



TC03934

Appeal number: TC/2012/00172

VAT default surcharge – Appellant’s book-keeper was only individual in the company who was able to complete return and arrange payment of vat - book-keeper ill when vat due for payment - whether reasonable excuse - no - whether penalty disproportionate - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

R J P ELECTRICAL LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 MR ROGER FREESTON FRICS**

**Sitting in public at H M Courts and Tribunals Service, Lincoln County Court on
12 August 2014**

The Appellant Company did not attend and was not represented

Ms Lisa Saxton, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. R J P Electrical Limited (“the Appellant”) appeals against a default surcharge of £2,198.18, for its failure to submit in respect of its VAT period ended 31 August 2013, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the VAT due of £14,654.55.

2. 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.

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

Background

4. The Appellant has been in the VAT default surcharge regime since defaulting in period 05/12 when a VAT surcharge liability notice was issued and has defaulted in four more consecutive VAT periods prior to the default period under appeal.

5. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires a VAT return and 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. 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 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for filing and payment. The Appellant’s return was due on 7 October 2013 but was received by HMRC three days late on 10 October 2013. The VAT was also due to be paid by 7 October 2013 but was not received by HMRC until 15 October 2013. Payment was made by direct debit.

7. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. 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. 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 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.

8. 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 1994 sets out the relevant provisions : -

5 ‘(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 –

10 (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

15 (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 ..’

9. It is s 59(7)(b) on which the Appellant seeks to rely. The burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question.

20 10. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

25 11. The Appellant’s appeal against the surcharge for period 08/13 was submitted to the Tribunal on 2 January 2014.

Appellant’s Case

30 12. The Appellant does not dispute that its VAT payment for the period 08/13 was due on 31 September 2013 or that it was late making payment. There does not appear to be any dispute that the payment, if made electronically, was due on 7 October 2013 but that the VAT was paid late on 15 October 2013.

35 13. The Appellant’s stated grounds of appeal to HMRC shortly after the surcharge was imposed was that the Appellant’s bookkeeper who had sole responsibility for VAT and initiating payment of bills, was unwell and absent during the ‘crucial period’. The Appellant said that there was sufficient money in the company’s account but payment was not made until she returned to work.

14. The Appellant’s representative in an email of 6 February 2014 clarified that the bookkeeper was absent from Thursday 3 October 2013 to Wednesday 9 October 2013. Having tried unsuccessfully to render the online return the director chose to await the bookkeeper’s return to work.

15. In the Notice of Appeal, the Appellant says that ill health is given in HMRC's guidance as one of the grounds of appeal on which an Appellant may be able to rely and that the bookkeeper was an employee, (as opposed to being a third party to whom the task had been delegated) employed to do the tasks which the directors were unable to do themselves. If her ill health had continued then alternative arrangements would have had to be found, but the illness was only for a few days.

HMRC's Case

16. At the hearing Ms Saxton for HMRC said that the potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice for period 05/12, particularly given the information contained on the reverse of the Notice which states:

'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.'

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).

17. 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
- On the E-VAT return acknowledgement.

18. The requirements for submitting timely electronic payments can be found —

19. In Notice 700 'The VAT Guide' para 21.3.1(the notice represents HMRC'S policy and understanding of the relevant legislation)

20. On the HMRC website www.hmrc.gov.uk

21. E-VAT return acknowledgement

22. Section 21.3 of Notice 700 The VAT Guide (APRIL 2012 onward) states;

"Paying by an approved electronic method will give you up to seven extra calendar days to submit your return and pay your VAT, unless you make annual returns or Payments on Account (and submit quarterly returns). The extended due date will be shown on your online VAT return and you must ensure that cleared funds reach HMRC's bank account by this date. (The exception to this is online Direct Debit (DD) - if you pay by DD,

5 then HMRC will automatically collect your payment on the third bank working day after the date shown on your return.) If your due date falls on a bank holiday or weekend, your payment must clear HMRC's bank account before then (unless you use the Faster Payments service - Faster Payments can be received on bank holidays and weekends).

If your payment arrives late you may be liable to a surcharge for late payment. To make sure that your payment clears our account in time, you should check with your bank or building society to find out:

10 If there are any single or daily limits to how much you can transfer from your account? Is there a cut-off time for processing payments on the same day? How long your payment will take to clear into HMRC's bank account? Checking these details will help to ensure that you do not incur any unnecessary late payment surcharges."

15 23. The Appellant's default history indicates that all of the previous five consecutive returns were rendered after the relevant due date. In period 05/12 the Appellant was over a month late with its payment. In the subsequent four quarterly vat periods the Appellant was between one month and nine days late.

20 24. HMRC contend that the possible unexpected absence of an employee is a generic risk common to any business, rather than specific to the Appellant, and as such something for which many businesses have alternative plans in place to help ensure effective business continuity. No details of any such contingency arrangements being in place have been provided in support of the appeal.

25 25. It is the ultimate responsibility of the directors to ensure that returns and payments are submitted on or by the due date and delegating that responsibility to an employee does not absolve responsibility.

30 26. Finance Act 2009 Section 108 provides that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange a payment deferment and this is agreed by HMRC. There is no record of the Appellant contacting HMRC to ask for advice, if unable to render the online return, as a result of staff absence.

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

35 28. Insofar as the Appellant argues that the surcharge is entirely excessive or disproportionate to the modest delay which occurred, the case of *Total Technology (Engineering) Limited v HMRC* heard in the Upper Tribunal held that:

(1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.

(2) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:

- (a) The number of days of the default
- (b) The absolute amount of the penalty
- (c) The ‘inexact correlation of turnover and penalty’
- (d) The ‘absence of any power to mitigate’

5 and decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality. The penalty was therefore not excessive or disproportionate. The penalty is tax geared and levied on the amount of VAT paid late at a percentage applicable to the number of defaults.

Conclusion

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

15 30. The Appellant’s main ground of appeal is that it’s bookkeeper who had sole responsibility for VAT and initiating payment of bills, was unwell and absent during the ‘crucial period’. The Appellant said that there were sufficient monies in the company’s account but payment was not made until she returned to work. Having
20 tried unsuccessfully to render the online return the director chose to await the bookkeeper’s return to work. The bookkeeper was an employee employed to do the tasks which the directors were unable to do themselves. The Appellant says that if her ill health had continued, then alternative arrangements would have had to be found, but the illness was only for a few days.

25 31. To decide whether a reasonable excuse exists the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person’s exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would
30 become payable on the particular dates, those factors would not have avoided the problem which led to the failures. It is clear that the Appellant should have had contingency measures in place. It was obviously not beyond the realms of possibility that the bookkeeper could one day be off ill when the VAT was due to be paid. Had the proprietors exercised reasonable foresight, due diligence and had proper regard for the fact that the VAT would become payable on a particular date alternative arrangements would have been in place to avoid the default.

35 32. 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 reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant’s late payment of VAT for the 08/13 period.

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

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 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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MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 19 August 2014

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