



TC04987

Appeal number: TC/2015/03424

*VALUE ADDED TAX – default surcharge – assumption of direct debit
payment arrangement being in place – whether reasonable excuse – held no
– appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

G SIDDONS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DR HEIDI POON
BEVERLEY TANNER**

**Sitting in public at Tribunals Service, City Exchange, 11 Albion Street, Leeds on
20 November 2015**

Mr Andrew Hulse of UHY Hacker Young for the Appellant

**Mr Anthony Burke, presenting office of HM Revenue and Customs, for the
Respondents**

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DECISION

1. The appellant (G Siddons Ltd) appeals against the default surcharge of £7,241.79, imposed at 15%, in relation to the late payment of VAT for the quarter 10/14. The appellant provides engineering services as a sub-contractor in the construction industry.
2. The Notice of Appeal was submitted on behalf of the appellant by UHY Hacker Young. Mr Hulse's representation, in gist, rehearsed the grounds that have been listed in the Notice of Appeal, which the Tribunal summarises in the following paragraphs.
3. The main ground of appeal advanced by the appellant is that the director of the company, Mr Garry Siddons, held the belief that the VAT liability for the period 10/14 would be collected by direct debit. Mr Siddons formed this belief on review of the bank statements from the previous year, which record VAT payments being made by direct debit, and he 'was satisfied [that direct debit] was the manner' whereby VAT for the period 10/14 would also be collected.
4. The second ground of appeal pertains to the remedial action taken by Mr Siddons on discovering that the payment for 10/14 had not been collected by direct debit as he had believed. The appellant submits that the director 'immediately made the payment again demonstrating he made steps to remedy the problem'. (The Tribunal queries the use of 'again' in this context, given that the payment had never been made in the first place.)
5. Thirdly, the appellant argues that previous default surcharges had all been paid, and 'in view of the changes to the compliance regime [Mr Siddons] has asked that this penalty [in relation to 10/14] to be suspended'. (The Tribunal understands from Mr Hulse that this ground of appeal is to be taken to mean Mr Siddons' change of accountants to improve the appellant's compliance records.)
6. Fourthly, the appellant submits that 'in mitigation to this', the appellant 'wish[ed] to explain that Gary Siddons has only recently, following growth in the business', taken on an employee 'to help with the administration of the business', having 'previously managed all "paperwork" to the best of his ability'.
7. Fifthly, according to HMRC, Mr Siddons was advised to set up a direct debit arrangement to avoid further surcharges arising in the future during the phone call he made on 9 October 2014 to the Debt Management Unit. The phone call was referred to in HMRC's review letter of 28 April 2015; Mr Siddons could not recall making the call. The appellant submits that if the advice had been by 'more formal communication – in writing – [Mr Siddons] would clearly have executed the request'. The appellant submits that 'formal communication would have been more appropriate [from HMRC] given the day to day demands on small business owners'.
8. In considering whether any one of these grounds of appeal amounts to a reasonable excuse for the late payment of VAT for the period 10/14, the Tribunal

applies the test set out by Judge Medd OBE QC in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239. The test as regards whether or not there is a reasonable excuse is an *objective* one, whereby:

5 ‘One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’

9. In respect of the first ground of appeal, the Tribunal asks whether it was
10 reasonable for Mr Siddons to infer from the bank statements of the *previous* year that
a direct debit arrangement would have been in place to collect the VAT for period
10/14. We note from the *Schedule of Defaults* that the last time the appellant made a
VAT payment by direct debit, it was for the period 07/13. Between 07/13 and 10/14,
15 four intervening quarterly payments were made, three of which resulted in a default,
and the Schedule records these three late payments were *all* made by Faster Payment
Service (FPS). Furthermore, for two out of these three defaults preceding the default
surcharge under appeal, part-payments (though on the same day) were made to meet
the full liability for the two quarters.

10. The Tribunal concludes that it is not a reasonable assumption to make that a
20 direct debit arrangement would continue to have been in place by basing on the bank
statements from the ‘previous year’ as the appellant claimed. The intervening
payments by FPS between 07/13 and the default under appeal in 10/14 simply negate
any assertion of reasonableness that such an assumption could have any sound
foundation; the pattern of payment by direct debit had clearly been replaced,
25 superseded, contravened by the FPS method for at least three out of the four ensuing
quarters leading up to the default in 10/14. (The Tribunal has no information on the
period 04/14, which did not result in a default.)

11. The second ground is only of relevance to the defence of ‘reasonable excuse’ if
the Tribunal had found that the appellant had a reasonable excuse in the first place.
30 Though not part of the provision under section 70 of VATA 1994 in respect of
‘reasonable excuse’ for the late payment of VAT, the statutory expression under sub-
paragraph 16(2)(c) of Schedule 56 to Finance Act 2009, which provides for penalties
for the late payment of direct taxes, is informative in considering ‘reasonable excuse’
and default surcharge:

35 ‘16(2)(c) where [the taxpayer] had a reasonable excuse for the failure but
the excuse has ceased, [the taxpayer] is to be treated as having continued to
have the excuse if the failure is remedied without unreasonable delay after
the excuse ceased.’

40 Since we have dismissed the first and main ground of appeal, the second ground in
respect of remedying the failure without unreasonable delay is of no relevance.

12. Furthermore, the Tribunal is of the view that Mr Siddons, in taking immediate
action to remedy the failure once he discovered the non-payment of VAT for 10/14,

was doing no more than meeting his compliance obligations. The discharge of the appellant's statutory duty cannot be, of itself, a ground for reasonable excuse.

5 13. In respect of the third ground of appeal, it is submitted that the default for 10/14 should be suspended in view of Mr Siddons' action to improve the appellant's compliance records. Again the Tribunal considers Mr Siddons was doing what should have happened all along in taking those steps to improve the compliance records of the appellant. Mr Siddons' conduct is no more than what is expected of a responsible trader conscious of and intending to comply with his obligations regarding tax, and is not a reasonable excuse for the *specific* failure arising for 10/14.

10 14. The Tribunal also notes from HMRC's action history and communications log that Mr Hulse contacted HMRC by phone on 25 July 2012 to advise the 'UHY Wingfield Slater' (the former name of UHY Hacker Young) would be the new accountants for the appellant. Since the appointment of UHY in July 2012, the appellant continued to be in default, with 8 defaults occurring between periods 10/12
15 and 10/14 (the period under appeal). The Tribunal cannot establish that the change of accountants as leading to any immediate improvement in compliance as regards VAT payments.

20 15. Similarly, to take on an extra employee to assist with the administration and compliance responsibilities that fall on Mr Siddons as a director is what a prudent taxpayer, who has due regard for his business and statutory obligations, would have done. The Tribunal cannot give any extra weight to such a move as 'extraordinary', or in any respect as amounting to a reasonable excuse. The appellant submits this (fourth) ground of appeal 'in mitigation', and if it is to be taken as suggesting that the Tribunal should consider special reduction, we can only emphasise that unlike its
25 counterpart for the late payments of direct taxes under Schedule 56 of FA 2009, the default surcharge regime for VAT does not provide for any discretion to be exercised, either by HMRC or the Tribunal, to apply special reduction.

30 16. The final ground of appeal is that HMRC should have used more appropriate means of communication with Mr Siddons and should have put in writing the advice on making direct debit arrangement for VAT payments. It is asserted that had the advice been given in writing, Mr Siddons 'would clearly have executed the request'.

35 17. The Tribunal observes that a direct debit VAT payment arrangement provides more beneficial terms of payment for the trader. Once the direct debit mandate is lodged, HMRC have the responsibility of applying for payment based on the VAT liability per the quarterly return submitted; the payment is therefore guaranteed to be
40 on time contingent upon the return being on time. Since the mandate gives HMRC authority to apply for payment on the due date of the return, funds will leave the trader's account 3 working days after the application for payment is made. Compared with other payment methods, the trader has a cash flow advantage of three additional working days by paying via direct debit. A direct debit arrangement is, of course, predicated on the funds being there for the full liability to be collected from the designated account, and that is a reason why the method may not always suit a trader's circumstances; for example, when only part-payment can be made in some

quarters due to the lack of funds for full payment to be collected, or when funds from accounts other than the designated bank account need to be mobilised to meet the full VAT liability for the quarter.

5 18. The appellant had paid by direct debit before, and should be familiar with the terms; such information is available 'in writing' on HMRC's website. The Tribunal is of the view that the direct debit arrangement in operation previous to period 07/13 must have been cancelled by someone taking a positive step. Notwithstanding the fact, as put forward by Mr Hulse, that Mr Siddons 'cannot recall cancelling' the direct debit arrangement, it was probable that only Mr Siddons himself had the authority to
10 cancel such an arrangement. It is therefore not a foregone conclusion that the advice to pay by direct debit 'would clearly have been executed' – in the light of the positive step that had been taken to cancel the former arrangement. The onus is on the appellant to make VAT payments on time by a method that suits its circumstances. The onus is not on HMRC to advise on the most suitable method in the most
15 'appropriate' form of communication for the appellant's purposes to ensure that the appellant meets its payment on time. Nothing in the fifth ground of appeal can amount to a reasonable excuse by transferring responsibility in various respects to HMRC.

19. For the reasons stated above, the appeal is dismissed. The default surcharge of £7,241.79 is confirmed.

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

30 **DR HEIDI POON**
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2016

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