

[2015] UKFTT 634 (TC)



TC04767

**Appeal number:TC/2014/06803
TC/2015/02083**

VAT – default surcharge – late returns and payment of VAT – whether reasonable excuse for lateness – whether surcharges arbitrary or disproportionate – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANTHONY JOSEPH HAWKES

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

The Tribunal determined the appeal on 2 December 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 17 December 2014 (with enclosures) and HMRC’s Statement of Case submitted on 27 July 2015 (with enclosures).

DECISION

Introduction

5 1. This is an appeal against default surcharges in respect of VAT accounting periods 07/14 and 10/14. The VAT due for period 07/14 was £4,249. The VAT due for period 10/14 was £2,730. Strictly the appeal against the default surcharge for period 07/14 was out of time but the respondents did not object to a late appeal and I accordingly grant permission for a late appeal.

10 2. The general rule is that a return must be made together with payment of the VAT due by the last day of the following month after the end of the period to which the return relates (Regulation 25 VAT Regulations 1995). However where a return and payment are made electronically, HMRC can direct that additional time may be allowed for submitting the return and making payment (Regulation 25A VAT
15 Regulations 1995).

3. HMRC have directed that where a return and payment are made electronically, traders have an additional 7 calendar days in which to make the return and payment. Cleared funds must reach HMRC's bank account by that date. Where that date falls on a weekend or bank holiday, cleared funds must reach HMRC's bank account
20 before that date unless payment is received on the weekend or bank holiday by way of faster payment.

4. HMRC have also directed that where the electronic payment is made by direct debit, HMRC will collect payment on the third working day after the additional 7 calendar days (See Notice 700 Paragraph 21.3.1).

25 5. The Appellant submitted both returns and paid the VAT due electronically. Payment was made by way of a direct debit mandate. Hence the Appellant had until 7 September 2014 to submit the 07/14 return. HMRC would then collect payment on 10 September 2014 and payment would be in time. The Appellant had until 7 December 2014 to submit the 10/14 return. HMRC would then collect payment on 10 December
30 2014 and payment would be in time.

6. The Appellant had been in the default surcharge regime under section 59 Value Added Tax Act 1994 since November 2010 due to previous defaults which are not in issue in this appeal. By period 01/12 the Appellant's defaults were such that he paid default surcharges at the rate of 15%.

35 7. *Section 59(7) VATA 1994* provides as follows:

“ (7) *If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—*

(a) ...

(b) *there is a reasonable excuse for the return or VAT not having been so despatched,*

5 *he shall not be liable to the surcharge ...”*

8. The meaning of reasonable excuse in this context is well established. In *The Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234 HH Judge Medd QC said:

10 *“ It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to*
15 *comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”*

Findings and Reasons

9. In relation to period 07/14 the default surcharge is 15% of the tax shown in the
20 return, that is £637.38. The Appellant states in his notice of appeal that he filed the return online and payment was taken by direct debit before he received any default notice. He regards the imposition of a default surcharge as arbitrary and disproportionate.

10. Section 59 requires the service of a “surcharge liability notice” specifying a
25 surcharge period. Where there is a default in submitting a return on time or paying a return on time during a surcharge period then a surcharge is imposed at the rates set out in the section. Defaults within a surcharge period will also cause the surcharge period to be extended where HMRC issue a surcharge liability notice extension.

11. The Appellant was sent a surcharge assessment for the default in period 07/14
30 on 12 September 2014. Upon receiving it he wrote to HMRC stating “I never received any written indication that my VAT return was late, once it was submitted I was informed online that the money would be taken from my bank account by direct debit on 12 September 2014. The money was taken out of my bank account on that day”.

12. The Appellant has not taken issue with HMRC’s statement of case which
35 describes the defaults since period 11/10 and the circumstances in which the surcharge period was extended to include the due dates for submission and payment of the 07/14 return. Apart from service of a surcharge liability notice there is no requirement on HMRC to give any other warning of their intention to assess a surcharge.

13. The return was due to be made by 7 September 2014 which would have resulted in the VAT being collected by HMRC on 10 September 2014. In fact the return was not submitted until 9 September 2014 and payment was not collected until 12 September 2014. In the circumstances I am satisfied that the default surcharge for period 07/14 properly became due from the Appellant.

14. In relation to period 10/14 the default surcharge is 15% of the tax shown in the return, that is £409.56. The Appellant states in his notice of appeal that the VAT return was filed online a matter of hours late, that is on 8 December 2014. The due date for payment by direct debit was 12 December 2014 and payment was collected by HMRC on that date. He contends that there was no late payment and that the surcharge is arbitrary and disproportionate. He also contends that he could have paid the VAT due at the time of submitting the return.

15. For the reasons given above the due date to submit the return was 7 December 2014 and the due date for payment by collection of the direct debit by HMRC was 10 December 2015. The appellant acknowledges that the return was late, and I find that it was not submitted until 8 December 2014. The result was that payment was not collected by HMRC until 11 December 2014, which was one day late. The Appellant's bank statement shows this as the date of payment, rather than the 12 December 2014 identified in his notice of appeal.

16. In the circumstances I am satisfied that the default surcharge for period 10/14 properly became due from the Appellant.

17. The Appellant has not made out any case that he had a reasonable excuse for late submission of the returns or late payment of the VAT for either period. It is no excuse that the Appellant could have paid the money on the date he submitted the 10/14 return because he had chosen to pay by direct debit and in any event the return itself was submitted late. There is no power for HMRC or for this tribunal to reduce a default surcharge based on any other form of mitigation.

18. In relation to both surcharges the Appellant contends that they were arbitrary and disproportionate. I am not satisfied that they were arbitrary. They were imposed in accordance with section 59.

19. As to whether they are disproportionate, I have had regard to the principles outlined by the Upper Tribunal in *Total Technology (Engineering) Limited v Commissioners for HM Revenue & Customs [2012] UKUT 418 (TCC)* and most recently in *Commissioners for HM Revenue & Customs v Trinity Mirror [2015] UKUT 0421 (TCC)*. In the light of those principles and on the facts of the present case I do not consider that the default surcharges in this case were in any way disproportionate.

20. In all the circumstances I must dismiss the appeal.

21. 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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JONATHAN CANNAN

TRIBUNAL JUDGE

RELEASE DATE: 7 December 2015

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