



TC01493

Appeal number: TC/2011/02441

VAT – default surcharge – electronic return prepared and submitted on final day of extended period – VAT payment initiated the same day once amount known – whether despatched in sufficient time – held, no – whether reasonable excuse for late despatch – held, no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

EYESTAR CONSULTING LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
SUSAN HEWETT**

Sitting in public at Southampton on 8 June 2011

Christopher Lincoln-Jones, Director, for the Appellant

David Lewis, Appeals Unit, HM Revenue and Customs, for the Respondents

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DECISION

1. The Appellant (“Eyestar”) appeals against the imposition of a default surcharge at the rate of 15 per cent, amounting to £692.55, for the period 03/10.

5 *The facts*

2. Mr Lincoln-Jones provided information in the course of his presentation, and was cross-examined by Mr Lewis; we therefore treated Mr Lincoln-Jones’ statements as evidence. Mr Lincoln-Jones also provided certain copy documents. In addition the Respondents (“HMRC”) provided a bundle of documents. From the evidence we
10 make the following general findings; we deal with certain specific findings later in this decision.

3. Mr Lincoln-Jones filed the VAT return for Eyestar electronically on 7 May 2010. His submission of the return was confirmed as having been successful at 09:33:47. The copy in HMRC’s records shows the due date and date of receipt as 7 May 2010.
15 The reason for submission on that date was not specified; see below. Having calculated the VAT balance due to HMRC, Mr Lincoln-Jones initiated the bank payment process.

4. The payment was received by HMRC on 11 May 2010; the bank payment method used was BACS.

20 5. Eyestar had previously been in default for the period 06/09. No tax had been due to HMRC for that period, the tax assessed being a credit balance of £8.16. However, the VAT return had been received by HMRC on 12 August 2009. As a consequence, HMRC had extended the surcharge period previously notified to Eyestar (as a result of earlier defaults). The period of the extended notice was until 30 June 2010, the rate
25 being 15 per cent.

6. On 14 May 2010 HMRC notified Eyestar of a default for the period to 31 March 2010 (ie 03/10).

7. Mr Lincoln-Jones took no action following the receipt of this notification until he received a letter from HMRC’s DM [ie Debt Management] Office dated 9 November
30 2010. He stated:

35 “1. Thank you for [the letter dated 9 November 2010], although I must say it causes me some bafflement. It refers, I think, to an automatically generated letter sent to me in May. This accused me of late payment, I checked my records then and have done so again now to ascertain when funds were transferred and I have a bank receipt of [number] dated 7 May 10.

40 2. I had ignored the reminder as it was obviously generated without human intervention and, as you can see from the above, is obviously a mistake. I do not resent this but would ask that you correct the error so that your system stops sending me these letters.”

8. On 30 December 2010 HMRC's Local Compliance office in Newcastle upon Tyne wrote to explain the balance of £516.09 VAT outstanding to date. The table set out in that letter showed that the surcharge assessment of £692.55 had been debited to Eystar's account with HMRC on 14 May 2010. The return for period 07/10 [which had not involved any default] resulted in a debit of £2,722.73. This increased the debit balance to £3,415.28. A remittance of £2,722.73 had been received on 30 July 2010, bringing the debit balance back down to £692.55. On 4 November 2010 a payment had been authorised in the sum of £176.46, reducing the debit balance to £516.09.
9. On 20 January 2011 Mr Lincoln-Jones wrote to HMRC's Default Surcharge Review Team "concerning a debt that HMRC erroneously believe is owed". He enclosed proof of a bank transfer to HMRC of 7 May 2010. He indicated that he [ie Eystar] was due to pay VAT at the end of the month, and stated that he would deduct the balance shown in HMRC's letter dated 30 December 2010, and that this would save HMRC the trouble of a refund.
10. On 9 February 2011 HMRC's Local Compliance Appeals and Reviews Unit based in Edinburgh responded with the results of the review. The conclusion was that HMRC did not agree that payment was sent or initiated in time to reach HMRC by the due date. Eystar's electronic payment for period 03/10 had not been received until 11 May 2010, whereas the due date for the payment was no later than 7 May 2010. Accordingly, the default for period 03/10 would remain in force. If Eystar still disputed the decision, it had 30 days from the date of the review letter in which to lodge an appeal to the First-tier Tribunal (Tax).
11. On the same date Mr Lincoln-Jones wrote to both HMRC's Default Surcharge Review Team and to HMRC's Local Compliance office in Newcastle to state that there had been no response to his letter dated 20 January 2011. He referred to the most recent VAT payment, which reduced the balance outstanding shown in HMRC's letter dated 30 December 2010, while he awaited HMRC's response.
12. On 25 February 2011 Mr Lincoln-Jones wrote both to the Tribunals Service and to HMRC's Edinburgh office challenging the conclusion of the review letter.
13. HMRC's Edinburgh office responded on 9 March 2011 to Eystar's request (in its letter dated 9 February 2011) for a further review, explaining that HMRC were only permitted to carry out one review for each decision under dispute. The details of the right to appeal and the contact address were repeated.
14. On 12 April 2011 HMRC's Edinburgh office responded to Eystar's letter dated 25 February 2011 "in which you *again* request a further review of the default surcharges applied to your VAT account". This response repeated in bold type the statement that HMRC were only permitted to carry out one review for each decision under dispute and that such review would be based on all the evidence available to the department at that time.
15. Mr Lincoln-Jones replied to that letter on 23 April and explained that the case had gone to HM Courts & Tribunal Service.

16. Eyestar’s Notice of Appeal was dated 27 March 2011 and was received by the Tribunals Service on 29 March 2011. Eyestar explained in subsequent correspondence that it had previously sent to the Tribunals Service a copy of its letter dated 25 February 2011, and questioned why its appeal was considered to have been made out of time.

Decision on application for permission to appeal out of time

17. Eyestar’s explanation for the late submission of the Notice of Appeal form is that HMRC’s review letter dated 9 February 2011 had not stated that an appeal should be lodged with the Tribunals Service on a particular form or where such a form might be procured. Eyestar contended that in good faith an appeal had been lodged in plenty of time, by means of its letter dated 25 February 2011 according to the best information available.

18. At the hearing HMRC did not seek to challenge the appeal on the grounds that it had been made late. However, in the interests of wider publication of the procedural requirements, we feel it appropriate to make comments in respect of this issue.

19. The purpose of requiring notice of appeal to be given on a specific form is to ensure that all parties to appeals are treated on an equal and uniform basis. The Notice of Appeal form and the supporting guidance are available from the “justice” website, on the Appeals page of the Tax Tribunals section. They can also be requested in hard copy from the Tribunals Service Tax office in Birmingham. Completing the official form ensures that all the appropriate information is provided in order to enable the appeal process to be dealt with in the proper way. Attempts to use an informal process can result in difficulty and possibly lack of fairness to parties. It is therefore necessary for the official Notice of Appeal form to be properly completed in accordance with the guidance and submitted within the time limit, namely within 30 days of the HMRC decision against which the applicant seeks to appeal.

20. We do consider that there would be some merit in HMRC correspondence being amended to indicate that the necessary form and guidance should be obtained from HM Courts and Tribunals Service or from the relevant section of the “justice” website.

21. Our decision on Eyestar’s application, which was implicit in our proceeding with the hearing of the substantive appeal, is that despite the delay in submission of the formal Notice of Appeal and the absence of any details at section 6 of that Notice, we consider it to be in the interests of justice for the appeal to proceed notwithstanding that, as a formal matter, it was out of time. Appellants should not assume that such applications will automatically be granted; the view of the particular tribunal considering any such application will be based on the specific circumstances of the applicant in question. The current appeals system is comparatively recent, having taken effect in April 2009, and as it matures there may be less reason for tribunals to accept late appeals based on lack of acquaintance with the proper procedures.

Arguments for Eyestar

22. Mr Lincoln-Jones explained that his business affairs were interfered with by his military commitments. His lifestyle was “a bit chaotic”. He described himself as the only competent member of his organisation.

5 23. The action of filing the return was also the calculation of money owing either way, whether to HMRC or Eyestar. Eyestar’s turnover was just large enough to be within the charge to VAT [ie for Eyestar to be registrable on the basis of its turnover]. The process was for him to fill in the online form, see how much needed to be paid, and then to go to the internet bank account.

10 24. On 7 May 2010 he had carried out the calculation and then immediately made the payment. He commented that he could not get it to HMRC any earlier. He contended that it was unreasonable not to accept that he had paid the tax on the day when he had filed the return.

15 25. He had been sent advice on how to avoid default surcharges. This explained that an extra seven days was allowed for electronic submission. In the third paragraph the note stated that where direct debit was involved, HMRC collected funds three days after the return date. He therefore questioned why it was unreasonable for him to say that the VAT was paid on the day of filing. In the absence of a completed return he would have to guess the amount payable. The note did not state that it was necessary
20 to allow five days for payment to be received by HMRC. He contended that he could not file the return before 7 May 2010. He referred to a letter dated 27 May 2011 which he had sent to a Mr Foster at HMRC’s Belfast Local Compliance Appeals and Reviews Unit office, a copy of which he handed in during the hearing.

25 26. HMRC had argued at the hearing that the return should be submitted earlier so that the funds could reach HMRC in time. If this was the case, why was this not stated in HMRC’s notices and guidance? The return was due on the due date. This was also the date on which the calculation of the VAT due could be performed. Otherwise, Mr Lincoln-Jones could not pay the VAT unless he guessed what was due.

Arguments for HMRC

30 27. Mr Lewis referred to the relevant legislation, ss 59, 59A and 59B of the Value Added Tax Act 1994 (“VATA 1994”), as well as s 71 dealing with reasonable excuse. It was clear that Eyestar had paid late. Eyestar had previously been within the default surcharge regime. The guidance referred to the time required for payments to reach HMRC’s bank account. In the present case the payment had not done so until 11 May
35 2010.

28. HMRC submitted that there was no reasonable excuse for the late arrival of Eyestar’s VAT payment. HMRC’s Notice 700/50 “Default Surcharge” stated at the end of paragraph 3.1:

40 Please remember whether you pay electronically or by cheque you must allow enough time for payment to clear our bank account by the

due date. Contact your bank well before the due date if you are in any doubt about how long the transfer of funds will take.”

29. Mr Lincoln-Jones had referred to not knowing how much VAT to pay until he had completed the return. The normal due date for VAT returns, one month after the end of the VAT period, allowed a full month to complete the return. Mr Lincoln-Jones should have completed it earlier. The “faster payments” service could not be used for payments to HMRC’s account. On behalf of Eyestar, Mr Lincoln-Jones should have allowed three days for the payment to reach that account.

30. Mr Lewis referred to *Slough Motor Co* (1994) VAT Decision 11818. In Eyestar’s case, the period under appeal was its fifth default; it had been in the default surcharge regime since 2005.

31. The surcharge was not excessive; Eyestar should have been aware of the way in which default surcharge was calculated. Instigating the transfer of the funds on the due date did not mean that they would be received on the due date. Eyestar should have made arrangements to ensure that the VAT amount was paid and received on time.

Discussion and conclusions

32. As Mr Lewis indicated, the normal time limit for making VAT returns is by or on the last day of the month next following the end of the period to which the return relates (VAT Regulations 1995, SI 1995/2518 reg 25(1)). However, HMRC are entitled to extend the time limits under which a registered person may submit his returns. A person making payment by electronic means (BACS, Bank Giro Credit Transfer, CHAPS, card payment, National Direct Debit or Online VAT Direct Debit) will receive an automatic extension of seven days to the time limit for both making payment and submitting his return. This is pursuant to a direction made by HMRC in accordance with SI 1995 reg 25A(20).

33. Although the time limits for making the return and making payment are both extended, the obligation on the registered taxable person is to make the electronic payment in time for the cleared funds to reach HMRC’s account before the extended period comes to an end. This obligation is made clear in the VAT Regulations 1995 reg 40(2B)-(2D) (inserted with effect from 1 December 2009 but applying to payments made from 1 April 2010 onwards) when dealing with cheque payments; it is less clear in relation to electronic payments. However, we can see no basis for construing the VAT Regulations differently in respect of different methods of payment, as the underlying policy for traders’ compliance obligations is to ensure that payment to HMRC is made on time. This must denote receipt by HMRC rather than initiation of the payment process by the trader.

34. In any event, the requirement under the VAT Regulations 1995 reg 40(2) and (2A) is as follows:

“(2) Any person required to make a return shall pay to the Controller 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.

5 (2A) Where a return is made or is required to be made in accordance with regulations 25 and 25A above using an electronic return system, the relevant payment to the Controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.”

10 35. Details of the requirements imposed by HMRC pursuant to the direction referred to above are contained in HMRC’s VAT Notices. We have set out above the extract from Notice 700/50 Default Surcharge. We should point out that the version of the Notice from which this is taken is that dated July 2010, which was later than the events resulting in the imposition of the default surcharge on Eyestar. There is a similar statement at paragraph 21.3.2 of Notice 700 (“The VAT Guide”). We consider that these statements, made in VAT notices which all traders should read and take into
15 account, make clear the obligation to ensure that electronic payments reach HMRC on time.

20 36. As a consequence, allowance must be made for the time taken by the banking system for funds to move from the trader’s account and be transmitted into HMRC’s account. It is therefore insufficient for funds merely to have left the trader’s account; this does not amount to payment to HMRC. The funds must be received by HMRC within the extended time limit; failure to ensure this may result in the trader falling within the default surcharge regime.

25 37. In order to comply with its payment obligations, the trader needs to pay the amount of VAT actually due. This requires a proper calculation of the amount due. We accept Mr Lincoln-Jones’ argument that in practical terms this requires completion of the VAT return in order to establish what is due from the trader to HMRC, or what is due from HMRC to the trader. However, we do not accept his argument that, as the final date for submission of the electronic return is seven calendar days after the end of the month following the VAT period, this prevents
30 calculation of the VAT before that stage and therefore makes it impossible to initiate the payment process until that date. The extended time limit for the return is the final date for its submission, not the only or required date.

35 38. The period covered by the return ends one month and seven calendar days before that final date. This gives a significant period for the necessary information to be collected and checked and the return to be prepared and finalised for submission. We are aware that many traders carry out this process well before the relevant time limit has expired. Although submission of the return on the final date meets the obligation in respect of its submission, it does not enable the correctly calculated amount of VAT due to be paid in such a manner as to give time for it to reach HMRC’s account
40 by the due date.

39. Section 59(7) of the Value Added Tax Act 1994 provides:

“(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—

5 (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,

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

10 40. Thus there are two separate questions to be considered in Eyestar’s case. The first is whether the VAT shown on the return was despatched at such a time that it was reasonable to expect it to have been received by HMRC within the extended time limit of seven calendar days after the normal due date. If the answer to this first question is no, then was there a reasonable excuse for the VAT not having been
15 despatched in time?

41. The day on which Mr Lincoln-Jones gave instructions to Eyestar’s bank to make payment was the seventh day after the normal due date. As a result, the only way in which payment to HMRC could have been effected so as to reach HMRC on time was some form of instantaneous transfer, such as a CHAPS transfer. The actual method
20 used as a result of Mr Lincoln-Jones’ internet instruction to the bank was BACS, which is not an instantaneous method. The information sheet entitled “Advice to help you avoid a Default Surcharge”, which we find that Mr Lincoln-Jones would have seen previously following earlier defaults of Eyestar, refers to one of the electronic payment methods as “BACS Direct Credit (via telephone banking, internet banking,
25 or in person at the bank) . . .” It also indicates, after explaining that payments due on the seventh day need to be made earlier where that day falls on a weekend or bank holiday (in which case the payment must reach HMRC’s account by the last working day beforehand) that the trader should: “Check with your bank to see how long it will take them to process payments.” There was no evidence that Mr Lincoln-Jones had
30 made any such check with the Appellant’s bank.

42. We therefore find that the VAT due from Eyestar to HMRC in respect of period 03/10 was not despatched at such a time that it was reasonable to expect it to reach HMRC’s account within the extended time limit.

35 43. Did Eyestar have a reasonable excuse for the late despatch of the VAT? We do not think so. Mr Lincoln-Jones did not explain why his calculation of the VAT due from Eyestar could not be performed until the final due date for submission of the return. As we have pointed out above, that date is one month and seven days after the end of the VAT period. Without further explanation, none having been given in the course of the correspondence or before us, we cannot see any reason for the
40 calculation having been made at the latest possible stage, given the need to ensure that the VAT reached HMRC’s account in time.

44. Mr Lincoln-Jones did refer to his military commitments, which involved him being absent from his business for periods of two weeks at a time. When Mr Lewis

asked him whether he had been away between March and May 2010, Mr Lincoln-Jones was unsure whether he had. In the absence of evidence to suggest that his military commitments had prevented him from dealing with the VAT return at an earlier stage, we find that they had not. His insistent response was that he always used the seventh day for making the return.

45. Mr Lincoln-Jones referred to passages in the VAT Notices and other documents suggesting that VAT would be collected three days after the seventh day. However, this fails to take account of the full information set out by HMRC. Notice 700/50 Default Surcharge at paragraph 3.1.1 states:

10 “If you pay by:
 an electronic method other than direct debit you will normally
 get up to seven extra calendar days in which to submit your
 return and payment
 Online Direct Debit you will normally get an extra seven
15 calendar days to submit your return. We will collect payment
 from your bank account on the third bank working day after
 the extended due date for your return.
 If the due date falls on a weekend or bank holiday, you must ensure
20 that cleared funds reach our bank account by the last bank working day
 beforehand.”

46. The reference to the further three days is clearly restricted to payment made by Online Direct Debit, which was not the method adopted by Mr Lincoln-Jones on behalf of Eyestar. This extract also makes clear that HMRC’s requirement is for cleared funds to reach their account by the final day of the extra seven day period, or before then if that day is not a business day.

47. We therefore hold that Eyestar was in default for VAT period 03/10 because the VAT due to HMRC was not despatched at a time and in a manner that it was reasonable to expect that it would be received by HMRC within the appropriate time limit. We further hold that there was no reasonable excuse for this default. Eyestar’s appeal is therefore dismissed.

48. We would like to make comments on the format of the explanation at the end of paragraph 3.1.2 of Notice 700/50. The final section of this paragraph is as we have set out at paragraph 28 above. However, this passage is part of paragraph 3.1.2 of the Notice, headed “3.1.2 Paying by cheque.” To make the position clear to traders, we recommend that it should be set out under a separate paragraph number and heading, such as “Ensuring that payments reach us in time”. It might also be advisable for the passage to be printed in bold type.

Right to apply for permission to appeal

49. 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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JOHN CLARK

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TRIBUNAL JUDGE
RELEASE DATE: 28 July 2011

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