



**TC04529**

**Appeal number: TC/2014/01743**

*VAT default surcharge - insufficiency of funds – payment of VAT one day late - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WOODFIELD TECHNOLOGIES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER: SUSAN HEWETT**

**Sitting in public at Fox Court, Grays Inn Road, London on 10 March 2015**

**The Appellant did not attend and was not represented**

**Mrs Lynne Ratnett Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### **The Appeal**

1. This is an appeal by Woodfield Technologies Limited (“the Appellant”) against a default surcharge of £1,927.65, for its failure to submit in respect of its VAT period ended 30 November 2013, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the VAT due of £12,851.00.

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

3. The Appellant did not attend the hearing. However the Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

### **Background**

4. The Appellant has been in the default surcharge regime from period 05/12 when a VAT Surcharge Liability Notice was issued, and has defaulted on five occasions prior to the default period under appeal.

5. The default period of 11/13 had a due date of 7 January 2014 for electronic payments and electronic VAT return submission. The return was received on 6 January 2014 and payment was received by FPS one day late on 8 January 2014.

6. 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].

7. 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.

8. 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.

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



But due to Christmas and New Year break and issues with our customer's payment team, this payment was not made until 8th of January and I immediately made the VAT payment.

5 As I was anticipating a potential issue with the payments, I tried to reach out to the VAT team on the 3rd and the 6th of January to inform them that I might be late by a day or two. Unfortunately I could not get through to the team.

I would like to appeal that in the light of a one day late payment occurring just after Christmas and the New Year holiday the surcharge be revoked”.

### **HMRC's Case**

10 17. The period 11/13 had a due date of 7 January 2014 for electronic payments and electronic VAT return submission. The return was received on 6 January 2014 and payment was received on 8 January 2014.

15 18. The first default was recorded for period 05/12 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.

19. Included within the notes on the reverse of the Surcharge Liability Notice(s), issued for the periods up to and including the 12/12 period, was the following, standard paragraph:

20 “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.”

25 20. Included within the notes on the reverse of the Surcharge Liability Notice(s), issued for the periods 01/13 onwards, are the following, standard paragraphs:

“Submit your return on time. Make a note of when your return is due.

Pay your VAT on time. Don't rely on HMRC to remind you - go to [www.hmrc.gov.uk/payinghmrcivat.htm](http://www.hmrc.gov.uk/payinghmrcivat.htm).

30 Problems paying your VAT? If you can't pay the full amount on time, pay as much as you can and before the payment is due, contact the Business Payment Support Service.”

21. 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.
- 35 • On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

22. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA 1994 s 59(5).

23. Liability to VAT surcharge is governed by VATA 1994 s 59 and the reverse of each notice issued, up to and including the 12/12 period, detailed how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA 1994 s 59(5).
- 5 24. With effect from the period 01/13 the Surcharge Liability Notice VAT160 advises 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.
- 10 25. The Directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon. Whilst it is accepted that a business has other expenses, VAT must be given priority. As a VAT registered company the Appellant charged VAT to their customers and are required by law to pay this with the appropriate return by the due date.
- 15 26. It would appear from the Appellant's statement that they were waiting for funds to be received. This would suggest that there was a possibility that the Appellant might have been suffering from an insufficiency of funds on the due date. A bank statement was supplied, but only shows transactions from 6-20 January 2014. The bank statement also makes reference to two other accounts (to which funds are shown as being transferred). Therefore it is not known what funds were available immediately prior to 6 January 2014 from the account to which the bank statement relates and the two other accounts.
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27. Section 71(1)(a) of VATA 1994 specifically excludes an insufficiency of funds as providing a reasonable excuse for late payment and the removal of a surcharge issued in accordance with s 59(4) of the said Act.
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28. Had the Appellant contacted HMRC before the due date regarding their apparent lack of funds then they would likely have obviated the issue of a surcharge. HMRC records indicate the Appellant did not contact the National Advice Service or the Business Payment Support Service prior to the due date to discuss late payment.
- 30 29. In their grounds for appeal the Appellant's company secretary states that he attempted to contact HMRC prior to the due date to advise there might be a delay in payment. In response to this HMRC in a letter dated 16 May 2014, requested evidence of such contact e.g. an itemised telephone bill. However in a telephone conversation on 9 June 2014 the Appellant's company secretary advised he could not supply any evidence of the attempts to contact HMRC.
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30. HMRC say that the Appellant received funds during the period and therefore had funds available to meet its VAT obligations. If the business chose to treat these funds as an interest free loan until the VAT became payable, but which was then not available at the due date due to cash flow problems, that is a risk the business took upon itself and HMRC contend cannot be used a reasonable excuse. In the case of *CG Steel Structures v. HM Revenue & Customs* TC/2014/00456 the Tribunal said:
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“It should be remembered that VAT is never the property of the company, the money belongs to the Crown at all times and must be paid over as the law requires.”

31. 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, and neither Commissioners nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

## 5 **Conclusion**

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

33. The Appellant's main ground of appeal is that it suffered a cash flow shortage, mainly caused by one of its main customers being late settling an invoice.

10 34. In *Customs & Excise Commissioners –v- Steptoe [1992] STC 757* the taxpayer argued that although the proximate cause of his default was insufficiency of funds, the underlying cause of that insufficiency, namely the unexpected failure by a major customer to pay him on time, amounted to a reasonable excuse. The Court determined on a majority, that the statutory exclusion of insufficiency of funds as an excuse did  
15 not preclude consideration of the underlying cause of insufficiency and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test had to be applied strictly.

20 35. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure, the Tribunal must take for comparison a person in a similar situation to that of the actual taxpayer 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  
25 and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

30 36. Having considered the Appellant Company's circumstances and the background facts and circumstances leading up to the default the Tribunal accepts that the underlying and primary cause of the default was a cash flow shortage. However it is specifically stated in s 71(1) VATA 1994 that any insufficiency of funds to pay any VAT is not reasonable excuse and the Appellant has not shown why the underlying cause of insufficiency occurred and that it was caused by an unforeseeable or  
35 inescapable event which despite the exercise of reasonable forethought and due diligence, could not have been avoided. As HMRC say, a bank statement was supplied but only shows transactions from 6-20 January 2014. The statement also makes reference to two other accounts, to which funds are shown as being transferred, therefore it is not known what funds were available immediately prior to 6 January 2014 from its account and the two other accounts.

40 37. HMRC may allow additional time for payment if requested. Section 108 of the Finance Act 2009 specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange a payment  
45 deferment and this is agreed. The Appellant, being aware that the expected payment from its customer may be delayed, says that attempts were made to contact HMRC on 3 and 6 January 2014, but was not able to provide any evidence of itemised telephone

bills when requested by HMRC. Because there was no time to pay arrangement in place before the due date, s 108 FA 2009 does not apply.

38. The default surcharge regime is a statutory penalty scheme. The penalty is for failure to file and pay by the due date and is intended to deter non-compliance with the obligation to pay on or by the due date. The lateness of a return or payment is a question of fact and once it occurs a surcharge arises. The payment was made just one day late but the length of the delay is immaterial except where to impose a penalty would be totally unfair. In the case of *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) the Appellant had received a surcharge of £4,260.26, calculated at 5% of the tax paid late. The tax was paid one day late. The First-tier Tribunal found in favour of the Appellant. HMRC appealed and HMRC's appeal was upheld. The Tribunal recognised that the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no, discretion for HMRC to relieve a surcharge once imposed.

39. Although the Appellant may regard the penalty as unfair, a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a Surcharge Liability Notice warning him that he will be liable to surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of each other.

40. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was unforeseen circumstances or events beyond its control. In the Tribunal's view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 11/13 period.

41. The appeal is accordingly dismissed and the surcharge upheld.

42. 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.

**MICHAEL CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 July 2015**