the net profit of the Appellant company. He referred us to the decision of the Upper Tribunal in *HMRC –v- Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC).

8. Mrs Oliver produced helpfully copy notes of her argument. On behalf of HMRC she submitted that the defence of *reasonable excuse* was not available in the circumstances of this case. The relevant statutory provision (Section 71 VATA) excludes generally problems of funding and of fault by a third party. In the present case fault lay with the Appellant company's internal cash system, for which those controlling it were responsible. They could not relieve themselves of that responsibility by delegating the work to an employee.

9. She rejected the argument that the default surcharge system was disproportionate and founded on the decision of the Upper Tribunal in *Total Technology*.

10. Essentially, in Mrs Oliver's view, the default arose from the failure of the directors to maintain proper accounting systems, and she invited us to dismiss the Appeal.

Decision

11. We consider that the stance of Mrs Oliver on behalf of HMRC is well-founded. The cause of the late payments in each instance was the inadequate financial systems of the Appellant company, and of its own internal management.

12. We do not consider that the Appellant had a *reasonable excuse* for any of the late payments. While in terms of Section 71(1)(a) VATA an insufficiency of funds is not a *reasonable excuse*, we would observe that until about September 2011, about the end of the third of the four "quarters", the company accounted on a "cash" basis. Accordingly it was in funds as it had received payment when the liability to VAT arose. Further, in the event funds were made available immediately within the Group.

13. Further, Section 71(1)(b) excludes reliance on a third party as a *reasonable excuse*. In the present case the default arose from the company's own internal systems. It was Lee Mason, the company's then Financial Controller who was

responsible in an immediate sense. The overall responsibility for ensuring the regularity of the company's accounts rested with its directors.

5 14. We are not satisfied that a *reasonable excuse* arises in the context of any of the late payments here, even in the case of the very short delays for the Periods 03/11 and 06/11.

10 15. Neither do we consider that the principle of *proportionality* assists the Appellant. There was not one isolated default. Rather there was a series of consecutive defaults. VAT is a turnover tax, not a tax on profit. The penalties are geared to the amount of tax due. While the company's profit is low in comparison with its turnover, there was no difficulty or delay in funding the tax due from within the Group once the default was discovered by its directors. As we read the Upper Tribunal's decision in *Total Technology* the system of default surcharges is not in
15 itself disproportionate. We do not consider that there are any exceptional factors in the present case. Once discovered, payment in full to meet the defaults was made without difficulty. The cause of the default was simply the inadequate financial management of the Appellant company by its own staff. The responsibility for ensuring due compliance with the tax system lay with the Appellants' directors.

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16. For these reasons we dismiss this Appeal.

25 17. 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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**KENNETH MURE QC
TRIBUNAL JUDGE**

RELEASE DATE: 21 November 2013

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