



TC03721

Appeal number: TC/2013/00991

VAT default surcharge - VATA 1994 s71(1)(b) - inadvertent transfer of funds out of, instead of into, Appellant's bank account by director caused a shortfall and a default - whether reasonable excuse - no - whether penalty disproportionate - no appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

L M COMMUNICATIONS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
MR NICHOLAS DEE**

Sitting in public at 45 Bedford Square, London WC1 on 22 April 2014

Mr Hugh R Holland Chairman of the Appellant Company

Mr Ojo, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

5 1. L M Communications Limited ('the Appellant') appeals against a default surcharge of £5,598.22 imposed in respect of the VAT period ended 30 September 2013 for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the VAT due of £37,321.52.

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

10 Background

3. The Appellant had previously defaulted on VAT payments in periods 06/11, 12/11, 03/12, 09/12 and 12/12 prior to the default under appeal.

15 4. Section 59 VATA 1994 provides for default surcharges. All VAT registered businesses are required by law to send to HMRC both their return and payment of the VAT by the due date, which is normally one calendar month after the end of the accounting period covered by the return.

20 5. The company paid VAT on a quarterly basis, and therefore its VAT return and the related payment was due 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 calendar days for electronic filing and payment and an additional three working days if payment is made by direct debit.

7. The period 09/13 had a due date of 7 November 2013 for electronic VAT payments and returns. The VAT Return was received electronically by HMRC on 6 November 2013. The company paid its VAT by way of a FPS transaction, which was received by HMRC on 15 November 2013.

30 8. Section 71 (1) VATA, 1994 - Reasonable Excuse provides:

(1) For the purpose of any provision of sections 59-70 which refers to a reasonable excuse for any conduct:-

35 (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance, nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

Appellant's contentions

9. The Appellant does not dispute that its VAT payment for the period 09/13, due on 31 October 2013, was late. It is agreed that the payment, if made electronically, was due no later than 12 November 2013 (being the third working day after 7
5 November 2013), but did not reach HMRC until 15 November 2013.

10. In his letter of appeal to HMRC dated 19 December 2013, Mr Holland explained that unfortunately, during the week of the scheduled payment, he was required to be out of the country. He was out of e-mail contact and control of the company's bank account. He enclosed a copy of an e-mail he had sent to the company's relationship
10 manager at Barclays Bank, dated 6 November 2013, explaining the situation and the liability to make payment of the company's VAT liability no later than 7 November 2013.

11. In his email to the bank, Mr Holland also mentioned that monies were expected into the account, but that Ms Lara Mingay who is a director of the company and who
15 also has access to its bank account, would ensure that there were adequate funds in the account to meet its VAT payment, if necessary by transferring monies from another (personal) account. The company had an overdraft facility with the bank of £20,000 and he had spoken to Ms Mingay saying that if it looked like the VAT payment would take the company over its overdraft limit, she should transfer funds from the other
20 account to the company's account to ensure payment to HMRC was made on time.

12. In the event, on 11th November 2013, rather than transfer funds into the company account, Ms Mingay mistakenly transferred monies out of the account (£6,000) which caused a shortfall of £12,000 and the direct debit payment to HMRC to bounce. In his letter to HMRC, Mr Holland explained that Ms Mingay is severely dyslexic and that
25 this could have contributed to her mistake. A Doctor's certificate could be provided if necessary.

13. The £6,000 inadvertently transferred out of the company's account was repaid into the company's account on 15 November 2013, enabling it to pay the VAT due of £37,321.52 the same day. Mr Holland said that he hoped the speed with which the error was rectified would provide sufficient grounds for the surcharge to be reversed.
30 If not, the surcharge would be a crippling blow for the company.

14. The Appellant says that the surcharge is entirely disproportionate to the modest delay which occurred.

HMRC's contention

35 15. HMRC say that as the payment was received eight days late, the surcharge was correctly imposed in accordance with VATA 1994 s 59(4), unless the Appellant can show a reasonable excuse.

16. The Appellant had been advised of the default surcharge regime previously and therefore must have been aware of the consequences of not paying its VAT by the due
40 date. The first default was recorded for period 06/11 and the company entered the

Default Surcharge regime. Given the information printed on the Surcharge Liability Notice, the potential financial consequences attached to the risk of further default should have been known to the Appellant from this point on.

5 17. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

10 *"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 18. The reverse of each 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).

19. 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
- 20 • On the E-VAT return acknowledgement.

25 20. Mr Ojo for HMRC said that bank statements for the period between 11 November 2013, when Ms Mingay transferred monies out of the account, and 15 November 2013, when the monies were re-transferred into the account, showed that if the company utilised its overdraft of £20,000 and had Ms Mingay not inadvertently made the mistake that she did, there would have been sufficient monies in the account to pay the VAT due. The earlier statement had not been produced, and therefore the Appellant had not necessarily shown that payment could have been made on 7 November 2013, had the mistake not been made. Furthermore the Appellant cannot rely on the error of an employee or third party as a reasonable excuse. The Appellant must take full responsibility for compliance with its obligations. A mistake by an employee or other individual which causes the late payment, even if it is a genuine mistake, is not a reasonable excuse.

35 21. With regard to proportionality, Mr Ojo for HMRC said that the case of *Total Technology (Engineering) Limited v HMRC* which was heard in the Upper Tribunal held that:

- 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
- 2) The Tribunal found that the DS penalty does not breach EU law on the principle of proportionality.

3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal decision in the case of *Total Technology* addressed the following factors:

- 5
- (a) The number of days of the default
 - (b) The absolute amount of the penalty
 - (c) The ‘inexact correlation of turnover and penalty’
 - (d) The ‘absence of any power to mitigate’

10 The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality.

Conclusion

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22. At the end of the hearing the Tribunal gave its decision.

23. The Appellant company has a poor compliance history and had been in the VAT default surcharge regime for some time. The proprietors were aware of the deadline for payment and the consequences of late payment.

20 24. As stated in VATA 1994 s 71(1)(b), where reliance is placed on any other person to perform any task, neither the fact of that reliance, nor any dilatoriness or inaccuracy on the part of the person relied upon, is a reasonable excuse. The Appellant therefore cannot rely on any delay caused by the inadvertent transfer of funds by Ms Mingay. Even if medical evidence was provided to show that Ms Mingay was suffering from a condition which may have contributed to the mistake, it cannot be said that the default was caused by events entirely outside the Appellant’s control. The Appellant could have delegated payment of the VAT to its accountant or someone who could be relied upon to ensure that payment of the VAT was made on time. It has therefore not shown a reasonable excuse for the late payment.

25 25. For the above reasons the appeal is dismissed.

30 26. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 11 June 2014