



Neutral Citation: [2023] UKFTT 00120 (TC)

Case Number: TC08727

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Held by video

Appeal reference: TC/2022/01299

VALUE ADDED TAX – default surcharge - whether appropriate and correct – yes - appeal dismissed.

**Heard on: 25 October 2022
Judgment date: 6 February 2023**

Before

**TRIBUNAL JUDGE KELVAN SWINNERTON
MEMBER MR DEREK ROBERTSON**

Between

GODAVARI CONSULTANCY SERVICES LTD

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr L Patil of the Appellant attended with his wife.

For the Respondents: Mr A Sing, litigator of HM Revenue and Customs’ Solicitor’s Office (with Mr A Smith who observed).

DECISION

INTRODUCTION

1. This is an appeal by Godavari Consultancy Services Ltd (“the Appellant”) against a VAT default surcharge for the VAT period 10/21.
2. A surcharge in the amount of £946.34 was imposed by HMRC under section 59 of the Value Added Tax Act 1994 (“VATA 1994”) for failure to submit payment of VAT on time.
3. Section 59 of VATA 1994 sets out the provisions in relation to the default surcharge regime.
4. The applicable surcharge rate was 15% of the outstanding VAT due for the period 10/21.
5. The amount of the surcharge is not in dispute between the parties.

THE HEARING AND EVIDENCE

6. We considered all of the documentation provided which included a hearing bundle with the Notice of Appeal of the Appellant, a bundle of legislation and case law, and a document from HMRC entitled ‘Statement of Reason’ dated 18 May 2022.

FINDINGS OF FACT

7. The business activity of the Appellant is domestic software development.
8. The director of the Appellant is Mr Linganno Vitthalrao Patil.
9. The Appellant has been registered for VAT with effect from 5 January 2011.
10. A number of VAT returns and payments are relevant to this appeal.
11. With respect to the VAT return for the period 10/20, the due date for the return and payment was 7 December 2020. The return was received on 7 December 2020. Payment was received on 23 November 2021.
12. In relation to the VAT period of 01/21, the due date for the return and payment was 7 March 2021. The return was received on 4 March 2021. Payment was received on 23 November 2021.

13. In respect of the VAT period of 04/21, the due date for the return and payment was 7 June 2021. The return was received on 7 June 2021. Payment was received on 7 September 2021.

14. In relation to the VAT period 07/21, the due date for the return and payment was 7 September 2021. The return was received on 6 September 2021. Payment was received on 28 September 2021.

15. In respect of the VAT period 10/21, the due date for the return was 7 December 2021. The return was received on 6 December 2021. Payment was received on 8 December 2021 according to the Respondents although this date is disputed by the Appellant and is considered in this decision.

16. A surcharge liability notice (“an SLN”) was issued to the Appellant for the period 10/20. It specified a surcharge liability period of 11 December 2020 to 31 October 2021.

17. The surcharge liability period was extended due to subsequent defaults.

18. The amount of outstanding VAT in respect of the period 10/21 was £6308.94.

THE LAW

19. As stated above, section 59 of VATA 1994 sets out the provisions in relation to the default surcharge regime.

20. Section 59(2) of VATA 1994 states:

“Subject to subsections (9) and (10) below, subsection (4) below applies in any case where-

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of notice”.

21. Sections 59(4) and 59(5) of VATA 1994 relate to the amount or percentage of the surcharge.

22. Section 59(6) of VATA 1994 states: *“For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for*

which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day".

23. Section 59(7) of VATA 1994 relates to whether or not the return was despatched at such a time and in such a manner that it was reasonable to expect that it would have been received within the appropriate timeframe.

24. Section 59(7) provides also that a surcharge does not arise in relation to a failure to submit a return or make payment by the due date if a person satisfies HMRC (or, on appeal, a Tribunal) that they had a reasonable excuse and they put right that excuse without unreasonable delay after the excuse has ended.

25. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in light of all the circumstances of a particular case (*Rowland v HMRC (2006) STC 9SCD*) 536.

26. Reasonable excuse was considered in the case of *Christine Perrin v Revenue and Customs Commissioners [2018] UKUT 0156 (TCC)* and in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise [1991] VATTR 234* by Judge Medd who stated:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

THE APPELLANT'S CASE

27. In the grounds of appeal of the Appellant, it is stated that VAT return was submitted on 6 December 2021 and that the VAT was also paid on that same date, 6 December 2021, before the due date of 7 December 2021. The grounds of appeal refer to Mr Patil telephoning the VAT helpline of HMRC, to being told by HMRC that a "false surcharge" had been issued, that the default surcharge would be cancelled and the records updated to reflect the cancellation of the default surcharge.

28. At the hearing, Mr Patil explained that he made payment on 7 December 2021 of the VAT due for the period of 10/21 (not on 6 December 2021 as detailed in the grounds of appeal) and that the payment of VAT was not late.

THE CASE OF THE RESPONDENTS

29. HMRC states that the payment of VAT for the period 10/21 was not made by the due date of 7 December 2021 as claimed by the Appellant but on 8 December 2021 and was, therefore, late albeit by only one day. HMRC states also that, under section 59 of VATA 1994, a surcharge is payable regardless of the length of delay in payment.

30. At the hearing, Mr Sing on behalf of the Respondents stated that payment by the Appellant was made by FPS (the Faster Payments Service) and funds transferred by this method typically are transferred immediately and usually within a couple of hours.

DISCUSSION

31. As stated above, the Appellant disputes that the VAT payment for the period 10/21 was made late. That is the fundamental issue to be determined in this appeal.

32. The onus lies with HMRC to demonstrate that the surcharge was issued correctly and within legislation.

33. With respect to the rates of penalty, these are detailed in section 59(5) of VATA 1994 with the first default within the surcharge liability period charged at 2% of the outstanding VAT and the second, third and fourth defaults charged at 5%, 10% and 15% respectively. There is no dispute between the parties as to the rate of penalty of 15% in this case.

34. In relation to the telephone call referred to by Mr Patil between himself and HMRC, this took place on 29 December 2021. The bundle of documentation available to us contained an internal note of HMRC with respect to that telephone call. That internal note does not make any mention of or refer to any false VAT surcharge. Neither does the internal note refer to a default surcharge being cancelled or to the records of HMRC to be updated in order to reflect the cancellation of any default surcharge. The internal note states: "*Q regarding submitting VAT return for the October period and making payment. Checked ETMP and the return was submitted on 06/12/2021 and payment showing on 08/12/2021. Adv customer on Curr bal being 1213.89 and an 276.55 outstanding. Customer said that figure was paid on the 28/12/2021. Adv to call back due to payment on the 28/12/2021, and the system need to be updated*".

35. Based upon the evidence available to us, we accept as accurate the record of the telephone call between Mr Patil of the Appellant and HMRC on 29 December 2021. We find that Mr Patil was not informed that a default surcharge would be cancelled nor that the VAT records of the Appellant would be updated to reflect any cancellation of a default surcharge. We find also, and for the avoidance of any doubt, that Mr Patil was not informed on a later telephone call with HMRC on 4 January 2022 (and in relation to which there is also an internal HMRC note of the conversation) that any default surcharge would be cancelled.

36. With respect to the payment of the outstanding VAT for the period 10/21, we were not provided with any documentary evidence by the Appellant that payment was made by either 6 December 2021 or by 7 December 2021. HMRC directed us to an internal HMRC ledger entry which detailed that an amount of £6,308.94 was credited to the account of the Appellant on 8 December 2021. Based upon the evidence available to us, we find that payment of the outstanding VAT due for the period of 10/21 was not made until 8 December 2021 and was, therefore, not made by the due date of 7 December 2021.

37. Having considered carefully all of the circumstances of this case, we find that the payment of VAT due for the period of 10/21 was made late. We find that the Appellant was served with the notices of the surcharge periods. We find that HMRC was correct to issue a surcharge of 15% of the VAT paid late for the period of 10/21 due to previous late payments for earlier VAT periods.

38. The case of the Appellant is not based upon the Appellant having a reasonable excuse for the late payment of VAT. In any event, we find that the Appellant has not provided a reasonable excuse for the late payment of VAT for the period 10/21.

DECISION

39. The VAT default surcharge of £946.34 has been calculated correctly and has been charged in accordance with legislation.

40. No reasonable excuse has been provided for the failure to make payment on time.

41. We dismiss the appeal and confirm the surcharge in the sum of £946.34.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

KELVAN SWINNERTON
TRIBUNAL JUDGE
RELEASE DATE: 07th February 2023

