



TC05213

Appeal number: TC/2016/00316

*VALUE ADDED TAX – default surcharge – whether reasonable excuse –
no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Ad Hoc Wine Bars Ltd

Appellant

- and -

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

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 25 April 2016 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (Default Paper Cases) having first read the Notice of Appeal dated 11 January 2016 and HMRC's Statement of Case of 4 February 2016.

DECISION

Introduction

1. This is an appeal against a Default Surcharge issued for the period 08/15 in the amount £1,136.71 which is charged at 10% of the tax assessed of £11,367.13
2. The Appellant acknowledges that the VAT return and payment for the period 08/15 was rendered after the due date of 8 October 2015 and as a result a Default Surcharge was issued.

Relevant Legislation

3. (a) VATA 1994 s.59 (4); s.59 (5),
4. (b) VATA 1994 s.70;71(1),
5. (c) VAT Regulations 1995 Reg. 25(A) and Reg. 40, (4) Finance Act 2009 s. 108.

Background Facts

5. The Appellant was registered for VAT in 2012 with the business of a licensed restaurant and wine bar. The Appellant submitted VAT returns and payment electronically and paid their VAT via the Faster Payment Service (FPS)
6. For the period 05/14 the Appellant made a late payment and late return and received a Surcharge Liability Notice. The VAT return was received after the due date of 14 July 2014 and the payment was received by HMRC after the due date of 15 July 2014.
7. For the period 02/15 the VAT return was received by the due date. The payment was made in instalments. The sum of £3,065.79 was paid on the due date of 7 April 2015. The balance of £7,000 was received by way of three payments. The first payment was received on 18 April 2015, the second on 11 May 2015 and the final payment was received on 26 May 2015. As the balance was received after the due date a Surcharge Liability Notice Extension was issued but there was no Default Surcharge as the amount due was less than £400 and so qualified for concessionary treatment. For the period 05/15 a VAT payment was received after the due date of 7 July 2015 and a Late Payment Surcharge Liability Notice Extension was issued. There was no Default Surcharge by concession since the amount due was less than £400.
8. The Appellant acknowledges for the purposes of this appeal that the VAT return and payment for the period 08/15 was rendered late and does not dispute the Default Surcharge.

The Appellant's Submission

9. The Appellant through their Financial Controller/ Book-keeper (Mrs Kelly Ryall) stated in their Notice of Appeal dated 11 January 2016 the following;

5 "I had only been employed by Ad Hoc for several weeks as the book-
keeper, prior to that I understood that the accounts were handled by the
Company's auditors Leigh Saxton Green, the partner dealing with it then
was Mr Phillip Clarke. As the accounts were in some disarray I had not
reached the stage of reviewing the VAT when I had received an email
10 from Phillip Clarke, saying that the VAT was due by the end of the
following day. This was sent to me on the 6th but I did not receive the
email until the 7th and therefore I took it that the VAT was due on the 8th.
This was duly submitted and paid directly on the 8th. I take full
responsibility for the lateness which was only one day and was caused by
an email error. The email shows that the email wasn't received until the
15 morning of the 7th. We therefore feel that this is unduly harsh. Ad Hoc
Wine Bars Ltd. is a small wine bar in the market town of Royston. The
Company is not profitable without constant funding from its shareholders"

10. The Appellant said the delay was not intentional and the surcharge would be an "a huge strain" on the Company.

20 11. The Appellant explained that the Tribunal should consider both the financial hardship the penalty would create and the fact that the sum is "not an insignificant sum which would impact the cash flow and the financial health of the business".

HMRC's Submissions

25 12. HMRC says that the Appellant had previously received Surcharge Notices which was acknowledged and the Surcharge under appeal had been correctly issued in accordance with VATA 1994 section 59(4). There was no issue of the Appellant not being in receipt of earlier Notices.

30 13. Where the VAT Return was submitted the Appellant would have received an acknowledgement which advises both the payment due date and for the Appellant to check with their bank as to the cut off time for making payments through the Faster Payment Service. The HMRC web pages have a "VAT payment deadline calculator" which advises the last day for payment using the Faster Payment Service for the period ending 31 August 2015 which is 7 October 2015.

35 14. The Directors of the Company (Mr Phillip Clarke and Mr Matthew Norris) have the ultimate responsibility for the timely submissions of VAT Returns and the tax due thereon. They would have been taken to know the due date for payment and the submission of returns.

15. The Appellant's bank debit transaction confirms that the VAT for the period 08/15 was paid late on 8 October 2015. There is no genuine mistake as the parties would have known the due date for payment and submission of returns but even if there was a mistake there is no reasonable excuse.

5 16. The Appellant, in their letter of 26 October 2015, refer to the late payment of VAT for the period 05/15 and say that this was due to the Director being away on business and could not authorise the payment until his return. HMRC say that if this was the case, the Directors should have made alternative arrangements or taken sufficient steps to ensure that the Company met its VAT obligations and therefore
10 there is no excuse since this was a foreseeable event.

17. Further, the Appellant had not operated a time to pay arrangement with HMRC for the late payment of VAT which would normally provide an excuse for late payment.

15 18. The Respondents contend that the Appellant has not provided any grounds which would constitute a reasonable excuse for late payment of VAT for the period of 08/15.

Conclusion

19. The Appellant have been in the Surcharge Regime since the period 05/14 and
20 would have been aware of the financial consequences of a VAT return or payment received after the due date. The Company has two directors appointed some years ago (2012) and would have known of their responsibility and the requirement for a timely submission of the return and payment. They have the ultimate responsibility in law to ensure compliance with the relevant legislation.

25 20. The Default Surcharge of £1,136.71 for the period 08/15 is less than 1.1% of the total value of sales net of VAT at £110,302.00. While the penalty may create some cash flow difficulties for which the Tribunal is sympathetic, cash flow problems and profitability on their own do not constitute a reasonable excuse.

30 20. There should have been a proper handover from the previous bookkeeper to the present which should have been done in a timely and efficient manner so as not to incur a penalty. In this case, the penalty related to being one day late. It is reasonable to assume that the parties could have arranged their affairs such that matters were in hand to meet the deadline for payment and submission of returns. It is unfortunate that
35 this position has resulted in a penalty. It may be viewed as harsh but being harsh does not provide a reasonable excuse under the legislation. The Upper Tribunal has decided there is nothing in the VAT default surcharge which leads to the conclusion that its architecture is fatally flawed or that it operates unfairly but recognised that there may be exceptional cases where the court may take a different view of the
40 penalty imposed. This case does not fall into the category of an exceptional case.

21. In the circumstances, the Appeal is dismissed. The Respondents have demonstrated that the penalty is due while the Appellant has not demonstrated that it is a reasonable excuse for late payment.

5 22.. The penalty for the period 08/15 is therefore upheld.

23. 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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**DR K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 28 JUNE 2016

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