



**TC06878**

**Appeal number: TC/2018/02415**

*VAT default surcharge - payment made two days late - instructions given to bank in time but financial limit on amount of FPS bank transfer caused delay – penalty for similar delay in earlier default period cancelled by HMRC - whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SYNERGY LIFTING LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER SUSAN STOTT**

**Sitting in public at Darlington Magistrates Court, Parkgate, Darlington on 14 August 2018**

**The Appellant did not attend and was not represented**

**Mr Gordon Hume, Officer of HMRC, for the Respondents**

## DECISION

### The Appeal

- 5 1. Synergy Lifting Limited ('the Appellant ') appeals against a default surcharge of £5,614.63 issued by HMRC on 13 October 2017 in respect of VAT period 08/17, the Appellant having failed to submit, by the due date, payment of VAT due.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making the late payment.
- 10 3. The Appellant did not attend the hearing. The Tribunal was satisfied that the Appellant had been informed of the date, time and venue of the hearing, and that it was in the interests of justice to proceed.

### Background

- 15 4. The Appellant registered for VAT in 2015. Its main business is that of providing crane hire, construction industry equipment and operators. It is based in Darlington.
5. The sole director at the date of the default surcharge was Stephen Gaylor.
- 20 6. 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.] The Appellant's preferred method of payment was via the Faster Payment Service (FPS).
- 25 7. 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 30 the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.
- 35 8. HMRC have a 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.
9. 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. The Appellant entered the VAT default surcharge regime in period 08/15 when a non-financial Surcharge Liability Notice was issued for a first default.

5 11. The Appellant company then defaulted in periods 11/15, 02/16, 08/16, 05/17 and also in period 08/17, being the default under appeal.

12. The period 08/17 had a due date of 7 October 2017 for electronic payments and electronic VAT submission. The return was received on 6 October 2017. Payment was received on 9 October 2017 by FPS, being two days later than the due date.

10 13. A surcharge of £5,614.63 was issued in respect of the default. The surcharge was calculated at 15% of the VAT due of £37,430.93.

14. 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.

15. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

30 ‘(1) for the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

35 Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

40 16. 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**

17. The Appellant's grounds of appeal as stated in its notice of Appeal are:

5 "Our quarterly VAT bill for the period 08/17 fell due on Saturday 7 October 2017. We made the payment in full on the Friday 6 October as a faster payment to reach HMRC on the same day. I was therefore under the impression that the bill had been paid in full and on time.

10 Although the payment was successful, our bank did not release it until the Monday 9 October because it was such a large amount (i.e. over £20,000) and therefore we were issued a surcharge by HMRC for a late payment - even though the faster payment was delayed due to reasons outside of our control.

I have since found out that the previous Managing Director of Synergy Lifting experienced the exact same issue when paying the VAT bill on a Friday. Subsequently the surcharge received was cancelled due to the circumstances.

15 Although it may have no bearing on your decision, please consider that we are only a small family run company. We are profitable but often struggle for cash flow, as our history may show, due to the nature of our work. We do not consider ourselves to be motivated by money - but instead take pride in providing jobs for our employees and delivering a good service for our customers - and a surcharge such as this will have serious repercussions on our business.

20 Given the circumstances surrounding the payment and the precedent set in exact same situation when the company was under the control of the previous Managing Director, I ask that the surcharge is cancelled."

## **HMRC's contentions**

25 18. The period 08/17 had a due date of 7 October 2017 for electronic VAT Payments and Returns. The VAT return was received on time. The Appellant paid its VAT electronically by FPS. The tax due was £37,430.93. Payment was made two days late.

19. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 08/15 Surcharge Liability Notice.

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

35 *"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."*

40 21. 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).

22. 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.
- 5 • On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

23. HMRC Public Notice 700 The VAT Guide s 21.3.1 ( August, 2013, Updated 1 April 2015 up to August 2017) (the notice represents HMRC’s policy and understanding of the relevant legislation) states:

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*“Paying by an approved electronic method will give you up to seven extra calendar days to submit your return and pay your VAT, unless you make annual returns or Payments on Account (and submit quarterly returns). The extended due date will be shown on your online VAT return and you must ensure that cleared funds reach HMRC's bank account by this date. (The exception to this is online Direct Debit (DD) - if you pay by DD, then HMRC will automatically collect your payment on the third bank working day after the date shown on your return.) If your due date falls on a bank holiday or weekend, your payment must clear HMRC's bank account before then (unless you use the Faster Payments service - Faster Payments can be received on bank holidays and weekends).*

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*If your payment arrives late you may be liable to a surcharge for late payment. To make sure that your payment clears our account in time, you should check with your bank or building society to find out:*

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*If there are any single or daily limits to how much you can transfer from your account. Is there a cut-off time for processing payments on the same day?*

*How long your payment will take to clear into HMRC's bank account?*

*Checking these details will help to ensure that you do not incur any unnecessary late payment surcharges.”*

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24. HMRC maintain that HMRC's web pages titled “Pay your VAT bill - how long it takes” advises the trader to check their bank’s transaction limits and processing times before making a payment.

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*“Payments made by Faster Payments (online or telephone banking) will usually reach HMRC on the same or next day, including weekends and bank holidays. CHAPS payments usually reach HMRC the same working day if you pay within your bank's processing times.  
Bacs payments usually take 3 working days.*

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*Check your bank's transaction limits and processing times before making a payment.”*

*<https://www.gov.uk/pay-vat/bank-details>*

25. A prudent business person mindful of their legal obligations would have made themselves aware of the relevant daily transaction limits and cut off times of their

initiating bank. This action would have enabled their VAT payment to have been received on time, thus avoiding the default surcharge.

26. HMRC in their letter of 1 June 2018, requested a copy of the Appellant's FPS transaction documents but no reply has been received to date.

5 27. The current managing director of the Appellant company Mr Peter Stephens, in the Notice of Appeal, refers to the previous Managing Director (Mr Stephen Gaylor) having similar problems when paying VAT by way of FPS transaction (for period 02/17) on a Friday.

10 28. Companies House records show that Mr Stephen Gaylor was appointed as Director on 18 December 2014 and resigned on 21 December 2017. Mr Peter Stephens was appointed as Director on 21 December 2017.

29. Mr Gaylor, in a letter of 24 April 2017, requested a review of the Default Surcharge for the Period 02/17. The VAT due for the period exceeded their bank's daily transaction limit of £25,000.

15 30. HMRC, on checking the trader's VAT ledger, found that this was the first occasion that quantum of VAT due had exceeded their bank's daily transaction limit. The company also enclosed a copy of the FPS request which confirmed the date and time the payment request was sent to the bank.

20 31. HMRC in their letter of 18 May 2017 cancelled the default surcharge for Period 02/17. In this letter, the company was advised to check with their bank what services were available to them, any daily value limits and cut off times for making payments. A further information sheet was also enclosed.

25 32. Mr Gaylor in a letter of 8 November 2017, requested a review of the Default Surcharge for Period 08/17 (which is the subject of this Notice of Appeal). The director advised the reason for the late payment was that the VAT payment due of £37,430.93 was above the bank's daily online payment limit.

33. HMRC contend that a prudent and competent business person, on receiving HMRC's letter of 18 May 2017, would have taken the appropriate or sufficient steps to ensure that they meet their VAT payment obligations.

30 34. VAT Regulations 1995, 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 thus a statutory obligation on a person required to make a return to pay the VAT to HMRC.

35 35. HMRC maintains the lateness of a return or payment is largely a question of fact, and once it occurs a surcharge accrues. The length of the delay is immaterial. The surcharge applies even if payment is one day late.

36. 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.

5 37. 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. Section 71(1) VAT Act 1994 has no definition of a reasonable excuse but the law specifies what is not.

10 38. The Default Surcharge of £5,614.63 for the Period 08/17 is less than 2.1% of the total value of sales net of VAT £277,182.

### **Conclusion**

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

15 40. 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.

20 41. The late transmission of the VAT payment was not entirely out of the Appellant's control. The Appellant was aware of their bank's daily transaction limit particularly after the late payment for 02/17 and could have taken action to ensure the VAT payment was received on or before the due date; thus the default surcharge could have been avoided.

25 42. The Appellant has not provided any grounds that can be considered a reasonable excuse for the late payment of VAT for Period 08/17. The proprietors of a company have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

30 43. Surcharges issued under VATA 1994 s 59 are a penalty based solely on the amount of VAT paid after the due date, no matter the length of delay. The rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

44. 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.

35 45. The burden of proof is on the Appellant to show that it has a reasonable excuse for the late payment of VAT for the period 08/17. For the reasons given above, in our view, that burden has not been discharged.

46. The appeal is accordingly dismissed and the surcharge of £5614.63 upheld.

47. 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: 18 DECEMBER 2018**

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