



TC04696

Appeal number: TC/2015/00542

VAT – default surcharge – whether reasonable excuse – no – whether penalty disproportionate – no – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

	SCS LOGISTICS LTD.	Appellant
	- and -	
	THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	Respondents

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 21 September 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) (Default Paper Cases) having first read the Notice of Appeal dated 20 December 2014 and HMRC's Statement of Case dated 4 June 2015.

DECISION

Introduction

5 1. The Appellant appeals against a Default Surcharge in the sum of £1951.20 for the period 08/14 which was levied at the rate of 15% the VAT due of 13008.03. The surcharge date is 17 October 2014.

Background

- 10 (1) The Appellant has been in the VAT Default Surcharge Regime from the period 02/12 onwards. There are five default periods in the default cycle history. The periods are 02/12; 08/12; 08/13; 02/14 and 05/14.
- 15 (2) The Appellant was on a quarterly basis for VAT. Section 59 VATA 1994 requires VAT returns and payments of VAT to be made on or before the end of the month following each calendar quarter.
- 20 (3) While HMRC have discretion to allow extra time for filing and payments are carried out by electronic means pursuant to VATA Regulations 1995 SI 1995/2518 Regs. 25A (20), 40(2). Under the discretion, HMRC allow a further seven days for electronic filing and payment.
- 25 (4) A taxable person who is liable to a default surcharge may escape that liability if they are able to establish that there is a reasonable excuse for delayed payment which gave rise to the Default Surcharge. This is laid out in VATA 1994 Section 59(7).
- 30 (5) Insufficiency of funds to pay the VAT due is not a reasonable excuse though the case law has established a principle that the underlying cause of insufficiency of funds may constitute a reasonable excuse.
- 35 (6) The onus of proof rests with HMRC to show that the surcharge was currently imposed. If so established, the onus then rests with the Appellant to demonstrate there was a reasonable excuse for the late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

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Appellant's submissions

The Appellant made the following points;

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- (1) The amount of the fine is disproportionate to the late payment of two days.
 - (2) That they were advised by their accountant that payment was due by the 9th rather than the 7th which was the payment date. The payment was made on 9 October 2014.
 - (3) They say that HMRC's representative assured them during a visit that they did not have any defaults and all their VAT returns and payments were in order.
 - (4) Finally they say that the penalties are difficult for small and medium size enterprises to pay.

15 **HMRC's submission**

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- (1) HMRC says that for the period 08/14 the due date was 7 October 2014 and while the return was received on time the payment made was received on 9 October 2014, being two days late. The Appellant was in the Default Surcharge Regime and the Surcharge Liability Notices which would have been issued explain clearly that a taxpayer should contact HMRC if they have difficulties paying. A phone number was provided of the National Advice Service. The note to the Default Surcharge Regime makes it clear that there are penalties for non-payment and in cases where businesses find difficulty paying they should enter into a timed pay arrangement in the Business Payment Support System.
 - (2) They say that VAT Notice 700 explains the requirements for submitting timely electronic payments.
 - (3) The Respondents note that following a request for a review of the Default Surcharge for the period 11/12 the Appellant was made aware in HMRC's letter date 15 February 2013 that the due date was the 7th when paying electronically. The Appellant acknowledged in their letter dated 19 April 2013 that payment was due by the 7th and therefore the assertion that the Appellant believed a payment to be due on the 9th cannot reasonably be asserted. They say that reliance on a third party, the accountant, is not a reasonable excuse and returns and payment remain the responsibility of the Directors.
 - (4) The Respondents say that a genuine mistake honestly made acting in good faith is not a reasonable excuse for Surcharge purposes.
 - (5) The Surcharge Liability Notices were correctly served at the Appellant's principal place of business and the Default Service

Notices were served and issued in accordance with the HMRC's procedure and that of the legislation.

Conclusion

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(1) This appeal is dismissed. The Appellant would have been aware of the financial consequences of any further default and been able to calculate the amount of any surcharge becoming due as they had been issued with Surcharge Liability Notices for several periods. It is reasonable to assume that a prudent business person in the same or similar circumstances would have procedures in place to deal with the payment of VAT and the submissions of return. As HMRC assert, reliance on a third party is not a reasonable excuse. The Tribunal has sympathy with the Appellant who seems to have had a long history of dispute with HMRC and feel not well served. This can be the subject of a complaint. However for the purposes of the law there is no reasonable excuse.

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(2) The Appellant says that the penalty is disproportionate. In the case of Total Technology (Engineering) Ltd in the Upper Tribunal the issue of proportionality was considered. The court in that case found that the surcharges imposed did not infringe the principle of proportionality. The level of surcharge is specified in section 59 of VATA 1994 and as such there is no discretion as to the amount to be levied given to HMRC.

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(3) The Default Surcharge of 1951.20 for the 08/14 period was therefore correctly applied and the penalty remains to be paid.

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(4) The Appeal is dismissed.

2. This document contains full findings of facts 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 the Tribunal no later than fifty six days after the 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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TRIBUNAL JUDGE K KHAN

RELEASE DATE: 09 DECEMBER 2015