



TC03122

Appeal number: TC/2012/06969

*VAT- Default surcharge – SECTION 59 Value Added Tax Act 1994 –
Reasonable excuse – proportionality – appeal dismissed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DATASYS LIMITED

Appellant

- and -

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

**TRIBUNAL: G. NOEL BARRETT LLB PRESIDING MEMBER
JUDGE DAVID DEMACK**

Sitting in public at Manchester on 12 August 2013.

Mr A Ashworth Director, for the Appellant.

Mr M Boyle of HM Revenue and Customs, for the Respondents.

DECISION

5 Introduction

1. This is an appeal by Datasys Ltd (“the Appellant”) against an assessment to default surcharge of £3,165.38 for late payment of VAT by the due date for the quarter ending 29th February 2012. The assessment was made on 13th April 2012.

2. The assessment resulted from the Appellant’s second default in accounting for its liability to VAT in a period of twelve months and followed a Surcharge Liability Notice (“SLN”) issued to the Appellant on 15th July 2011.

3. The Appellant appeals against the default surcharge firstly on the basis that it has a reasonable excuse for late payment; and secondly that the amount of the surcharge is disproportionate to its default.

The Law

4. By section 59(1)(a) and (b) of the Value Added Tax Act 1994 (VATA) a person shall be regarded as being in default for that period:

“if by the last day on which a taxable person is required to furnish a return HMRC have not received that return, or have received that return but have not received the amount of VAT shown on the return”.

5. Under Regulations 25(1) and 40(1) VAT Regulations 1995, if the tax payer is on a quarterly basis for returns, they and their related tax payments are due on or before the end of the month next following each calendar quarter. Where however the taxpayer files its return or pays tax electronically HMRC allow a further seven days from the end of the month next following each calendar quarter for such electronic filing and payment.

6. On a first default occurring, HMRC serve an SLN on the taxable person. Although no surcharge is imposed on the SLN, if any further defaults are made by the taxable person before the expiry of the first anniversary of the last day of the period referred to in the SLN, then the taxable person becomes liable to a surcharge being the greater of the specified percentage or £30.

7. With each SLN, HMRC provide the taxable person with notes explaining what amounts to a default and the consequences which will flow from further defaults. Those notes also advise the taxable person to contact HMRC’s local Debt Management Unit if they expect to have difficulty paying VAT on time.

8. The specified surcharge percentages are set out in Section 59(5) VAT as follows:

(a) in relation to the first prescribed period the specified percentage is 2%.

(b) in relation to the second such period the specified percentage is 5%.

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(c) in relation to the third such period the specified percentage is 10%.

(d) in relation to such period after the third the specified percentage is 15%.

10 9. HMRC do not however issue a surcharge at the rate of 2% or 5% if it calculates it to be less than £400.

10. Section 59(7) VATA provides that a taxable person shall not be liable to the surcharge and shall not be treated as having been in default, if he satisfies the Tribunal there is reasonable excuse for the return of the VAT not having been so despatched.

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11. Section 71(1) VATA provides that:

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

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(b) where reliance is placed on any 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”.

25 **The Evidence and our Findings of Fact**

12. From the documentary evidence and the oral evidence of Mr Ashworth on behalf of the Appellant and Mr Boyle of HMRC, we make the following findings of fact.

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13. We accept that the SLN and the subsequent assessment to surcharge were properly served.

14. Mr Ashworth confirmed, and we accept that the Appellant’s first default occurred as a result of a mistake he made. Mr Ashworth said that he had been under the mistaken belief that he had instructed the Appellant’s bank to make the tax payment by the due date and it was only when he received the SLN in August 2011 that he realised that he had forgotten to instruct or had been distracted from instructing the Appellant’s bank to make the payment in question.

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15. Mr Ashworth also said, and again we accept, that the default resulting in the assessment to surcharge had arisen as a result of the Appellant’s banking error. As the payment was made electronically through the Appellant’s telephone banking arrangements the due date for payment by the Appellant for the relevant quarter fell seven days after the 31st March 2012, that is by 7th April 2012.

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16. The 7th April 2012 was in fact the Saturday of Easter Weekend 2012 and Mr Ashworth explained that he failed to instruct the bank by telephone to make the payment on the 5th April. He confirmed that he had not been able to place instructions with the Appellant's bank any earlier because the Appellant had insufficient cash in its account until 4th/5th April.

17. Having failed to contact the Appellant's bank to make the payment of tax on Thursday the 5th April, (which was the last banking day before Good Friday which fell on the 6th April), Mr Ashworth instructed the bank by internet to make the payment on the next working day by CHAPS i.e. on Tuesday 10th April, but an error on the internet banking system resulted in payment not being made until two days later, on the 12th April 2012. Mr Ashworth's explanation was not challenged by HMRC, and we accept it.

18. Finally Mr Ashworth submitted that the amount of the penalty "for being just three days late" in payment was disproportionate.

19. Mr Boyle maintained and we accept that a delay in payment attributed solely to a Bank Holiday could not be classified as unforeseeable; the onus fell upon the Appellant to initiate tax payments in time to meet the deadline. Whilst the Appellant's mistake might be a genuine oversight, it fell short of amounting to a reasonable excuse.

20. We also accept Mr Boyle's submission that the circumstances explained by Mr Ashworth were neither unforeseeable nor inescapable.

21. Furthermore as the Appellant's electronic payment authority was not issued until Good Friday, the 6th April, (a Bank Holiday), the Appellant could not have formed any reasonable belief that the payment would arrive with HMRC by Saturday 7th April.

Decision

22. The burden of establishing a reasonable excuse falls upon the Appellant.

23. In our judgment, it has failed to establish that it had a reasonable excuse for the late payment of VAT for the quarter ending 29th February 2012.

24. Its reasons for the late payment i.e. its mistake in forgetting to make the payment on Thursday 5th April; and the mistake by the Appellant's Bank and consequent late entry of the CHAPS payment are insufficient to amount to a reasonable excuse.

25. Whether taken collectively or individually the reasons for late payment of the Appellant VAT were neither unforeseeable nor inescapable.

26. Even had the Appellant's bank made payment of the tax in point in accordance with the Appellant's instructions i.e. on 10 April 2012 the payment would still have been late.

5 27. Mr Ashworth also submitted that the amount of the surcharge imposed was disproportionate to the Appellant's mistake.

28. The question of whether or not this Tribunal has the power to determine whether or not a particular penalty, (as decided upon by Parliament), is or is not proportionate to the particular "default" was examined recently in great detail by the
10 Upper Tribunal in the case of *HMRC –v- Total Technology (Engineering) Limited [2012] UKUT 418 (TC)*.

29. In that case the payment was only one day late; previous defaults had been due
15 to innocent errors; the taxpayer had an excellent compliance record prior to the first of the defaults; the amount of the penalty was £4,260.26 and the tax payers profits were around £50,000 per year.

30. Mr Justice Warren and Judge Bishopp said at page 26 para 81:

20 "..... the VAT default surcharge regime penalises only the failure to deliver a return and to make payment of the tax owed by the due date It is to be noted that the penalty does not increase as time goes by; the penalty is for failure to do something by a due date, not a penalty for continuing failure to put right the
25 original default"

31. At page 31 para 99 they concluded;

30 "In our judgment there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are however some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the Tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has
35 imposed".

32. In the instant case, in our judgment, the surcharge VAT was not disproportionate either in the context of the number of defaults by the Appellant, or as
40 to its amount in relation to the Appellant's quarterly sales.

33. We dismiss the appeal and confirm the penalty in the sum of £3,165.38.

34. 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
45 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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G NOEL BARRETT
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 10 December 2013

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