



TC02923

Appeal number: TC/2013/04241

VAT – default surcharge – VAT return completed electronically – VAT must now be paid electronically- payment made after due date by cheque- reasonable excuse-no-appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARC'S OF TAMWORTH LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE BARBARA KING

The Tribunal determined the appeal on 20 September 2013 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 20 June 2013 (with enclosures), HMRC's Statement of Case submitted on 23 July 2013 (with enclosures)[and the Appellant's Reply dated 27 August 2013.

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DECISION

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The issue

1. The appellant company appeals against a default surcharge of £290.88 imposed on it in respect of its late payment of VAT for the quarter 02/13.

10 The legislation

2. 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 VAT return for a VAT quarterly period by the due date for that quarter, or if he makes his return by the due date but does not pay by that date the amount of VAT shown on the return as payable in respect of that period.

3. Regulation 25 of the VAT Regulations 1995 sets out the rule that where a taxpayer is on a quarterly basis for VAT, its VAT return and its related payments are due on or before the end of the month following each calendar quarter. The end of the following month is therefore the 'due date' for payment of the VAT.

20 4. Regulation 40 (2A) provides that where the VAT return is made electronically then the payment of VAT must also be made electronically.

5. Regulation 40(2B) provides that, from 1 April 2010, a payment by cheque,

“ whether or not in contravention of paragraph (2A) above”

is treated as made on the day it clears through HMRC's account.

25 6. HMRC have discretion to allow extra time for both filing and payment where these are carried out by electronic means. Under that discretion HMRC allow a further seven days for such electronic filing and payment.

7. Where a taxpayer is in default, HMRC may serve a surcharge liability notice on the defaulting taxable person, which brings him within the default regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. A new default, made within the surcharge liability period, gives rise to a default surcharge being charged. The first surcharge within the period is made at 2%. The percentage increases to 5% for a second default within the period, 10% for a third and 15% for all subsequent defaults, within a specified period.

35 8. Section 59A VATA provides that 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.

Evidence and findings

9. A schedule had been prepared by the respondents (“HMRC”) showing all occasions when the VAT has been paid late by the appellant over the period from 02/12 through to 02/13. In each case the VAT return had been received electronically by HMRC on or before the due date. For each period the appellant has then paid the VAT by cheque, either in one or two instalments.

10. I find that Regulation 40 (2B) quoted in paragraph 5 above, allows HMRC to accept a cheque, even where the payment should have been made electronically, but the payment is late if the funds are not cleared by the due date and there is no additional seven days if the payment is by cheque.

11. The first undated letter written on behalf of the appellant is written by S Allen and received by HMRC on 23 April 2013. This letter appears to suggest that S Allen knew the payment should have been made by electronic means, but the appellant did not do so for two reasons- firstly that the company was struggling financially to pay the ‘large amount in one go’ and secondly because of difficulties in entering bank details on line.

12. HMRC state that the VAT return for the period 02/13 was submitted electronically on 2 April 2013 but the cheque was received late on 3 April 2013, which was a Wednesday. In 2013 Good Friday fell on 29 March 2013 and Easter Monday fell on 1 April 2013. Both of those days were bank holidays and the days in between were a Saturday and Sunday.

13. S Allen states that the cheque was posted ‘6 days before it was due’, but as it is not clear which date S Allen thought was the due date and he/she does not state the date of posting, I find that this does not show that an effort had been made to get cleared funds into HMRC’s bank account by 28 March 2013.

14. On balance I find that S Allen was at work on 2 April 2013 when the VAT return was submitted on line. Had the payment of VAT been made electronically on the same date the payment would have been in time and no default surcharge would have occurred. I find therefore that the illness of S Allen ‘prior to the week of the 7 April’ has not contributed to the failure by the appellant company to pay its VAT by the due date. The failure was due to the use of the postal system over Easter when the money should have been sent electronically to avoid this problem.

15. HMRC has produced print outs from the web site which indicate that virtually all VAT registered businesses must now submit their VAT return electronically and then pay the VAT due electronically. These print outs refer to the fact that no cheques should be sent in the post if the return has been sent electronically and only companies which have obtained exemption can submit a paper VAT return and then pay by cheque.

16. Mr Marc Rendon has written the letter of appeal, received on 20 June 2013, on behalf of the appellant company. He states that the website does not provide information to say that payments by cheque must be received by 31st of the month. He

does not however produce any print outs from any websites which he alleges were misleading.

17. I find that the information on the website produced by HMRC does clearly state that if a VAT return is done electronically then payment of the VAT must be made electronically. There is now no provision for payment by cheque and therefore no 'due date for payment by cheque' is mentioned in this part of the website. I find that Mr Rendon has not shown that the appellant company was misled into believing that payments by cheque were still allowed. Ignorance of the law is no excuse. Reasonable excuse has not been shown.

18. The UK default surcharge regime is intended to deter non-compliance with the obligation to pay on the due date. It is intended to be penal. I find that the penalty in this case is not plainly unfair. The appellant company was in the default regime from 02/12 onwards. In that time they had had several reminders from HMRC that payment of VAT had to be made electronically. Defaults continued but no surcharge was incurred for the periods 05/12 and 08/12 as the percentage resulted in an amount less than the threshold of the amount collected by HMRC. The surcharge for the period 02/13 is at the 10% rate and the amount of £290.88 is above the threshold collected at that rate.

Decision

19. The appeal is dismissed and the penalty of £290.88 is confirmed.

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

BARBARA KING
TRIBUNAL JUDGE

RELEASE DATE: 2 October 2013