



TC02001

Appeal number: TC/2011/8183

VAT – default surcharge – reasonable excuse, reasonable expectation that payment would be received on time

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GARNMOSS LIMITED T/A PARHAM BUILDERS Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
SUSAN HEWETT**

Sitting in public in Southampton on 25 January 2012

Mr Richard Parham, director of the appellant, for the Appellant

Mrs Naomi Davey HM Revenue and Customs, for the Respondents

DECISION

1. The appellant appeals against default surcharges imposed by HMRC in respect of the periods 12/10 and 03/11 for the failure to pay VAT relating to those periods on time.

2. The appellant is a firm of builders and glass merchants operating in Chichester. It is a family business. Mr. Richard Parham is a director. His sister also works in the business. Miss Sally Potheary deals with the accounting for the business. Mr Parham and Miss Potheary live together. We heard oral evidence from Mr Parham and Miss Potheary.

3. During the course of the hearing Mr. Parham made a number of heartfelt complaints about HMRC and the operation of its systems. Our duty however is to determine the appeal against the surcharges and we have no power to deal with those complaints. This decision thus relates solely to the question of whether default surcharges are exigible in respect of the relevant periods.

4. A person is liable to a default surcharge only where the requirements of section 59 VAT Act 1994 are satisfied. A default surcharge may be assessed only if the taxpayer defaults in a "surcharge period". A surcharge period may be brought into existence only if a taxpayer defaults and HMRC serve a notice creating a surcharge period (see section 59(2) and (4)). Such a period runs for 12 months from the period of the default but may be extended if the taxpayer defaults in respect of a VAT period ending within the surcharge period and HMRC serve an extension notice extending the period to the end of 12 months after the period of that later default. And so on (see section 59(3) VATA 1994).

5. The amount of the surcharge is prescribed by section 59(5). It is a percentage of the outstanding VAT for the period of default (or £30 if there is no outstanding VAT). That percentage is 2%, 5%, 10% or 15% according to whether the default is the first, second, third or fourth or subsequent default in the payment of VAT in the (extended) surcharge period.

6. Section 59 contains no provision permitting a reduction in the percentage charged or any mitigation of the charge. However, section 59(7) provides:

“ If a person who apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners, or, on appeal, the 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 dispatched 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 dispatched,

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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served)."

5 7. A "default" is a failure to deliver a VAT return on time or a failure to pay the VAT shown on the VAT return on time.

8. These requirements mean in this particular case that the tribunal needs to consider what happened in relation to five VAT periods: for the surcharges assessed depend upon a surcharge period existing, and therefore on the occurrence of a default which enabled the service of a surcharge liability notice; and the amount of any surcharge will depend upon the number of relevant defaults. Therefore we now consider period by period whether there was a default, whether the appellant could rely upon section 59(7) to expunge the default, and what documents were served by HMRC on the Appellant. We draw our conclusions from this exercise in the final section of this decision.

1. The period 09/09.

9. In this period the appellant delivered its VAT return on time and paid all but £39.50 of the £17,013.39 of VAT which was shown as due on that return on time. It paid the remaining £39.50 on 13 October 2010 following a demand from HMRC.

10. Miss Pothecary explained why the £39.50 had not been paid. A journal entry had been misposted on the accounting system. As a result the VAT account showed an overpaid balance of £39.50. Miss Pothecary concluded that in the past £39.50 more had been paid to HMRC as VAT than should have been paid. She therefore deducted that sum from the amount shown as payable on the 09/09 return but did not adjust the return (because it did not relate to amounts paid). By deducting £39.50 from the VAT paid it made her accounting entries balance. She thought that HMRC would understand what had happened. However it seems that the £39.50 was not an overpaid amount but arose as a result of the earlier missed posting. Thus less VAT was paid than should have been.

11. The Act provides that a person is to be regarded as being in default if he fails to pay the amount of VAT shown on the return as payable by him. The appellant therefore defaulted in respect of this period. The question for us is whether the appellant had a reasonable excuse.

12. 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 (7).

13. Following the default HMRC served a surcharge liability notice upon the appellant. This was received by the appellant. It specified a surcharge period lasting

until 30 September 2010. Since we find that the default was not expunged we conclude that the notice was validly served and that a surcharge period began to run from the date of that notice.

2. The period 12/09.

5 14. This period the appellant submitted its return on time but was one day late in the payment of the VAT shown as due on that return. It paid the VAT electronically. The requirement to the bank was keyed into the appellant's computer at 7:12pm on Thursday 4 February 2010. The payment arrived at HMRC's account on Monday, 8 February 2010.

10 15. Mr. Parham agreed that the payment was late but asked us to consider the fact that Miss Potheccary's father died on 21 December 2009 and that his funeral was on 6 January 2010

15 16. Mr Parham and Miss Potheccary said that they had expected that the payment would be made to HMRC on the same day they had given their instructions to the bank and not several days later. At that time they could not make CHAPS payments through their bank.

20 17. Mrs Davey pointed to HMRC's guidance literature which places the obligation clearly upon a taxpayer to ensure that his money gets to HMRC's account on time. She also referred to a letter sent to the appellant in 2005 which asks the taxpayer to note that payments "**must** reach HM revenue & Customs account on or before the seventh day. However if the seventh day falls on a weekend or a bank holiday we must receive payment by the last working day beforehand. You are therefore advised to check with your bank to see how long it takes them to complete any necessary transactions".

25 Commentary

30 18. Although we accept that the effects of the death of a near relative are serious and long-lasting, Miss Potheccary's father's funeral was some four weeks before the day on which the instructions were given to the bank. It seems to us that after this interval a bereavement would not on its own constitute a reasonable excuse for failure to send monies on time.

19. We believe that the warning given by HMRC to the taxpayer in 2005 was too long ago to be counted against the taxpayer five years later when making an online banking payment.

35 20. Had Mr. Parham and Miss Potheccary been told by the bank in unequivocal terms that their payment would arrive 24 hours after their instruction, we would have found that the company would have had a reasonable excuse for late payment or that subsection 59(7)(a) applied. But as we understand it, their expectation that the payment would be made on the next day was not based on third-party confirmation or their own experience. We ask ourselves whether it was reasonable to expect the
40 payment to arrive on the next day: no doubt many people would have thought so, but

on balance we think that the reasonable person would have checked with the bank first. On balance therefore we do not think that the company had a reasonable excuse or a reasonable expectation that the payment would arrive on time.

21. We therefore conclude that the default in this period cannot be expunged and therefore counts towards the number of defaults in the period and is capable of supporting the issue of a surcharge liability extension notice.

3. The period 03/10.

22. In this period the VAT shown on the return was paid on time but HMRC said the first time they received the return was on 2 (do we need a specific date here) June 2010, some three weeks late. Miss Pothecary says that in this period she sent in a paper return and then at a later date sent in an online return. She showed us a copy of the paper return she had sent to HMRC. That return, she told us, had been posted on 29 April 2010. HMRC's records show no indication of receipt of the return.

23. Mrs Davey showed us HMRC's computerised record. Had a return been received she told us that there would have been an entry on this record. If the paper return had been received and rejected she said that an error record was likely to have been produced.

24. We accept Mrs Davey's evidence that had the return been received by HMRC it was likely that an entry would have been made in its computer record. Miss Pothecary's evidence that she posted the return on 29 April 2010 was supported in our view by a copy of the paper return which had a slightly different figure in box 3. That suggested to us that it was a genuine copy of the return. On the other hand April 2010 was a long time ago and it is easy at that distance to confuse one action with another.

25. On balance we are not persuaded that the return was in fact posted on that date.

26. As a result it seems to us that section 59(7)(a) does not apply in relation to this period, and the company is therefore to be treated as having defaulted in it. As a result any surcharge liability extension notice served in respect of this period is to be treated as effective.

4. The period 12/10.

27. For this period the company's VAT return was submitted online and on time and was received by HMRC on 3 February 2011. If payment was to be made by electronic means it had to reach HMRC's account by 7 February 2010. Miss Pothecary used the company's online banking service to arrange a CHAPS payment. She keyed in instructions at 5:03pm on 7 February 2011. However, the bank's deadline for CHAPS payments was 3:50pm. The instruction was therefore executed on the next day and the payment received late.

28. We were shown a printout of the instruction given by Miss Pothecary to the bank. It showed that the effect of the instruction would be that the payment would be made on 8 February. Miss Pothecary told us that when keying in the instruction she

either had not seen this or that it had appeared only on the printout and was not on the screen.

29. Mr. Parham submitted that it was reasonable for the company to expect that an instruction for a CHAPS payment would be executed on the date it was given and thus that the default should be expunged by section 59(7)(a). Mrs Davey said that a reasonably conscientious businessman would not have made this mistake or expected the money to be received on time.

30. We agree with Mrs Davey. It is reasonable to expect that if it is important that payment is received by a particular date the sender will check to ensure that its method of payment will achieve that objective.

5. The 03/11 Period

31. The return for this period was submitted online on 21 April 2011. Payment was due on 7 May 2011, which was a Saturday. Miss Potheary gave instructions to the bank online to make a CHAPS payment of the VAT on 6 May 2011. She keyed in the instructions at 4:07pm. The printout she obtained indicated that the payment would be made on 9 May 2011. The deadline for same-day payment was 3:50pm (that deadline also appeared in the printout for the previous February payment).

32. Mr. Parham says that the company had a reasonable excuse for the delayed payment or could reasonably have expected the payment to have been received on time. Mrs Davey notes that the printout that Miss Potheary obtained indicates that she had used the online banking facility on 5 May at 5:45 PM: if instructions had been given at that time then the payment would have arrived on time. It would be reasonable to have done so.

33. We agree with Mrs Davey. A reasonable person would have checked on the banking deadline and ordered the payments sooner. It was not reasonable to expect that the payment made after the deadline would arrive on time. We find that section 59 (7) does not apply and the default is not expunged.

The Service of Surcharge Extension Period Notices

34. The appellant accepted that the notice had been given creating a surcharge period in respect of the 09/09 period. As a result a surcharge period was created which ended on 30 September 2009. The defaults for 02/09 and 03/10 fell within that period. But the defaults for 12/10 and 03/11 fell within a surcharge period only if that initial period had been extended by a surcharge liability extension notice given to the taxpayer. In the absence of such extension no surcharge can arise under section 59.

35. HMRC said that on 12 February 2010 and 14 May 2010 notices were served on the taxpayer which extended the surcharge period respectively to 31 December 2010 and 31 March 2011.

36. If, and only if, they were so sent can the defaults for 12/10 and 03/11 give rise to a surcharge liability.

37. In correspondence with HMRC before the appeal, and before us, Mr. Parham asserted that no such notices had been received. Miss Pothecary told us that she (or Mr. Parham's sister) opened the post. Anything relating to HMRC was kept for, or given to, her. Her file of HMRC correspondence contained the letter of 13 November 2009 advising of the surcharge period arising from the 09/09 default but contained nothing thereafter until October 2010 except for a letter received on 6 June 2010 advising of the cancellation of the 03/10 surcharge stating that "the surcharge period remained extended as advised previously."; (we find it odd, if the extension notices had not been received, that this letter did not provoke some questioning).

38. Mrs Davey showed us printouts from HMRC's computer records which indicated that these surcharge liability extension notices had been sent to the taxpayer. We asked Mrs Davey how HMRC's computer record was maintained and what controls there were over postings to it. She told us that postings could be made only by HMRC's officers in Southend, but she could not give us any evidence about how and when postings were made and what controls there were over postings.

39. Mrs Davey pointed to the fact that the taxpayer had received the letters of 13 November and 6 June which were recorded on the record, and that it had not changed its address. But that was evidence that what was sent was on the record rather than that what was on the record was what had been sent.

40. Thus there was no evidence before us which indicated that a posting in the computer record meant that a letter had in fact been sent out rather than, for example, that instructions had been given to send a letter (other than the assertions in other officers' letters that the record indicated that a letter had been sent).

41. We have to decide on the evidence before us whether, on the balance of probabilities, the notices were sent. The evidence that they were not was that of Miss Pothecary, but we thought it was possible that the letters were received but misfiled or lost. On the other hand we had a computer printout which one might expect to be accurately kept, but in relation to which we had no evidence linking the entry to the posting of a letter.

42. On balance, on that evidence, we are not satisfied that the letters were posted and therefore we are not satisfied that the notices were served on the taxpayer.

43. As a result the surcharge period cannot be treated as extended to cover the defaults for 12/10 and 03/11 and the appeals must be allowed in respect of those periods.

Conclusion.

44. Although we have concluded that there were defaults in each of the five periods which cannot be expunged by virtue of section 59(7), a surcharge liability arises only if a surcharge period is in existence. Whilst a surcharge period was created following the 09/09 default there was insufficient evidence for us to conclude that that period was extended by notices served on the taxpayer thereafter. As a result no surcharge liability arises.

45. The appeal is allowed

46. 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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CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 27 April 2012

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