



**TC03035**

**Appeal number: TC/2012/04163**

*VAT default surcharge - VAT paid late because the Appellant erroneously believed VAT due 21 days after due date for electronic return - whether reasonable excuse - no - whether part payment made on time - no - Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KTG RECRUITMENT LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL S CONNELL  
                  PETER WHITEHEAD**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 22 May  
2013**

**Miss Anthony for the Appellant**

**Ms Anne Sinclair Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

1. KTG Recruitment Limited (“the Appellant”) appeals against a default surcharge of £2,091.57 imposed for its failure to submit, in respect of its VAT period ended 30 December 2011, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the amount due of £13,943.85

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### 10 Background

3. The Appellant’s principle business activity is the manufacture and retail of curtains.

4. The Appellant had previously defaulted on VAT payments for period 03/10 and again for periods 06/10, 09/10, 12/10, 03/11, and 09/11 (the 09/11 surcharge was removed on review) when VAT surcharge liability extension notices were issued.

5. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Section 59 of the VATA 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].

6. The Appellant paid VAT on a quarterly basis. The Appellant’s VAT Return and payment for the 12/11 period was due on 31 January 2011. HMRC may allow additional time for payment when made by electronic means and pursuant to Regulation 40 (4) of the VAT Regulations 1995 allows an additional seven days after the end of the calendar month when payment would normally fall due (together with a further three days when the VAT is collected by direct debit). Limitations apply if the due date falls on a weekend or a bank holiday in which event the due date defaults to the last previous working day.

7. The Appellant submitted its 12/11 VAT return electronically on 2 February 2011 and was therefore on time. However, payment of the VAT due was not made until 16 February 2012 and was therefore nine days late.

8. 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 surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. 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

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

9. A surcharge liability notice was issued for £2,091.57 on 17 February 2012.

10. HMRC contend that the Appellant should have been aware of the potential financial consequences of further defaults having been in the default surcharge regime from 03 /10 and having defaulted on six subsequent occasions.

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 : -

‘(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 –

(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

(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 ..’

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’s stated grounds of appeal in a letter dated 27 February 2012 to HMRC were as follows:

“on 22nd of November my business manager spoke to a gentleman at HMRC and queried when the October – December return would be due, this was because we wanted to ensure that the VAT return would be filed on time. We were told that the return had to be made by 07 February 2012 and in accordance with this we completed the return on 02 February 2012. We were under the impression that we had a further 21 days to pay from this date and therefore made the payment on 16 February 2012. We were quite shocked when we received the surcharge notice dated 17 February 2012. We then spoke to someone at HMRC who advised that the payment and return were actually due on the 07 February 2012. Unfortunately this was not the information conveyed to us in November 2011 and we were extremely upset and annoyed that the surcharge had been levied against us. We understand that it is our responsibility to ensure compliance with HMRC rules but in this instance we really have been misadvised by an HMRC employee. We really wanted to make sure we submitted our payment on time. We do not have a

note of the persons name but I'm sure you will have a system of logging calls and perhaps you could trace our call...".

14. Miss Anthony on behalf of the Appellant said that following the surcharge for 12/11 the company had been compliant with regard to its VAT obligations. She said that unfortunately no one at the company had read the VAT default warnings on the surcharge liability notices. She said everyone in the company had also been very busy.

#### HMRC's Case

15. Ms Sinclair 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 03/10 and subsequent surcharge default extension notices. The information contained on the reverse of each 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. Payment by electronic transfer gives you an extra seven days to pay unless you make payments on accounts or annual returns if the seventh day is a weekend or bank holiday, payment must reach HMRC's bank account by the last working day.

16. 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](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

17. 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).

18. Therefore, HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

19. With regard to the Appellant's grounds of appeal, an honest mistake does not amount to a reasonable excuse. Ms Sinclair said that HMRC had no record of a telephone call from the Appellant on 22 November 2011. There was only one call, on 27 February 2012, when the Appellant was told that the VAT return should have been in by 7 February 2012. There were no previous discussions with regard to the payment date.

#### Conclusion

20. HMRC's acknowledgement of the filed electronic return confirms the amount due and when the VAT should be paid. The Appellant had been submitting electronic payments since 03/10 and therefore should have been aware of when the payment was due. There was no reason why anyone at HMRC would have told the Appellant that payment was due 21 days after the due date for the return

21. The Appellant should therefore have been aware of the due date for payments of its VAT and the potential consequences of late payment.

22. The Appellant's only ground of appeal is that it was misinformed by HMRC as to the due date the payment. The Tribunal does not accept that the Appellant was told that the due date for payment was 21 days after the due date for filing of the electronic return. In any event, the Appellant would or should have been aware from previous defaults that the due date for payment was seven days after the month end following the quarter end (for an electronic payment).

23. The burden of proof is on the Appellant to show that a reasonable excuse existed for its failure to meet its VAT payment obligations. In the Tribunal's view, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 12/11 period.

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

25. 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 S CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 8 November 2013**