



TC06133

Appeal number: TC/2017/01938

VAT default surcharges - payment received by HMRC two days late - VAT payment fell due during Christmas holiday period - whether reasonable excuse - no - whether penalty disproportionate - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

SBS PARTNERSHIP

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 30 June 2017 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 1 March 2017, and HMRC's Statement of Case received by the Tribunal on 30 March 2017. The Tribunal wrote to the Appellant on 31 March 2017 stating that if the Appellant wished to reply to HMRC's Statement of Case it should do so within 30 days. No reply was received

DECISION

The Appeal

1. SBS Partnership ('the Appellant') appeals against a default surcharge of £499.11, in respect of the VAT period 11/16, imposed by HMRC for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 2% of the VAT due.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

10 Background

3. The Appellant has been registered for VAT since 2006 and carries on the business of letting commercial property.
4. The Appellant has been in the VAT default surcharge regime from period 05/16 when a non-financial Surcharge Liability Notice was issued.
5. Prior to the default under appeal there had been one previous default for period 05/06 when the due date for an electronic payment was 7 July 2017. Payment was received on 25 July 2016, being eighteen days late.
6. No financial penalty was issued on the first default but a Surcharge Liability Notice was issued. Financial penalties in respect of second and subsequent defaults are levied as set out in paragraph 7 below.
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.]
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. 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.

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. The Appellant paid its VAT electronically. No direct debit was set up.

5 11. In respect of the 11/16 default, as payment was made electronically (Faster Payment Scheme), the due date was 7 January 2017. The return was received on time on 22 December 2016, but the VAT payment was paid on 9 January 2017, two days late.

10 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 : -

15 ‘(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.’

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.

30 **Appellant’s contentions**

14. The Appellant’s grounds of appeal as set out in the notice of appeal are as follows:

35 “Our offices were closed for the Christmas holidays when the payment was due. We reopened on 9 January 2017 and made the payment that day. We apologise for the delay but given that it was only two days please reconsider. We will ensure that future payments are made on time”

HMRC’s contentions

40 15. The first default was recorded for Period 05/16 when the Appellant entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default would have been known to the Appellant from that point onward, particularly given the information printed on the Surcharge Liability Notice issued.

28. The proprietors of a business have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

16. The requirements for submitting timely electronic payments can be found -

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- In Notice 700 ‘The VAT Guide’ para 21.3.1(the notice represents HMRC’s policy and understanding of the relevant legislation)
 - On the HMRC website www.gov.uk/hmrc
 - E-VAT return acknowledgement.

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

10 “*Submit your return on time*

Make a note of when your return is due.”

“*Pay your VAT on time*

Don’t rely on HMRC to remind you — go to www.hmrc.gov.uk/payinghmrc/vat.htm”

“*Think ahead*

- 15
- 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.”

20 18. The Surcharge Liability Notice V160 advises 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.

25 19. With effect from period 04/15 each notice issued details on the reverse how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA s 59(5).

30 20. Value Added Tax Regulations 1995, at Regulation 40, state that “any person required to make a return shall pay to HMRC such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return”. There is a statutory obligation on a person required to make a return to pay the VAT to HMRC.

21. The Default Surcharge system seeks to ensure businesses that fail to pay VAT on time do not gain a commercial advantage (by way of an interest free loan) over the majority that do. The system therefore imposes a financial penalty on traders who are persistently late paying their VAT.
- 5 22. HMRC has a statutory responsibility to ensure that tax due is not retained and used as working capital after the date when it is due to be paid.
23. Having traded since 2006, the company proprietors would clearly have been aware of the deadline for payment of VAT.
- 10 24. Section 70 VAT Act 1994, mitigation of penalties, is not engaged in respect of surcharges under s 59 - the rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount due to mitigating circumstance per s 70 VAT Act 1994.
- 15 25. The liability to pay a surcharge may be avoided where the failure timeously to despatch the return or make payment of the VAT declared to be due is attributable to a reasonable excuse, s 59(7)(b) VAT Act 1994. No reasonable excuse has been provided.
26. In respect of the 11/16 default, HMRC consider that having received the surcharge liability notice for period 05/16, the Appellant would have been aware of the potential fiscal consequences of further default.
- 20 **Conclusion**
27. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.
- 25 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. There is no statutory definition of reasonable excuse. The only reason the default surcharge can be mitigated is if the Appellant can prove it is a reasonable excuse.
- 30 30. The fact that the VAT payment for 11/16 fell due during a Christmas holiday period is not a reasonable excuse for the late payment. Proprietors of a company exercising reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates, would have put measures in place to ensure payment was made on time.
- 35 31. The Appellant has not provided any grounds which contain a reasonable excuse for the late payment of VAT for the period 11/16. The Appellant did not take appropriate or sufficient steps to ensure that the company met its VAT obligations.
32. The burden of proof is on the Appellant to show that it has a reasonable excuse for the late payment of VAT for the default period, but has not discharged that onus.

42. The appeal is accordingly dismissed and the VAT default surcharge for 11/16 is confirmed.

5 33. 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 CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 27 September 2017

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