



TC04752

Appeal number: TC/2014/06163

*VAT default surcharge – payment received by HMRC was eight days late –
payment by cheque – whether reasonable excuse – no – Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NASIR ASGHAR t/a THE FASHION SPOT

Appellant

- and -

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

Respondents

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

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester on 9
June 2015**

The Appellant did not attend and was not represented

**Ms Georgina Mitchell, Officer of HM Revenue and Customs, for the
Respondents**

DECISION

The Appeal

- 5 1. Mr Nasir Asghar t/a The Fashion Spot (“the Appellant”) appeals against a default surcharge of £395.03 for his failure to submit, in respect of his VAT period ended 01/11, by the due date, payment of VAT due.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.
- 10 3. The Appellant did not attend and was not represented. The Tribunal was satisfied that the Appellant had been notified of the date and venue of the appeal hearing and that it was in the interests of justice to proceed.

Background

15 4. The Appellant has been in the default surcharge regime from period 10/06 onwards. Prior to the period subject to this appeal, fifteen earlier Surcharge Liability Notices had been issued. The Appellant first defaulted on VAT payments in period 10/06 when a VAT Surcharge Liability Notice was issued and again in fourteen subsequent periods when VAT default extension notices were issued.

20 5. 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 6. The due date for the Appellant’s 01/11 VAT period was 28 February 2011. The date is extended by seven days where payment is made electronically except where this falls on a bank holiday or weekend when the due date is deemed to be the last previous working day. The Appellant’s return was received on time but payment was received late by cheque on 4 March 2011 clearing on 7 March 2011. The amount due under the return was £2,633.55.

30 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
35 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 after the issue of a VAT Surcharge

Liability Notice, the specified percentage is 2% and the percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

9. On 11 March 2011 HMRC issued a VAT default surcharge of £395.03 representing a 15% surcharge on VAT due of £2,633.55

5 10. In a letter of 28 March 2011, the Appellant requested a review of surcharge, saying that a cheque had been posted on 1 March 2011 for receipt by 7 March 2011. HMRC replied explaining that payment was received on 4 March 2011 by cheque, and that the due date for cheque payments was 28 February 2011; the seven day extension being a concession for electronic payments only.

10 11. 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 : -

15 (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 –

20 (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

25 (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 ..’

30 12. 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

13. The Appellant does not dispute that his VAT payment for the period under appeal was paid late.

35 14. The grounds for appeal as stated by the Appellant in his Notice of Appeal are that earlier defaults had arisen when his late father had been in charge of administration of the business and it is unreasonable to surcharge him at 15%.

40 15. From the time of his father’s death in January 2010 the Appellant took full charge of the business and took responsibility of clearing £9,151.96 in VAT debt that had accumulated. Since his father’s death he has kept up to date with payments, with each quarter’s payment being made on time.

16. The issuing of a surcharge at 15% for the period 01/11 does not seem just given that this was a transitional period, when he moved from paper returns to online returns and from cash/cheque payment to electronic payment. He considered that HMRC should show more flexibility rather than issuing surcharges.

5 HMRC's Case

17. Ms Mitchell for HMRC said the potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice for period 10/06 and further surcharge extension notices for subsequent default periods. The information contained on the reverse of each
10 Notice states:

15 '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.'

18. 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
 - On the E-VAT return acknowledgement.
- 20

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

20. HMRC contend that, whilst originally in partnership with his father, the
25 Appellant had continued the VAT registration number as a sole trader from 1 January 2006 onwards. As such, there had been fourteen previous defaults, nine of which were at the highest rate of 15%, before period 04/10 when the Appellant rendered his first online return.

21. HMRC contend that, notwithstanding any reliance previously on his late father,
30 the Appellant has remained responsible throughout the default cycle for VAT compliance. VAT Act 1994 s 71(1) specifically states "where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the party of the person relied upon is a reasonable excuse".

22. Therefore the surcharge has been correctly issued in accordance with the VAT
35 Act 1994 s 59(4).

Conclusion

23. The issue is whether the Appellant has shown a reasonable excuse for the late payment.

5 24. The Appellant was clearly aware of the due date for payment of his VAT and the potential consequences of late payment. Because there had been numerous earlier defaults, the Appellant would have been aware of the financial consequences of a further late payment and should have ensured that the VAT payment was made in good time to reach HMRC no later than the due date.

10 25. The burden of proof is on the Appellant to show that the underlying cause of his failure to meet his VAT payment obligations was due to unforeseen circumstances or events beyond his 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 period under appeal

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

15 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
20 accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **MICHAEL CONNELL**

TRIBUNAL JUDGE
RELEASE DATE: 26 NOVEMBER 2015