

DECISION

Introduction

1. This concerns an appeal to the Tribunal dated 22 February 2013 made by the
5 appellant against a surcharge of £955.80 assessed by the Respondents for the late
submission of payment for the appellant's VAT return for the quarter ended
31 October 2012.

Statutory Framework

2. Section 59 of the VAT Act 1994 sets out the provisions whereby a Default
10 Surcharge may be levied where HMRC have not received a VAT return for a
prescribed accounting period by the due date, or have received the return but have not
received by the due date the amount of VAT shown on the return as payable.

3. When the first default occurs a surcharge liability notice is issued which
specifies a surcharge period of 12 months beginning on the date of the notice and
15 ending 12 months later assuming no further defaults occur. If a further default does
occur then a surcharge of 2% of the tax due for the period may be levied and the
period of the notice is extended to one year from that default. Further defaults within
the surcharge period can give rise to increasing surcharges of 5%, 10% and a
maximum of 15% of the tax due, and the period of the surcharge notice is extended to
20 one year from each default. If a taxpayer makes all returns and payments on time for
one year within the period of the surcharge liability notice he will not receive a
surcharge during that period and will be removed from the surcharge system. If he
subsequently defaults the whole process starts again.

4. Section 59(7) covers the concept of a person having reasonable excuse for
25 failing to submit a VAT return or payment therefor on time.

5. Section 71(1) of the VAT Act 1994 covers what is not to be regarded as a
reasonable excuse for a failure to submit a return or payment on time.

Case law

Hok Ltd [2012] UKUT 363 (TCC)

30 *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC).

Facts

6. The appellant is based in Castlemilk, Glasgow and has been in business since
1970.

Appellant's submissions

35 7. Tom Fraser submitted that what had happened was that in inputting the payment
instruction to the Bank for payment for the VAT return for the period ending

31 October 2012 his wife had made a simple keying in error in omitting to change the instruction from a standard payment by BACS to a same day value payment. There was an intervening weekend so the result of this error was that payment was received by HMRC four days late on 11 December 2012. He argued that this was a simple error which anyone could make, it was not done with any intention to delay payment as sufficient funds were in the appellant's bank account to cover the payment and he considered it was a reasonable excuse for the late payment.

8. Tom Fraser's second argument was that a penalty of £955.80 for such a simple error whereby HMRC were only short of the money for four days was plainly unfair and disproportionate to the nature of the error committed

Respondent's submissions

9. Mrs McIntyre for HMRC referred to a schedule in the bundle which detailed incidences of late payments and/or late returns by the appellant in the periods ended 31 October 2010, 31 July 2011, 31 October 2011 and 31 October 2012.

10. It is the surcharge that was levied for the last of these failures that is the subject of this appeal. The appellant's VAT return for the quarter ended 31 October 2012 was due to be submitted by 30 November 2012. A further seven days grace is given where payment is made electronically. The return was received by HMRC on 30 November 2012 so was in time but the payment of £9558.02 shown as due was not received by the Respondents until 11 December 2012, that is four days late. The three earlier failures had resulted in a surcharge rate of 10% of the tax due applying so an assessment of £955.80 was made by the Respondents.

11. Mrs McIntyre advised that in reviewing the case HMRC had decided on 23 July 2013 to remove the surcharge for the period to 31 July 2011 and this had the knock on effect of reducing the surcharge rate for subsequent periods. The surcharge rate for the late payment which is the subject of this appeal was reduced from 10% to 5% thus the surcharge was reduced from £955.80 to £477.90. Mr Fraser confirmed that he accepted HMRC's calculation and did not dispute the previous surcharges.

12. Mrs McIntyre submitted that the matters of the fairness and proportionality of the surcharge had been considered by the Upper Tribunal in the case of *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) and put forward that decision to support her submission that the appellant's submission on fairness and proportionality must fail.

13. Mrs McIntyre pointed out that when considering what constituted reasonable excuse Section 71(1)(b) of the VAT Act 1994 states:

“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 person relied upon is a reasonable excuse.”

She said that although this was a simple error the legislation is clear and therefore submitted that the appeal be dismissed.

Decision

14. The appellant has made comment at the hearing about the unfairness of the level of the surcharge and that it is disproportionate. Mrs McIntyre pointed out that The Upper Tribunal addresses these points in the case of *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) and though they may be considered harsh its conclusions must apply in this case. In addition, in the Upper Tribunal's decision in the case of *Hok Ltd* [2012] UKUT 363 (TCC) the powers of the First-tier Tribunal were considered. In respect of the level of surcharges the Tribunal may amend the amount if the legislation has been applied wrongly or the amount calculated inaccurately. It has no power to reduce the level of the surcharge if it thinks the amount is unfair. The levels of the surcharge have been set by Parliament.

15. The surcharge of £477.90 for the quarter ending 31 October 2012 that has been assessed by HMRC has been correctly calculated as 5% of the tax due as reported by the appellant on its VAT return for that period. The reasons for the late payment for that return was admitted by the appellant to be a simple human error in keying in the payment instructions to the Bank. Whilst in the unfortunate circumstances of this case the Tribunal has some sympathy for the appellant, the legislation and case law make it clear that the Tribunal has to dismiss this appeal.

16. 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.

**PETER R SHEPPARD
PRESIDING MEMBER**

RELEASE DATE: 27 August 2013