

[2016] UKFTT 697 (TC)



TC05429

Appeal number: TC/2015/07090

VAT default surcharge - payment made one day late by FPS – no direct debit arrangement in place - Appellant understood he had additional three days to make payment - whether reasonable excuse - no - whether penalty disproportionate - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX**

PALING PLUMBING & HEATING LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER NOEL BARRETT**

Sitting in public at City Exchange, 11 Albion Street Leeds on 6 June 2016

The Appellant did not attend and was not represented

Aidan Boal, Officer of HM Revenue and Customs, for the Respondents

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DECISION

The Appeal

5 1. Paling Plumbing & Heating Limited ('the Appellant') appeals against a default surcharge of £296.90 imposed by HMRC, in respect of the VAT period ended 30 July 2015, for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the VAT due of £2,969.07.

10 2. The Appellant did not attend the hearing. The Tribunal was satisfied however that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

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

Background

15 4. The Appellant's business is that of Commercial and Domestic Heating and Plumbing Contractors. Mr Phillip Paling is a Company Director.

5. The Appellant has been in the VAT default surcharge regime from period 01/14 when a non-financial Surcharge Liability Notice was issued. Prior to the default under appeal there had been five previous defaults.

20 6. No financial penalty was issued on the first default but a Surcharge Liability Notice was issued. Financial penalties in respect of the second and third defaults were issued at 2% and 5% but waived because they both fell below the De Minimis level of £400, which allows HMRC a concessionary discretion not to levy a penalty. Nonetheless any further default would attract a penalty of 10%. Penalties in respect of
25 the fourth and fifth defaults were waived or cancelled because the Appellant had a reasonable excuse for the late payment.

30 7. The Appellant was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995.]

35 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
40 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. 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.

5 10. If payment is by direct debit, HMRC will automatically collect payment from the businesses bank account three bank working days after the extra seven calendar days, following the standard due date.

10 11. In respect of the default, as payment was made electronically (Faster Payment Scheme), the due date for the 07/15 period was 7 September 2015. The return was received on time on 3 September 2015 but the VAT payment was paid on 8 September 2015, one day late.

15 12. 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 : -

‘(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 –

20 (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

25 (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.’

30 13. 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 that there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

Appellant’s contentions

14. The Appellant’s grounds of appeal are that:

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- The VAT payment for the period 07/15 was not paid late as the Company had until 10 September 2015 to make payment.
 - Mr Paling queries why he received a surcharge of 10% of the VAT due when, so far as he was aware, if a default had occurred, a surcharge of only 2% was due given that no previous surcharges had
- 40
- been issued.

- Mr Paling also says that the surcharge is unfair, given that the Company's payment was only one day late if payment was due on 7 September 2015.

5 **HMRC's contentions**

15. The period 07/15 had a due date of 7 September 2015 for electronic VAT Payments and Returns. The VAT return was received on time. The Appellant paid his VAT electronically by FPS. The tax due was £2,969.07. The payment was paid one day late. As the payment was received late the Surcharge was correctly imposed.

10 16. The Appellant entered the Default Surcharge Regime following a default in period 01/14. The Company then defaulted in five of the following six VAT periods, the last of which is under appeal.

15 17. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 01/14 Surcharge Liability Notice.

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

“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.”

20 19. 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).

25 20. 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.
- On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

30 21. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellant made no contact with HMRC prior to the due dates for payment and did not make any request for a time to pay arrangement.

35 22. As the Appellant had not registered to pay its VAT by way of direct debit then it was not entitled to the extra three days given to traders who choose to pay by this

method i.e. by the 10th of the month. It appears that Mr Paling mistakenly thought that the Company had until 10 September 2015 to pay the 07/15 VAT.

23. The reason a surcharge of 10% surcharge was applied, as opposed to a 2% or 5% surcharge, was because two previous surcharges had been issued but not enforced and collected by concession, as explained above. The Appellant had been notified of this but may have erroneously thought that surcharges had not been imposed.

24. The surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4), payment having been received by HMRC after the due date.

25. The Appellant says that the surcharge is unfair given the one day delay which has occurred. The case of *Total Technology (Engineering) Limited v HMRC* was heard in the Upper Tribunal when it was 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 addressed the following factors:
 - (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'

26. 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

27. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

28. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period

29. Mr Paling's understanding that the Company had until 10 September 2015 to make payment of the VAT due was mistaken. The Company did not pay its VAT by direct debit and therefore had to pay the VAT by 7 September 2015.

30. Two previous surcharges had been levied at 2% and 5% respectively (albeit not collected) and therefore the 07/15 default attracted a surcharge of 10%

31. The reason a surcharge of 10% was applied, as opposed to a 2% or 5% surcharge, was because two previous surcharges had been issued but not enforced and collected

by concession, as explained above. The Appellant had been notified of this but may have erroneously thought that surcharges had not been imposed.

5 32. The Appellant says that the surcharge is unfair. For the reasons submitted by HMRC and set out in paragraph 25 above this is not a ground of appeal which can be considered by the Tribunal.

33. The burden of proof is on the Appellant to show that he has a reasonable excuse for the late payment of VAT for the period 07/15. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

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

10 35. 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
15 "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**

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RELEASE DATE: 20 OCTOBER 2016

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