



**TC05244**

**Appeal number: TC/2015/06389**

*VAT default surcharge - payment made one day late - bookkeeper of Appellant company not available to arrange payment - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**FIRST TESTING LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 10 February 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 notification of appeal dated 19 October 2015 and HMRC's Statement of Case, the Appellant submitting no response**

## DECISION

### The Appeal

- 5 1. This is an appeal by First Testing Limited (“the Appellant”) against a default surcharge of £1,308.40 imposed by HMRC on 14 August 2015, in respect of the VAT period ended 30 June 2014, for the Appellant’s failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the VAT due of £13,084.08.
- 10 2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### Background

- 15 3. The Appellant registered for the purpose of VAT with effect from 1 January 2003 and carries on a business of testing fall arrest systems.
- 15 4. The company had previously defaulted on VAT payments in periods 03/14, 06/14, 09/14, 12/14, and 03/15.
- 20 5. The company was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires the Appellant to furnish VAT returns and pay the outstanding VAT on or before the end of the month following each calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].
- 25 6. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 Regs 25A (20), 40(2). Under that discretion, HMRC allow a further seven days for electronic filing and payment following the standard due date.
- 25 7. Because payment was normally made electronically by FPS, the due date for the 06/14 period was 7 August 2014 as payment was made electronically. The return was received on 22 July 2014 and the payment on 8 August 2014. The payment was therefore one day late.
- 30 8. 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. Section 59 (7) VATA 1994 sets out the relevant provisions:

35 “(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 –

- 40 (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

5 (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.”

9. By letter dated 25 August 2015, the Appellant asked HMRC to review its decision to impose the surcharge, setting out the reasons for the delay in payment.

10 “Further to your surcharge letter of 14th August, my Book Keeper was on annual leave returning on Monday 10th August 2015 when she immediately made payment of the £13,084.08 due for period 06/15. We realise the payment was one working day late but would ask that you reverse this surcharge. We have experienced problems in the recent past with our payments of VAT and have budgeted hard to make payment in full for period ended June 2015, we continue to make weekly payments of £1000.00 to clear the outstanding amount and have every intention of making full payments going forward but to add a surcharge will only make it harder for us to achieve our goal.”

20 10. On 25 September 2015, HMRC reviewed the default surcharge but upheld their decision.

11. The Appellant lodged an appeal with the Tribunal on 20 October 2015.

### **Appellant’s Contentions**

25 12. The Appellant does not dispute that its VAT payment for the period 06/14 was late. It is agreed that the payment, if made electronically, was due on 7 August 2014 but did not reach HMRC until 8 August 2014. The Appellant’s grounds of appeal, as stated in its Notice of Appeal, were:

“This company has over the past four years had many serious issues to contend with including but not limited to:

- 30 1. Three senior members of staff left to set up in competition attempting to take our customer base from us.
2. Finding replacements for the members of staff mentioned above.
- 35 3. Creating, managing and improving processes within the organisation to retain and grow our customer base maintaining work for our engineering staff.
4. Our Managing Director suffered a brain seizure and was absent from work for a substantial amount of time.
5. As with a great many companies in the UK we have suffered as a result of the economic climate.

40 We are seeing the results of our hard work and whilst we have had difficulties meeting our debts we are now beginning to see light at the end of the tunnel in that we are able to now to pay our VAT bills in full rather than in installments, we have one installment program paying £1,000/week ongoing that now has a balance of £9,000. Indeed a payment of this payment plan was scheduled with our online bank to be made on Friday 7th August preventing a second payment being

45 processed until this one had cleared our account. A failure of internet provision

5 also meant that no further payments could be processed until the following Monday. My Book Keeper returned from holiday on Monday 10th August and immediately made the payment of £13,084.08 in full (1 day late). As stated in our letter of 25th August, we have worked and budgeted very hard, we have every intention of making our VAT payments in full and on time going forward and to apply this surcharge only makes it harder for us to achieve our goal. It seems very hard for one working day late.”

### HMRC's Contentions

10 13. The Period 06/14 had a due date of 7 August 2014 for electronic VAT payments and returns. The VAT payment was received electronically by HMRC, one day late on 8 August 2014. The surcharge was therefore correctly imposed.

15 14. The Appellant has been in the default surcharge regime from period 03/14 onwards. When the Appellant first entered the Default Surcharge Regime, included within the notes on the reverse of the Surcharge Liability Notice, is 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.”*

15. Included within the notes on the reverse of Surcharge Liability Notices issued for the periods 01/13 onwards, are the following, standard, paragraphs:

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

30 b. “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).”*

35 c. “Think ahead  
*If the person who normally does your VAT return will be absent, make alternative arrangements.  
If you can't pay the full amount on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether.”*

40 16. With effect from the period 01/13 the Surcharge Liability Notice V160 advised 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.

45 17. The potential financial consequences attached to the risk of a default should have been known to the Appellant from this point on, given the information printed on the Surcharge Liability Notice.

18. The requirements for submitting timely electronic payments can in any event be found-

- In notice 700 “the VAT guide” paragraph 21.3.1 which is issued to every trader upon registration.
- 5 • On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

19. Notice 700/50 (December 2011) s 6.3 (the notice represents HMRC’s policy and understanding of the relevant legislation) states that HMRC consider that genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses for surcharge purposes. The fact that company’s bookkeeper was on holiday and not available to deal with the payment is not a reasonable excuse.

20. The surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4).

21. The payment for the period was received on 8 August 2015, yet the Appellant states the book keeper was on leave until 10 August 2015 and made the payment on her return.

22. HMRC have spoken to the Appellant (Simon Rood) re the discrepancy in the dates. The Appellant explained that he contacted the book keeper on 8 August 2015 and she made the payment on that day as she has remote access to allow her to do this. Her first day back in the office was 10 August 2015. He was unable to contact her on the 7th as she was travelling. He explained he was unable to make the payment himself as he doesn’t know how to do it. They now have arrangements in place for payments to be made in the book keeper’s absence.

23. The VAT Act 1994 specifically excludes reliance on any other person to perform a task from being a reasonable excuse:

24. The Directors have ultimate responsibility for the timely submission of any tax due on a VAT return. Annual leave is a foreseeable event and HMRC would expect arrangements to be put into place to ensure the return and payment were received on time.

25. The Appellant refers to various other events and problems in its Notice of Appeal, but does not explain why any of those events or problems contributed to the delay in making the VAT payment which fell due on 7 August 2014. These issues were not the cause of the late payment for this period.

26. There is no record of contact with HMRC prior to the due date. Had contact been made prior to the due date, HMRC may have been able to offer advice in order to avoid a surcharge.

## **Conclusion**

27. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate whether there was reasonable excuse for late payment of the tax. The standard of proof. This is the ordinary civil standard of the balance of probabilities.

28. The VAT payment for period 06/14 was made late and therefore the default surcharge was correctly imposed pursuant to VATA 59(5).

29. The proprietors of the Appellant company were aware of the due date for payment of the VAT due for 06/14. The absence of the book keeper was foreseeable and they should therefore have ensured that arrangements were in place for the VAT to be paid.

30. The event which caused the late payment was not outside what the exercise of reasonable foresight would have enabled the Appellant to do in order to avoid a default.

31. It cannot be said that the proprietors of the Appellant, having due regard for the fact that it's VAT was payable on the due date, did everything they could by the exercise of reasonable foresight and due diligence to ensure payment was made on time. The burden of proof is on the Appellant to show that it has a reasonable excuse for the late payment of VAT. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

32. None of the other events and problems encountered by the Appellant company and referred to in the Notice of Appeal amounts to a reasonable excuse for the late VAT payment.

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

34. 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 2016**