



**TC06235**

**Appeal number: TC/2017/02290**

*VAT default surcharge - VAT paid two (or possibly three days late) - Appellant had spoken to HMRC to explain that there would be a delay in payment and that payment which he erroneously believed was due on a Saturday could not be paid until the Monday - advised by HMRC that payment could be made on the Monday - time to pay therefore not requested - whether reasonable excuse - yes - Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MEZZANINE FLOORS (HULL) LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE: MICHAEL CONNELL  
MEMBER: JULIAN STAFFORD**

**Sitting in public at Hull Magistrates Court, Market Place, Kingston-upon-Hull  
on 12 October 2017**

**Mr Martin Palmer, Director of the Appellant Company**

**Mr Gareth Hilton, Officer of HMRC, for the Respondents**

## DECISION

### **The Appeal**

- 5 1. Mezzanine Floors (Hull) Limited (“the Appellant”) appeals against a VAT default surcharge of £6,039.48, for its failure to submit in respect of its VAT period 11/16, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £40,263.22.
2. The point at issue is whether the Appellant has a reasonable excuse for making the late payment.

### 10 **Background**

3. The Appellant has been registered for VAT with effect from 9 February 2000. Its main business is that of supply and installation of raised floors systems.
4. Prior to the default under appeal the Appellant had previously defaulted on VAT payments in period in 11/15 when a surcharge liability notice was issued and again in  
15 four further periods.
5. The Appellant has been mandated to both render returns and pay the tax due electronically from 2013. Its usual method of payment has been by the Faster Payment Service (FPS) or the National Direct Debit System (NDDS).
6. HMRC have discretion to allow extra time for both filing and payment when these  
20 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.
7. Period 11/16 VAT fell due on 31 December 2016. The return was received on  
25 time, on 4 January 2017. If made electronically, payment was due on 7 January 2017, but because that was a Saturday, payment fell due on the working day prior to that, that is 6 January 2017.
8. Payment of the VAT due was not made until Monday 9 January 2017.
9. On 13th January 2017, HMRC issued a default surcharge assessment in the sum of £6,039.48 to the Appellant calculated at the 15% rate.
- 30 10. 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].
- 35 11. 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.

12. 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 : -

‘(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 –

(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

(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 ..’

13. 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.

14. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

15. Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

16. 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.

## **Appellant's Case**

17. The Appellant does not dispute that its VAT payment for the period under appeal was late. Mr Palmer for the Company says that the VAT was paid on 9 January 2017, but for the reasons explained below, that in itself, is not something on which we need to make a finding.

18. The Appellant's stated grounds of appeal in its Notice of Appeal to the Tribunal (so far as relevant to this appeal) are:

“We are appealing due to circumstances out of our control. We had very large VAT returns and we paid these in full, we didn't need a payment plan we was just late, but with reasons and these was explained to HMRC. ....

The £40,263.22 (Sept-Nov 16) was due 7th January but was paid 9th January - 2 day's late but 7th was a Saturday and was paid 9th Jan. We didn't realise it had to be paid 6th but our accounts don't work Friday, but this fine £6k for couple days late.

From the history you will see these are large VAT returns to what we usually do and we still managed to pay them without a payment plan, therefore we feel the fines are unjustified as we paid the VAT just a couple days late.”

19. At the hearing, Mr Palmer elaborated on the reasons 'explained to HMRC'. He said that the Company was expecting to receive approximately £60,000 payment under an invoice factoring arrangement on 6 January 2017, but that his accounts clerk, Claire did not work on a Friday and was not in to make the payment until Monday 9 January 2017. He himself had telephoned HMRC on Friday 6 January to explain the position and that payment of the VAT due as he believed on Saturday 7 January 2017, would be not be made until Monday 9 January 2017.

20. He says he was told 'not to worry, just ensure payment is made as soon as you can'. He said that he told the person he spoke to that the VAT was due on Saturday 7 January. He was not corrected and was only asked to give the Company name but no further details (e.g. the Company's VAT Number). He was (mistakenly) 'very aware' that the VAT fell due for payment on 7 January but explained that he was not asking for time to pay. Had his clerk Claire been working that day payment would have been made on 6 January subject to the Company receiving the £60,000 under the factoring arrangement. He felt as if he had been inadvertently misled by HMRC.

## **HMRC's Case**

21. Mr Hilton for HMRC said that the onus of proof rests with HMRC to demonstrate that a penalty is due. Once so established, the onus is then on the Appellant to demonstrate there is a reasonable excuse for late payment. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

22. There is a statutory obligation on a person required to make a return to pay the VAT to HMRC. Value Added Tax Regulations 1995, at Regulation 40, state that any person required to make a return “shall pay” to HMRC “such amount of VAT as is

payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return”.

23. The first default was recorded for period 11/14 and the Appellant entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default would have been known to the Appellant from this point onward, given the information printed on the Surcharge Liability Notice issued.

24. Given the default history and information available, the Appellant would have been aware of the potential fiscal consequence of a further default prior to the periods subject to appeal.

25. 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 06/15, when a Surcharge Liability Notice was issued, particularly given the information contained in the Notice which on the reverse 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.’

26. 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.

27. 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).

28. An insufficiency of funds is, of itself, precluded from providing a reasonable excuse for default by s 71(1)(a) VATA 1994.

29. HMRC recognise that the Appellant has made payment in full for the period under appeal, as opposed to requesting a payment plan as they have done for previous periods. Where this has been requested prior to the due date the surcharge has been removed as the Appellant was entitled to relief under s 108 of the Finance Act 2009. However, surcharges issued under VATA 1994 s 59 are a penalty based solely on the amount of VAT paid after the due date, no matter the length of delay.

30. Within HMRC’s website [www.gov.uk/ pay-vat/](http://www.gov.uk/pay-vat/) it clearly states that:

“If the deadline falls on a weekend or bank holiday, your payment must arrive in HMRC’s bank account on the last working day before it (unless you pay by Faster Payments).”

31. In addition at [www.gov.uk/pay-vat/bank-details](http://www.gov.uk/pay-vat/bank-details) ‘How long it takes’ - it states:

5           “Payments made by Faster Payments (online or telephone banking) will usually reach HMRC on the same or next day, including weekends and bank holidays.”

32. Had the Appellant made use of the VAT payment deadline calculator, also readily available on HMRC’s website, it confirms that the last date of payment for the period 11/16 was 7 January 2017. Due dates regularly fall on a weekend and/or Bank  
10 Holiday and the Appellant has the responsibility to make themselves aware of the times when this is the case and arrange for payment to be sent at an earlier date, if unable to make payment on the actual day.

33. By not making themselves aware of the instructions for ensuring payment is made by the due date, the Appellant put itself in a position whereby it was likely that a  
15 surcharge would be issued.

34. By not realising that payment for period 11/16 must be made prior to the weekend, as the due date fell on a Saturday (unless paying via FPS), this could be seen as a claim to genuine error by the Appellant and Notice 700/50 Default Surcharge s 6.3, which represents HMRC’s understanding of the legislation would  
20 preclude this from providing a reasonable excuse.

35. HMRC also maintain that the VAT was not paid until 10 January 2017, not 9 January as contended by Mr Palmer.

36. In his ruling in the case of *Garnmoss Limited t/a Parham Builders* (TC/2011/8183) Judge Hellier stated:

25           “What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus this default cannot be ignored under the provisions of subsection [s59 VA TA] (7).”

30           This is a First-tier Tribunal case and therefore may be persuasive, but is not binding.

37. It appears from the grounds of appeal that even had the Appellant been aware that payment should be made on 6 January 2017 that payment would still have not been made, as their accounts clerk did not work on a Friday. Reliance on a third party to carry out tasks for which the directors are ultimately responsible, in this instance the  
35 accounts employee, is precluded from providing a reasonable excuse by VATA 1994 s 71(1)(b).

38. Mr Hilton said that HMRC had no record of Mr Palmer’s call to HMRC on 6 January, but he would have been warned that a VAT default surcharge would be

issued. In his notice of appeal Mr Palmer had never previously indicated that he was awaiting a payment.

39. HMRC say that the surcharge has been correctly issued in accordance with VATA 1994 s 59(4).

5 **Conclusion**

40. The burden of proof is on the Appellant to show that it has a reasonable excuse for the default. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment. The VAT was paid late by either two or three days. We make no finding in that regard for the reasons explained below.

10 41. VATA 1994, ss 59 and 71 set out the reasonable excuse provisions which apply to the default surcharge. As regards the Appellant Company's cash flow shortage generally, it is clear from s 71(a) VATA, that an insufficiency of funds to pay any VAT due is not in itself a reasonable excuse. However that is not, as such, a ground of appeal.

15 42. The Appellant's grounds of appeal are that Mr Palmer would have asked for time to pay, which given the circumstances would have in all probability been agreed, had he not been inadvertently misled by the person he spoke to at HMRC on Friday 6 January 2017. He did not know that the VAT had to be paid on 6 January and that was not explained to him by the person he spoke to. Had he known that payment had to be  
20 made that day, and that otherwise a VAT default surcharge would arise, which was never mentioned, he would have asked for time to pay.

43. Having considered the background facts and circumstances leading up to the default, in the Tribunal's view, for the reasons given above, whether the payment was two or three days late, we conclude that there was a reasonable excuse for the  
25 Appellant's late payment of VAT for the 11/16 period.

44. The appeal is accordingly allowed and the surcharge discharged.

45. 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  
30 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 CONNELL**

35

**TRIBUNAL JUDGE**

**RELEASE DATE: 22 November 2017**