



TC04438

Appeal number: TC/2015/00009

*VAT – default surcharge – section 59 VATA 1994 – whether reasonable
excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Sandland Packaging Ltd

Appellant

- and -

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

**TRIBUNAL: JUDGE VICTORIA NICHOLL
 MR HENRY RUSSELL OBE**

Sitting in public at Priory Courts, Birmingham B4 6DS on 1 April 2015

Martin Hickman in person for the Appellant

Philip Jones, Higher Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by the Appellant (“the Company”) against a default surcharge imposed by the Respondents (“HMRC”) in respect of the 07/14 period on 12 September 2014 for £4933.31.

The Facts

2. Mr Hickman is a director of the Company and gave evidence that we accepted. The Company had experienced cash flow problems as a result of the general downturn in trade and had not been able to make its VAT payments in full for some time prior to the 07/14 period. Mr Hickman had made calls to HMRC on a number of occasions over the previous year to ask for time to pay VAT. On 9 June 2014 HMRC refused Mr Hickman’s latest time to pay request due to the large number of previous payment promises and because future compliance was not assured. Mr Hickman did not call HMRC in relation to payment for the 07/14 period as the Company’s finances had improved by that time and it had funds to pay the VAT on time.

3. The schedule of defaults in 2014 shows that the payment for the 01/14 period was made late, by CHAPS, in two instalments on 19 and 28 March 2014. The surcharge liability notice was issued on 14 March 2014 notifying the directors of the consequences of further defaults during the surcharge period. On 13 June 2014 HMRC advised the Company that the direct debit payment instruction had been cancelled and that payment for the 04/14 period should be made immediately. The payment for the 04/14 period was made late, by CHAPS, in two instalments on 11 and 17 June 2014. A surcharge liability notice extension was issued on 13 June 2014 and, as this was a second default in the surcharge period, the charge was calculated at the rate of 2%. On Friday 5 September 2014 the Company filed its VAT return for the 07/14 period but the payment of the VAT due was not made until 9 September 2014. The payment was made electronically by CHAPS. As this was the third default in the surcharge period a surcharge liability notice extension was issued on 12 September 2014 and the surcharge was calculated at the rate of 5%.

4. The Company’s VAT payments had previously been made by a member of its accounts staff but, sometime before the payment for the 07/14 period was due, the member of staff left the Company and Mr Hickman took charge of making the VAT payments. The Company had the funds to pay the VAT in September 2014 and Mr Hickman intended to make the payment early. He believed that the Company had until 10 September 2014 to pay the VAT and made the payment by CHAPS on 9 September 2014. Following receipt of the surcharge notice for the 07/14 period Mr Hickman wrote to HMRC in a letter received on 6 October 2014. The letter noted that the Company was “aware that our payment record has not been 100%, but in this instance we paid a day early. The payment was made by chaps on the 9th, and we understood that if payment was made this way you had a further 3 days to pay.” HMRC treated this letter as a request for a review. The default surcharge was

reviewed by HMRC on 12 November 2014, and exceptionally on a second review on 24 November 2014, but both reviews concluded that the penalty should be upheld.

5. The Company had been provided with an information sheet of “Top tips on how to avoid VAT surcharges” under cover of letters dated 7 August 2012 and 28 July 2014. These sheets noted that “Paying by electronic transfer gives you an extra seven days to pay...If your due date falls on a bank holiday or weekend, your payment must clear HMRC’s bank account before then”. The sheet goes on to note that CHAPS and Faster Payments are the only method of same day payment and that other methods take at least three working days to reach HMRC’s bank account. The sheets also note that paying by direct debit gives you “even more time to pay. A Direct Debit mandate must be in place before submission of your online return.”

The Law

6. Section 59(1) of the Value Added Tax Act 1994 (“VATA 1994”) provides that a taxable person is in default if that person has not submitted a VAT return, or if HMRC have not received the amount of VAT shown on the return as payable, on or before the due date for the accounting period in question. Where a person is in default under section 59(1) VATA 1994 HMRC may issue a surcharge liability notice (“SLN”) on that person under Section 59(2) VATA 1994. The SLN notifies the taxable person that a liability to a surcharge will arise if the person defaults again during the surcharge period of one year from the end of the accounting period in respect of which the SLN is issued. The surcharge period is extended on each subsequent default to run for one year from the end of the latest accounting period in respect of which the person is in default.

7. The amount of the surcharge liability is the greater of £30 and the specified percentage of the person’s outstanding VAT for the accounting period. The specified percentage is 2% in respect of the first accounting period in respect of which the taxable person is in default in the surcharge period, 5% in respect of the second, 10% in respect of the third and 15% in relation to each such period after the third.

8. Section 59(7) VATA 1994 provides that a person who would otherwise be liable to a surcharge is not and is treated as not being in default for the accounting period in question if HMRC or, on appeal, a tribunal is satisfied that there is a reasonable excuse for the VAT not having been paid by the due date. Section 71 VATA 1994 specifies that an insufficiency of funds to pay and reliance on any other person to perform a task is not a reasonable excuse.

35 Submissions by the parties

9. Mr Hickman accepted that the Company had been late in making payment of its VAT for the periods 01/14 and 04/14. He also accepted that although he had intended to pay the VAT for the 07/14 period one day early, it had also been paid late. Mr Hickman claims that this was a genuine mistake as he believed that the VAT was due on or before 10 September 2014 and so he arranged a CHAPS payment on 9 September 2014. Mr Hickman considers that this genuine misunderstanding on his

part should be regarded as a reasonable excuse for the VAT not having been paid in time to be received by HMRC within the appropriate time limit.

10. Mr Jones, for HMRC, took the Tribunal through the relevant legislation in Sections 59 and 71 VATA 1994 and the terms of HMRC's discretion, as set out in VAT Notice 700, to allow extra time for both filing and payment when these are carried out by electronic means. Under this discretion taxable persons using electronic filing and payment are given a further seven days after strict limit of the end of the calendar month following the end of the accounting period covered by the return. The relevant passage states:

10 “Paying by an approved electronic method will give you up seven extra
calendar days to submit your return and pay your Vat...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.
15 (The exception to this is online Direct Debit (DD) – if you pay by DD,
then HMRC will automatically collect your payment on the third 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...”

11. Mr Jones submitted that this wording in VAT Notice 700 makes clear that electronic payment gives an extra seven calendar days, but that payment by direct debit gives a further three days as payment is sought on the seventh day and takes three days to clear. As the Company did not have a direct debit arrangement in place this ten day extension did not apply to the Company. Further, the Company had not made a request to defer payment before the due date for this payment and no time to pay arrangement was in place.

12. Mr Jones concluded by noting that the Company is not new to VAT. It was given specific advice several years ago in connection with a previous default surcharge period. Mr Hickman had called and written to HMRC on a number of occasions and most recently in relation to the 04/14 default which he claimed was due to cash flow problems. That default decision was reviewed and a copy of the “Top Tips on how to avoid VAT surcharges” information sheet was enclosed with HMRC's letter advising that it did not accept that the Company had a reasonable excuse for late payment in respect of the 04/14 period.

13. Mr Jones conceded that the Company had obviously made an attempt to set up a direct debit in 2014 but HMRC wrote to the Company on 13 June 2014 and 24 June 2014 to inform them that the Direct Debit instruction had been cancelled. If the Company had carried out a simple Google search for “when is my VAT due” for the 07/14 period the answer of 5 September 2014 would have come up within a few clicks that would have taken less than a minute. The VAT payment deadline calculator only requires the month and year of the end of the accounting period in question to be entered and the method of payment to calculate the date. Even if Mr Hickman had clicked on direct debit instead of CHAPS the answer would have said that the last date to set up a direct debit was 3 September 2014.

Discussion

14. The only issue in this appeal is whether the Company had a reasonable excuse within the meaning of sections 59(7) and 71(1) VATA 1994 for not having paid the VAT for the 07/14 period on time. The Company did not claim that the default was due to insufficiency of funds or an accounts employee leaving, and we found that these did not cause the late payment in any event. The sole reason for the payment being late was Mr Hickman's genuine mistake about the due date for payment by CHAPS. But the test is not whether the taxpayer made an honest and genuine mistake about the date for payment, but whether it had a reasonable excuse for the late payment.

15. In considering whether the Company had a reasonable excuse we applied the test as set out by Judge Medd QC in *The Clean Car Co Ltd v C&E [1991] VATTR 234* where he said:

“the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

16. In this case Mr Hickman had spoken with HMRC on a number of occasions about the payment of VAT and had received information and literature explaining the due date for payment. We accepted that Mr Hickman had understood from this that the payment had to be received by HMRC by the seventh day of the month and that an extra three days, making a total of ten days, was given for a type of electronic payment. However, he did not exercise due diligence or give proper regard to the fact that the extra three days was only for direct debit payments when he knew that the Company would pay by CHAPS in September 2014. We found that this mistaken understanding was not a reasonable excuse for the late payment.

17. We noted that the penalty was harsh given that Mr Hickman had intended to pay the VAT on time but, as confirmed by the decision of the Upper Tribunal in *HMRC v Total Technology [2012] UKUT 418 (TCC)* “the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed”. The question for the tribunal is whether the actual penalty is disproportionate in all the circumstances and, on the facts of this case, we find that it is proportionate.

Decision

18. For the reasons set out above, we have decided that the Company did not have a reasonable excuse for its failure to make the payment for the 07/14 period on time. The Company was liable to pay the default surcharge and the appeal is dismissed.

19. 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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VICTORIA NICHOLL

TRIBUNAL JUDGE

RELEASE DATE: 20 May 2015

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