



TC04141

Appeal number: TC/2014/03523

VAT default surcharge - VAT not paid on time due - return filed one day late - direct debit therefore applied one day late - whether a reasonable excuse – no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LEWIS SITE SERVICES LTD

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 9 October 2014 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 24 June 2014 and HMRC's Statement of Case received by the Tribunal service on 21 July 2014.

DECISION

The Appeal

1. Lewis Site Services Limited (“the Appellant”) appeals against the Respondent’s decision to impose a VAT default surcharge in respect of the Appellant’s failure to submit, for VAT period ended 03/14, by the due date, payment of the VAT due.

2. The late payment surcharge imposed is £439.65 representing 5% of the VAT paid late of £8,793.06.

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

Background

4. The Appellant had previously defaulted in period 08/13 when a VAT surcharge liability notice was issued. As that was a first default, the surcharge was 0%. The Appellant defaulted for a second time in respect of VAT period 12/13 and a 2% surcharge was imposed.

5. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Section 59 of the VATA 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. The Appellant paid VAT on a quarterly basis and usually paid its VAT by direct debit. When payment is made electronically, HMRC allows additional time for payment, and pursuant to Regulation 40(4) of the VAT Regulations 1995 allows an additional seven days after the end of the calendar month when payment would normally fall due (together with a further three days when the VAT is collected by direct debit). Limitations apply if the due date falls on a weekend or a bank holiday, in which event the due date defaults to the last previous working day.

7. 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. In respect of the 03/14 period under appeal, the statutory due date for payment by electronic means was 7 May 2014, subject to a further three day extension when payment was made by direct debit. Payment should therefore have been made by 10 May 2014. The VAT return was received one day late on 8 May 2014, and the payment was received on the 13 May 2014.

9. 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 : -

10 ‘(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 –

15 (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

20 (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 ..’

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.

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

30 ‘(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.’

12. 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.

Appellant’s Case

13. The stated grounds of appeal in the Appellant’s notice of appeal were:

 "We notified our bank with the amount of VAT to pay and it should have been paid but was apparently 1 day late through no fault of ours."

40 14. The Appellant states in a letter received by HMRC on 4 June 2014:

"We refer to your recent letter regarding surcharge which we disagree with. This money was taken out of our bank on the day it was due, we pay our vat electronically so we don't agree to any surcharges. Please amend your records accordingly."

HMRC's Case

5 15. Period 03/14 had a due date of 7 May 2014 for electronic VAT Returns. The Appellant pays its VAT by way of direct debit instruction. The Appellant's VAT Return was received after the due date, on 8 May 2014. As a consequence of late receipt of the return, the direct debit payment was delayed accordingly. Payments by direct debit are collected automatically from the Appellant's bank account on the third
10 working day after the extra seven calendar days following the standard due date. The Appellant's VAT payment reached HMRC's bank account on 13 May 2014.

16. As the VAT Return and Payment were both received after the due dates the Surcharge Liability Notice was issued. The Respondents view is that the surcharges have therefore been correctly issued in accordance with s 59(4) of the VAT Act 1994,
15 payment having been received by HMRC after the due date.

17. HMRC contend that the Appellant should have been aware of the potential financial consequences of a default, having been in the default surcharge regime from 08/13 and having defaulted on two previous occasions.

18. The VAT acknowledgement form would have advised that payment was due
20 electronically and would have given the dates that it was due to be made by. Again, it would have said:

25 "...Before making an electronic payment please contact your bank or building society to check the services available to you, any daily value limits and the latest cut off times for making payment. For more information on making electronic payments see the 'How to pay' guide on the HMRC website."

19. Information when using the CHAPS Payment method is provided on the HMRC website.

20. Included within the notes on the reverse of the previous Surcharge Liability Notices is the following standard paragraph:

30 "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."

21. With effect from the period 01/13 the Surcharge Liability Notice V160 advises
35 a trader how the surcharges are calculated and the percentages used. Subsequent Surcharge Notices advise the trader of the percentage used to calculate the current surcharge, if one has been issued, and/or the percentage which will be used in calculating the surcharge for any subsequent default.

22. As the Appellant has not made reference to non-receipt of the earlier surcharge notices HMRC contend that it can be concluded that these were received by the Appellant.

5 23. The fact that the previous default surcharge notices did not contain a financial element may be relevant. The Appellant may not have realised they were default surcharge notices because of this, whereas they immediately recognised the notice for period 03/14 as it included a financial element.

10 24. Period 08/13 had a due date of 7 October 2013 for an electronic VAT Return. The Appellant pays their VAT by way of direct debit instruction. As the VAT Return and payment was not received by the due date a "VAT Notice of assessment of tax and surcharge liability notice" was issued on 11 October 2013. The Appellant's VAT Return was received after the due date on 15 October 2013. As a consequence of late receipt of the return the direct debit payment was delayed accordingly. Payments by direct debit are collected automatically from the Appellant's bank account on the third
15 bank working day after the extra seven calendar days following the standard due date. The Appellant's VAT payment reached HMRC's bank account on 18 October 2013.

20 25. Period 12/13 had a due date of 7 February 2014 for an electronic VAT Return. The Appellant pays their VAT by way of direct debit instruction. As the VAT Return and payment was not received by the due date a "VAT Notice of assessment of tax and surcharge liability notice extension" was issued on 14 February 2014. The Appellant's VAT Return was received after the due date on 17 February 2014. As a consequence of late receipt of the return the direct debit payment was delayed accordingly. Payments by direct debit are collected automatically from the Appellant's bank account on the third bank working day after the extra seven calendar
25 days following the standard due date. The Appellant's VAT payment reached HMRC's bank account on 20 February 2014.

26. HMRC maintain that the surcharge in respect of the period 03/14 has been correctly issued in accordance with VATA 1994 s 59 (4), payment having been received after the due date.

30 27. The Appellant registered for VAT in January 2013. The Appellant submitted an Online Direct Debit Instruction for VAT with an effective date of 10 April 2013.

28. HMRC Public Notice 700 The VAT Guide s 21.3.1 (APRIL 2012 onward) states:

35 *"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, then HMRC will automatically collect your payment on the third
40 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).

5 *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: 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."*

10 29. HMRC's web pages advise under the heading "Deadlines for submitting your VAT Return" that:

"You must submit your return so that HMRC received it by the due date. This deadline is shown on your online return and is normally one calendar month and seven days after the end of your VAT period."

15 HMRC internet advised for the "Accounting period ending 31 March 2014" the "Deadline for VAT Return submitted online" is "7 May 2014".

<http://www.hmrc.gov.uk/vat/managing/returns-accounts/deadlines.htm>

20 30. HMRC's VAT payment deadline Calculator advises for the period ending 31 March 2014 - Paying by Direct Debit. "The Direct Debit will be collected from your account on 12 May 2014."
<http://www.hmrc.gov.uk/tools/vatpaymentsdeadline/calculator.htm>

25 31. When the Appellant submitted their VAT Returns electronically the Appellant would have received an e-VAT acknowledgement which states "*Your VAT Return has been successfully submitted.*" The acknowledgement advises the date the VAT due will be debited from their bank account.

32. HMRC maintain that for period 03/14, the VAT Return was received one day late. As a result of the VAT Return being received late the VAT payment by direct debit was also received one day late.

30 33. HMRC maintain the due date for period 03/14 was 7 May 2014. Had the return been received on time the payment would have been taken by HMRC on 12 May 2014. The Appellant's payment was received by HMRC on 13 May 2014. Because the VAT return was received one day late, on 8 May 2014, this delayed the direct debit payment by one working day.

35 34. Public Notice 700/50 (December 2011 and July 2013) s 6.3 (the notice represents HMRC's policy and understanding of the relevant legislation) states that HMRC consider that genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses for surcharge purposes.

35. HMRC maintain the lateness of a return or payment is largely a question of fact and once it occurs a surcharge accrues. The length of the delay is immaterial. The surcharge applies even if payment is one day late.

5 36. The VAT Act 1994 s 70, mitigation of penalties, is not engaged in respect of surcharges under s 59 - the rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount due to mitigating circumstance per VAT Act 1994 s 70.

37. The Default Surcharge of £439.65 for the period 03/14 is less than 0.8% of the Total Value of Sales net of VAT £56,489.00.

10 38. HMRC contend that the Appellant, having been registered for VAT since January 2013, would have been familiar with the due date for the VAT Return to be received by HMRC in order to collect the VAT payments by direct debit on time.

15 39. HMRC further contends that the Appellant has not provided any grounds that can be considered as reasonable excuse. HMRC maintain that the Appellant did not take appropriate or sufficient steps to ensure that they met their VAT payment obligations and the default surcharge was a direct result of the late submission of the Appellant's VAT Return. The Directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

Conclusion

20 40. The Appellant was clearly aware of the due date for payment of its VAT and the potential consequences of late payment.

41. 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.

25 42. 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, the Appellant would not have avoided the circumstances which led to the failures.

35 43. The due date for period 03/14 was 7 May 2014. Had the return been received on time the payment would have been taken by HMRC on 12 May 2014. The Appellant's payment was received by HMRC on 13 May 2014. Because the VAT return was received one day late, on 8 May 2014, this delayed the direct debit payment by one working day. The Appellant would have received an e-VAT acknowledgement which states "Your VAT Return has been successfully submitted". The acknowledgement advises the date the VAT due will be debited from their bank account, and from that the Appellant would have been able to see that payment would be made late. The
40 Appellant did not take sufficient steps to ensure that they met their VAT payment

obligations. The default surcharge was a direct result of the late submission of the Appellant's VAT Return.

5 44. In the Tribunal's view, for these reasons and those argued by HMRC, the burden on the Appellant of establishing that a reasonable excuse exists for the late payment of its VAT for period 03/14 has not been discharged

45. The appeal is accordingly dismissed and the VAT default surcharge of £439.65 is confirmed.

10 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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MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 19 November 2014

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