



**TC03519**

**Appeal number: TC/2011/07601**

*VAT default surcharge - VAT paid to agent for onward transmission to HMRC - paid five days late - whether reasonable excuse - no - whether surcharge disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PETER SARGEANT  
t/a PANTHER CRANE SERVICES LTD  
- and -**

**Appellant**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL S CONNELL  
MR ALAN SPIERS**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 6 January  
2014**

**The Appellant did not attend and was not represented**

**Mr Tony O'Grady, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

1. This an appeal by Peter Sargeant t/a Panther Crane Services ('the Appellant')  
5 against a VAT default surcharge of £1,364.59, for his failure to submit, in respect of  
VAT period ended 31 May 2011, by the due date, payment of the VAT due. The  
surcharge was calculated at 15% of the VAT due of £9,097.29.

2. The point at issue is whether or not the Appellant has a reasonable excuse for  
making late payment.

10 3. The Appellant did not attend the hearing. The Tribunal was satisfied that the  
Appellant had been given notice of the time, date and venue of the appeal hearing and  
that it was in the interests of justice to proceed.

### Background

4. Prior to the default for 05/11 the Appellant had previously defaulted on a VAT  
15 payment in period 02/08 when a VAT surcharge liability notice was issued and again  
in respect of periods on 11/08, 02/09, 08/09,11/09 and 11/10. All payments for these  
periods were paid by cheque.

5. Section 59 Value Added Tax Act 1994 ("VATA") sets out the provisions in  
relation to the default surcharge regime. Section 59 requires a VAT return and  
20 payment of VAT due on or before the end of the month following the relevant  
calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].

6. Under s 59(1) a taxable person is regarded as being in default if he fails to make  
his return for a VAT quarterly period by the due date or if he makes his return by that  
due date but does not pay by that due date the amount of VAT shown on the return.  
25 The Commissioners may then serve a surcharge liability notice on the defaulting  
taxable person, which brings him within the default surcharge regime, so that any  
subsequent defaults within a specified period result in assessment to default  
surcharges at the prescribed percentage rates. The specified percentage rates are  
determined by reference to the number of periods in respect of which the taxable  
30 person is in default during the surcharge liability period. In relation to the first default  
the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the  
second, third and fourth default.

7. HMRC have discretion to allow extra time for both filing and payment when  
these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs  
35 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for  
payment. The due date for the 05/11 period was 7 July 2011

8. The Appellant paid VAT on a quarterly basis, usually by cheque but sometimes  
by electronic transmission. The Appellant's return was due no later than 30 June 2011

and received by HMRC on 27 June 2011. Payment of the tax due was made late by BACS on 12 July 2011.

9. As the Appellant was already in the default regime, a SLNE (VAT166) was issued on 15 July 2011 and the surcharge imposed.

5 Relevant legislation

10. A taxable person who is otherwise liable to a default surcharge, may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59 (7) VATA sets out the relevant provisions : -

10                   ‘(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

15                   (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

20                   (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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 ..’

11. The burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question. It is s 59(7)(b) VATA on which the Appellant seeks to  
25 rely on the basis that for reasons set out below the VAT was paid late because the responsibility for payment was delegated to its agent.

12. Section 71(1) VATA 1994 specifically states that '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  
30 excuse'.

13. The onus of proof rests with HMRC to show that the surcharges were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of a balance of probabilities.

35 Appellant's case

14. The Appellant's advisors say in a letter to HMRC dated 29 July 2011, that they had arranged for an internet transfer of the VAT to HMRC on 5 July and that the payment was scheduled to arrive with HMRC by 7 July, being the due date.

15. A copy of the agent's client account bank statement for the Appellant shows that the cheque covering the amount of the VAT was paid into that designated client account on Wednesday 29 June 2011, with a presumed clearance date of Tuesday 5 July 2011 (the fifth working day). The Appellant's advisors say that the internet  
5 payment made on Tuesday 5 July was checked for accuracy by one of the directors, but upon reviewing the bank's internet website later in the week, it was discovered "*that the funds had not left our account*".

16. The Appellant's agent letter goes on to say that they made '*enquiries into the quickest payment method available only to find that faster payment is not an option at  
10 HMRC and even debit card payments take three days. In the circumstances a three-day Internet payment was made from our client account, which left our account on eighth of July*'.

17. The BACS payment of the VAT due was made from the agent's client account on Friday 8 July, reached HMRC's account on Tuesday 12 July, and was therefore  
15 five days late.

18. The Appellant's advisors say "*effectively, therefore, our client has made payment in advance of the due date, it was only the transfer of funds from our account to yourselves that was delayed*".

19. A further ground of appeal advanced by the Appellant's agent is that the surcharge levied is disproportionate. They refer to *Enersys Holdings UK Ltd* [2010] UKFTT 20 (TC) in support of this argument. The agent argues that the imposition of a surcharge of £1,364.59 on a liability of £9,097.29 outstanding for a few days is clearly disproportionate. The Appellant says in *Enersys* the default surcharge failed to strike a balance between punishment and deterrence on the one hand and reasonableness on  
20 the other. In that case, the surcharge was held to be unreasonable as it was "not merely harsh but plainly unfair". The Appellant's agent argued that this applies in this case and that the loss to HMRC was only three days interest on the amount  
25 outstanding, which at 5% would amount to £5.25.

#### HMRC's case

20. In a telephone conversation dated 7 November 2011 an officer of HMRC spoke to the Appellant's agent and asked him to contact the bank in writing to find out if the bank was aware of any problems with the internet banking on 5 July. It was agreed that the agent would write to the bank and send to the officer a copy of that letter and the bank's reply when received. HMRC say that notwithstanding that request, to date  
35 they have not received a copy of the letter to the bank or a copy of the bank's reply.

21. The Appellant had already received several surcharge liability notices. The Appellant was therefore well aware of the consequences arising from the late payment of VAT.

22. The Appellant delegated responsibility for paying the VAT for the quarter 05/11 to his accountant. No payment was made until 8 July 2011 which was after the due  
40 date and the payment did not reach HMRC until 12 July 2011.

23. Mr O'Grady for HMRC said that the potential financial consequences attached to the risk of a default would have been known to the Appellant after the issue of the Surcharge Liability Notice in 02/08, given the information contained in the Notice. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

'Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.'

24. The requirements for submitting timely electronic payments can also be found -  
In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.

On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)

On the E-VAT return acknowledgement.

Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

25. Therefore HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

26. Section 71(1) VATA says that the Appellant cannot use his reliance upon his accountants to pay his VAT for him as a reasonable excuse in the event that the VAT is not paid on time.

27. With regard to the proportionality argument, the case of *Total Technology (Engineering) Limited* [2012] UKUT 418 has now been decided in the Upper Tribunal, and as a result of that decision HMRC argue that in this appeal the surcharge of £1,364.59 is not disproportionate.

### Conclusion

28. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

29. As the Upper Tribunal said in *Total Technology* there is nothing in the VAT default surcharge regime which leads to the conclusion that its architecture is fatally flawed or that it infringes the principle of proportionality. The Tribunal recognised that the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no, discretion for HMRC to relieve a surcharge once imposed. It concluded however that there must be some upper limit on the penalty for a default which was proportionate, although it did

not suggest what that might be, given that all the circumstances of the default must be taken into account.

5 30. The Tribunal said that it is therefore open to Tax Tribunals to consider individual default surcharges without having first concluded that the default surcharge regime as a whole is disproportionate. However, in assessing whether a 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 imposed. The Tribunal should show the greatest deference to the will of Parliament when considering the application of the VAT default surcharge scheme.

10 31. By way of further background to the Tribunal's reasoning in *Total*, the Tribunal referred to what Simon Brown LJ had said in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26], setting out the test for assessing proportionality -

15 “... it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very  
20 highest level commending the courts to show such deference.”

25 32. The Tribunal observed that the “not merely harsh but plainly unfair” test set a high threshold which must be surmounted before a Tribunal could find that a penalty, correctly levied on the taxpayer by statutory provisions set by Parliament, should be struck down as disproportionate.

30 33. In the case of *Energys*, referred to by the Appellant, due to a human error, the relevant return was submitted, and payment made, one day late. This resulted in a 5% penalty amounting to just over £130,000. Judge Colin Bishop held that the penalty was wholly disproportionate to the gravity of the offence. It was not merely harsh but plainly unfair and in the absence of any justification it could not be saved by the State's margin of appreciation. As he said, penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the underlying aims of the VAT Directive by imposing a disproportionate burden on a defaulting trader and distorting the VAT system as it applies to him. It possible to  
35 envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate.

40 34. Although the Appellant regards the penalty as unfair a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to

conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of each other. It is then open to the taxpayer to show whether a reasonable excuse exists for the late payment.

35. Is the penalty disproportionate? The penalty imposed on the company was £1,364.59. The delay was five calendar days but the penalty would have been the same if the delay had only been one day or significantly longer. There must of course be a proportionate upper limit to a penalty. The penalty is certainly substantial but cannot be described as “devoid of reasonable foundation”. It is significantly below and cannot be compared with the penalty of £130,000 imposed in *Energys*. It does not approach the level which the Tribunal described in *Energys* as ‘unimaginable’. In our view it cannot be said to be within a range which would sensibly be regarded as entirely disproportionate.

36. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal’s view, for the above reasons, that burden has not been discharged and there was no reasonable excuse for the Appellant’s late payment of VAT for the 05/11 period.

37. The appeal is accordingly dismissed and the surcharge upheld.

38. 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.

**MICHAEL S CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 23 April 2014**