



**TC04660**

**Appeal number: TC/2014/04667**

*VAT default surcharge - payment of VAT three days late - whether  
reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**C A SUPPORT SERVICES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER: IAN PERRY**

**Sitting in public at Fox Court, Grays Inn Road, London on 31 March 2015**

**Mr Michael Pritchett and Mr Erroll Pinnock for the Appellant**

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

## DECISION

### **The Appeal**

- 5 1. This is an appeal by C A Support Services Limited (“the Appellant”) against a default surcharge of £4,550.83 for its failure to submit in respect of its VAT period ended 30 April 2014, by the due date, payment of the VAT due. The surcharge was calculated at 5% of the VAT due of £91,916.68.
2. The point at issue is whether the Appellant has a reasonable excuse for making late payment.

### 10 **Background**

3. The Appellant has been in the default surcharge regime from period 07/13 when a VAT Surcharge Liability Notice was issued. As it was a first default, it did not attract a surcharge.
4. The Appellant again defaulted in respect of period 10/13. The default attracted a 15 surcharge of £1,904.68, that is 2% of the amount due, being £95,234.16.
5. The default period under appeal of 04/14, had a due date of 6 June 2014 (7 June being a Saturday) for electronic payments and an electronic VAT return submission. The return was received on time but payment was received three days late on 9 June 2014.
- 20 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].
- 25 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 30 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 35 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 the late payment, which gave rise to the default surcharge(s). Section 59 (7) VATA 1994 sets out the relevant provisions:

5                                   ‘(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 –

10                                   (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

15                                   (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. It is primarily s 59(7)(b) on which the Appellant seeks to rely. Its grounds of appeal are primarily that the delay in payment was caused by its bank.

20 11. 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.

### **Appellant’s Case**

25 12. The Appellant does not dispute that its VAT payment for the period 04/14 was late.

13. The Appellant’s grounds of appeal in its Notice of Appeal to the Tribunal are:

30 i. “Instructions were passed to the bank for the payment to be made in a timely fashion so that the payment would reach HM Revenue and Customs before the allotted time.

ii. The bank treated the payment as a ‘normal’ payment, which meant HM Revenue and Customs’ account being credited on the Monday 9 June 2014. The employee in charge of bank processing maintains that he put the correct annotation on the payment mandate.

35 iii. It is apparent that there has been a breakdown in the process, which the Directors could not have reasonably foreseen.

iv. It is believed that the surcharge levied is out of proportion to the error, especially bearing in mind the history of timely payments. The surcharge will have a serious detrimental impact on the business and may lead to cutbacks at

a time when it is hoped to move the business forward and encourage and support growth in the [Appellant's business] area”.

5 **HMRC's Case**

14. The period 04/14 had a due date of 6 June 2014 for an electronic payment and an electronic VAT return submission. The return was received on time but payment was received late on 9 June 2014.

10 15. The first default was recorded for period 07/13 when 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.

16. 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:

15 “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).

20 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.”

17. 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.
- On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- 25 • On the E-VAT return acknowledgement.

18. 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).

30 19. 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).

20. 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.

5 21. 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.

10 22. Surcharges issued under VATA 1994 s 59 are a penalty based solely on the amount of VAT paid after the due date, irrespective of the length of delay. Neither the Commissioners nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

15 23. HMRC contends that the Appellant failed to take account of the fact that where the 7th calendar day falls on a weekend, VAT payments must be received by the Friday before the weekend.

20 24. The Appellant has submitted as evidence, a document entitled "Future dated payment" which sets out that the date the payment was to leave the bank account to go to HMRC's account with Citibank was 9 June 2014. This date is quite clearly after the 7 June 2014 and therefore the payment to HMRC was late. In an email to HMRC dated 31 October 2014, the Finance Manager says that the Director authorised payment on 6 June 2014 with the expectation that payment would be made that same day. He states that the bank actioned the payment for 9 June 2014. However the bank mandate quite clearly shows that the date payment was to leave the trader's account was not 6 June 2014. This is not a case where the payment reached HMRC because of an unforeseen delay by the bank. The bank acted in accordance with the Appellant's instructions.

### **Conclusion**

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

30 26. The Tribunal does not accept the Appellant's main ground of appeal, that the delay in payment was caused by its bank. As HMRC say the payment mandate given to the bank by the Appellant is entitled "Future dated payment" which authorised payment to HMRC's account with Citibank on 9 June 2014. There is no evidence that the payment was authorised for 6 June 2014.

35 27. The Appellant contends that the penalty is disproportionate to the delay that occurred. 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  
40 three days 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*

5 [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.

10 28. 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.

15 29. 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 04/14 period.

20 30. The appeal is accordingly dismissed and the surcharge upheld.

25 31. 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.

30 **MICHAEL CONNELL**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 19 OCTOBER 2015**

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