



TC05066

Appeal number: TC/2015/02666

*Value Added Tax – default surcharge – whether reasonable excuse –no -
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Falconwood Employment Agency

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DR K KHAN
NIGEL COLLARD**

Sitting in public at Fox Court on 9 July 2015

The Appellant was not present.

Lynne Ratnett, Presenting Officer, appeared for the Respondent

DECISION

1. Pursuant to Rule 29 of the Tribunal Rules the matter was heard without the Appellant present.
2. The Appellant requested a full decision.

Introduction

3. The Appeal, dated 8 April 2015, concerns the late payment Default Surcharge for the VAT period 11/14.
4. The Tribunal must determine whether the Default Surcharge was correctly imposed and whether the Appellant had a reasonable excuse for the late payment.
5. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse.
6. The standard of proof is the civil standard of proof on a balance of probability.
7. In law the relevant provisions are Section 59 (Default Surcharge) and Section 71 (Reasonable excuse) Value Added Tax Act 1994 (VATA 1994).

Relevant facts

8. For the period under appeal – 11/14 – the VAT Return was submitted electronically on 6 January 2015. The due date for payment was 7 January 2015. The VAT was paid by four cheques between 9 January and 17 February 2015. The payment was between 9 and 48 days late as there is no 7 day extension with payment that is not made electronically.
9. By way of background, for the period 08/14 the due date was 7 October 2014 for electronic submissions. The return was submitted on 2 October 2014 and was therefore in time. VAT liability was £60,455.70 of which £13,456.70 remained unpaid at the due date. This was paid by the Faster Payment System on 23 November 2014. The payment was made after the 7 day extension given for electronic payments and therefore was late and the surcharge was issued at the rate of 2%. As the amount of the surcharge was below £400, HMRC by concession did not seek payment of the amount.

The Appellant's Contention

10. The Appellant in their written submissions to the Tribunal stated as follows;

5 “As stated in our previous letter we are subject at present to very severe cash flow restraints and major clients are not paying us in a timely manner. Please find enclosed copy statement for one of our major clients, which must be treated as strictly confidential which shows how slowly we are being paid. Our apologies that this does not refer to the period in question but the trend has always been the same and more historic data is not available on our system. This is not unique and is fairly typical of other customers. We've been asked to pay our VAT which we have not yet received and I was informed by HMRC that we are above the turnover limit for cash accounting which would help solve our problem. In any event, £35,000 of the amount due was sent in plenty of time, so the Default Surcharge should not be on the earlier amount even if being applied”.

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Respondent's Contention

11. Pursuant to Regulation 25 Value Added Tax Regulations 1995 (1995 Regulations), traders are required to furnish a VAT return for a prescribed accounting period using electronic communication. There is a statutory obligation on a person required to make a return to pay the VAT to HMRC under Regulation 40 of the 1995 Regulations.

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12. Pursuant to Section 40 (2A) of the 1995 Regulations the return and payments should be made electronically.

13. Where payment is made by cheque, payment shall be treated as made when the cheque clears the account of HMRC.

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14. Pursuant to Section 59 VATA 1994 a taxable person is regarded as being in default if they fail to make a return for a VAT quarterly period by the due date and in such cases a Default Surcharge Liability Notice may be served on the defaulting taxable person. This brings that person within the Default Surcharge Regime and any subsequent defaults (within a specified period) results in an assessment at the prescribed percentage rate. The specified percentage rates are determined by reference to the number of periods of default.

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15. The Respondents say that the taxpayer failed to make payment by the due date since the cleared amounts were received later than the due date.

16. They say that there is no reasonable excuse and in relation to the point made by the taxpayer regarding cash flow difficulties and it is clear that the cash flow difficulties of the taxpayer existed for some time and this would not be a reasonable excuse.

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Conclusion

17. The Appellant states in his letter of 9 February 2015 that the cheque for the amount of £35, 000 was sent to HMRC in plenty of time but was not banked for two weeks. However the cheque was dated 6 January 2015 and the due date for clearing HMRC's bank account was 31 December 2014. The cheque was therefore not submitted to HMRC to allow it to clear on time. The surcharge of £3262.24 was therefore correctly calculated on the outstanding VAT of £65252.90 at 31 December 2014.

18. In relation to the Appellant's point concerning cash flow difficulties, it is stated in Section 71(1a) that an insufficiency of funds to pay any VAT due is not a reasonable excuse. The Appellant argues in his letter of 24 February 2014 that they were experiencing severe cash flow pressure over an eighteen to twenty four month period. It would appear that the business was experiencing difficulties for a three year period rather than the shorter period indicated by the taxpayer. However the Tribunal was not provided with any evidence to show how the late payment brought about the insufficiency of funds which resulted in the taxpayer being unable to pay the VAT by the due date. The change in the payment terms by one of the major clients took place much earlier than the 11/14 period, which is under appeal. Further, cash flow difficulties are viewed as an ordinary hazard of running a business and are reasonably foreseeable and in this case there was not a sudden cash flow crisis and therefore there is no reasonable excuse.

19. While the taxpayer had Time to Pay agreements (TPA) for the periods 05/13, 08/13 and 11/13, there were not any such arrangements for the period under appeal. The Appellant was aware of the facility but did not appear to make arrangements with HMRC to make payments later or in an agreed manner.

20. The Tribunal finds that the underlying and primary cause of the default was not an unforeseen event outside the control of the Appellant. One would have expected a prudent taxpayer in the circumstances to approach HMRC and agree time to pay arrangements before the due date. However this was not done. There is some indication that the Appellant may have attempted to contact HMRC to agree time to pay arrangement but having been unsuccessful they could have made a formal request in writing or made further efforts to enter into such arrangements. It is clear to the Tribunal however that time to pay arrangements were not in place at the relevant time.

21. For these reasons the Tribunal finds that there is no reasonable excuse.

22. The Tribunal finds that for the 11/14 period the Appellant failed to make VAT payments on time and there was no reasonable excuse for the late payment.

23. 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

5 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.

10 **DR K KHAN**
TRIBUNAL JUDGE

RELEASE DATE: 28 APRIL 2016