



**TC03727**

**Appeal number TC/2013/02326**

*Value added tax – default surcharge – late payment due to failed direct debit  
– appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE LEISURE MARKETING COMPANY LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY  
MRS SONIA GABLE ATII**

**Sitting in public at Portal House, 27 Southway, Colchester, Essex on 2 June 2014**

**There was no appearance for the taxpayer company**

**Mr Philip Rowe of HM Revenue and Customs for the Crown**

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## DECISION

### *Introduction*

1 We were satisfied that due notice of the hearing had been given to the taxpayer and  
5 that, as we were in possession of its written evidence in support of the appeal, it was  
pursuant to Rule 33 in the interests of justice to proceed with the appeal in the  
taxpayer's absence. The appeal concerns a default surcharge of £911.25 for the  
period 11/12, which is at 15% of the tax paid late.

### *Facts*

10 2 The surcharge history of the appellant shows that defaults occurred in periods 02/11,  
08/11, 05/12 and 08/12, as well as that under appeal in respect of 11/12. The first  
default occasioned simply the issue of a surcharge liability notice commencing the  
surcharge regime; after a default penalty for 11/11 had been cancelled, the second and  
15 third defaults we mention resulted in no monetary penalty, because the amounts of the  
surcharges were each less than £400 and were not therefore collected. A surcharge of  
£538.29 at 10% for the period 08/12 was therefore the first to impact financially on  
the company. But in each case the company would have been notified of the defaults  
and their significance in the surcharge system, namely that the progressive increase in  
the penalties from 2% to 5% to 10% to 15% was in principle operating.

20 3 The due date for the payment in respect of the 11/12 quarter was 31 December  
2012, extended in the case of electronic payments by seven days to 7 January 2013.  
The return for the quarter was received by HMRC on 6 January 2013 and triggered  
the use by them on 7 January of the direct debit which the taxpayer had given on its  
25 account; ordinarily, this should have resulted in the payment reaching HMRC three  
working days later, but on 10 January the Revenue were notified by the bank that the  
direct debt had been refused. Had the direct debit been honoured, there would have  
been no default.

4 The notice of appeal states that the reason the direct debit was refused was that it  
exceeded the taxpayer's account limit by £35, and that the bank therefore refused  
30 payment altogether. When this was discovered by the taxpayer, full payment was  
made by the Faster Payment Service on 13 January 2013; it was therefore six days  
late. Although 13 January that year was a Sunday, payments made by this system are  
still effected even though the banks are closed. The notice of appeal gives no further  
grounds of appeal than these statements of events.

### *Legislation*

35 5 The Value Added Tax Act 1994 provides:-

#### *59 The default surcharge*

(1) Subject to subsection (1A) below if, by the last day on which a taxable  
person is required in accordance with regulations under this Act to furnish a  
40 return for a prescribed accounting period—  
(a) the Commissioners have not received that return, or  
(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.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge 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.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(7) If a person who, apart from this subsection, 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—

(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

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

#### *71 Construction of sections 59 to 70*

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

(2) In relation to a prescribed accounting period, any reference in sections 59 to 69 to credit for input tax includes a reference to any sum which, in a return for that period, is claimed as a deduction from VAT due.

#### *Conclusions*

6 It is well established that if a surcharge complies with the statutory requirements in the circumstances of the case, it must be upheld and any indulgence or mitigation is a matter for the commissioners alone or, in exceptional cases, for judicial review; parliament has given the tribunal no power to reduce or mitigate default surcharges.

7 In the outcome, no reasonable excuse within the meaning of the legislation has been established: given the very limited powers which parliament has allowed to the tribunal, we regret that the appeal cannot succeed. We add only that it is unfortunate that the taxpayer's bank did not make payment of all the funds requested save the £35  
5 for which there was no provision, since the 15% penalty would then have been calculated by reference to that sum alone.

8 The taxpayer, not having been present or represented at the hearing of this appeal, is entitled pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to make an application in writing to be received by the tribunal  
10 no later than 28 days after this Decision is sent to it for the Decision to be set aside and remade.

9 This document contains the 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 no later  
15 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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**MALACHY CORNWELL-KELLY**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 June 2014**

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