

[2017] UKFTT 646 (TC)



TC06073

Appeal number: TC/2017/02409

VAT default surcharge - payment made one day late by FPS - Company accountant having control of VAT payments hospitalised at relatively short notice - whether reasonable excuse - on the facts - yes - appeal allowed

FIRST-TIER TRIBUNAL

TAX

SKY THRONE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER PETER SHEPPARD**

Sitting in public at Alexandra House, The Parsonage, Manchester on 22 May 2017

The Appellant did not attend and was not represented

Mr Bernard Haley, Officer of HMRC, for the Respondents

© CROWN COPYRIGHT 2017

DECISION

The Appeal

- 5 1. Sky Throne Limited (“the Appellant”) appeals against a default surcharge of £1636.08 imposed by HMRC, in respect of the VAT period ended 31 October 2016, for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the VAT due.
- 10 2. No-one from the Appellant Company attended the hearing. The Appellant had been notified of the time date and venue of the appeal hearing. On the morning of the hearing the Company accountant, Mr Raza, requested a postponement saying that he wanted to attend, but was ill. He said in his letter that if a postponement was not possible he was content for the appeal to go ahead in his absence. Mr Raza did not elaborate on the nature of his illness and no medical evidence was provided. The Tribunal decided that it was in the interests of justice to proceed.
- 15 3. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

Background

- 20 4. The Appellant’s business is that of the distribution and retail of electronic cigarette supplies. The business is based in Manchester. The Appellant has been registered for VAT with effect from 2014.
5. The Appellant has been in the VAT default surcharge regime from period 07/14 when a non-financial Surcharge Liability Notice was issued. Prior to the defaults under appeal there had been eight previous defaults.
- 25 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%, but waived because they both fell below the de minimis level of £400, which allows HMRC a concessionary discretion not to levy a penalty. Any further default attracts a penalty. The penalty under appeal is the Appellant’s ninth
30 default.
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 taxable person, which brings him within the default surcharge regime so that any
40 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.

5 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 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.

15 11. In respect of the 10/16 default, as payment was made electronically (Faster Payment Scheme), the due date was 7 December 2016. The return was received on time on 7 December 2016, but the VAT payment was paid on 8 December 2016, one day late.

20 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 –

25 (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

30 (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.’

35 13. Section 108 Finance Act 2009, specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange Time to Pay, and this is agreed by HMRC.

40 14. 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

15. The Appellant's grounds of appeal are that the Senior Accountant, Mr Jawad Raza, the main person in the company responsible for handling VAT matters, had been hospitalised at short notice.

5 16. Mr Raza in in the Notice of Appeal to the Tribunal, states:

10 "I had a sudden and serious illness in December 2016 and was given an urgent appointment for the surgical procedure from the Hospital on 5 December 2016. This surgical procedure was urgently given to me due to the seriousness of my illness and as such was not a foreseeable event. I never had such a sudden and serious illness in past. Despite my bad health condition, I somehow managed to complete remotely the VAT Return for the aforesaid period on the 7 December 2016 but in the late hours (after 6pm). Unfortunately, it was not possible to make the payment due to the lack of access to the online business banking. However the full payment was made first thing in the next day morning on 8th December 2016."

15 "An assistant (who could have arranged payment of the vat) was also away from work on examination preparation leave, in the week commencing 5 December 2016 and returned to work on 9 December 2016".

17. A copy of the hospital appointment letter was sent to HMRC.

20 18. Mr Raza said that VAT Return for Period 10/16 was submitted on time on 7 December 2016 and the payment was made as soon as he was able to access on line banking facilities on 8 December 2016, being less than twelve hours late. HMRC reduced the Surcharge from £2,454.13 to £1,636.08 because a repayment was due to the Appellant.

HMRC's contentions

25 19. The first default was recorded for Period 07/14 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, given the information printed on the Surcharge Liability Notice issued.

30 28. The directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

20. The requirements for submitting timely electronic payments can be found —

- 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
- 35 • E-VAT return acknowledgement.

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

“Submit your return on time

Make a note of when your return is due.”

5 *“Pay your VAT on time*

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

“Think ahead

- If the person who normally does your VAT return will be absent, make alternative arrangements.
- 10 • 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.”

22. With effect from the period 01/13 the Surcharge Liability Notice V160 advises a trader how the surcharges are calculated and the percentages used. Subsequent
15 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.

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

24. 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
25 required to make a return to pay the VAT to HMRC.

25. 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.

30 26. 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.

27. Section 108 of the Finance Act 2009 specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange a payment deferment and this is agreed by HMRC.

35

28. HMRC consider that a person 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 or contacted HMRC to request a deferment of payment.
- 5 29. HMRC’s website details what actions to take if a trader cannot pay their VAT on time and warns of surcharges. This web page can be found at the following addresses:
<https://www.gov.uk/Nat-returns/surcharges-and-penalties>
<https://www.gov.uk/difficulties-paying-hmrc>
- 10 30. HMRC contends that the Appellant did not ensure sufficient care was taken in relation to its financial and statutory obligations. The Appellant knew the consequences of payment failure and should have taken steps to protect the company from the consequences of late payment.
- 15 31. 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.
32. The Appellant provided a copy of Mr Raza’s hospital appointment letter which was dated 21 November 2016 and advised the date of appointment as Monday 5 December 2016.
- 20 33. As the Appellant was aware of the future date of Mr Raza’s appointment, this was a foreseeable situation. HMRC would have expected measures to have been put in place to ensure that the Appellant met its legal obligation to submit the VAT payment on time.
- 25 34. The Appellant submitted the VAT Return on time and was clearly aware of the need for the VAT Payment to have been received on the due date of 7 December 2016.
35. The Appellant could have set up a forward dated payment by way of Faster Payment Service thus avoiding the surcharge. The internet advises with regards to Faster Payment Services:
- 30 “Forward-dated payments are one-off payments sent and received on a pre-arranged date, set-up by the customer in advance. Typically used to pay bills, rent etc.
- Customers can initiate forward dated payments with their bank online, using a mobile device, over the phone or in a branch.
 - Payments can, be sent 24 hours a day, seven days a week (subject to the service offering of your bank).
 - Up to £100,000 can be sent per transaction (although individual banks may impose lower limits). You can check the current limit.
- 35

Although forward dated payments can be sent at weekends and on other non-bank working days, some organisations only process incoming payments on working days. If you are using

a forward dated payment to pay a bill you should check how quickly they apply payment (this information is usually available on the back of your bill)”

5 36. The Appellant waited too long to initiate the VAT payment and as a direct result as stated in the Grounds for Appeal “it was not possible to make the payment due to the lack of access to the online business banking”.

10 37. The Appellant in their letter of 23 December 2016, advised that an assistant was also away from work on “examination preparation leave” in the week commencing 5 December 2016 and returned to work on 9 December 2016. An employee being absent from work on “examination preparation leave” would have been known and agreed by the Appellant and as such is a foreseeable event.

15 38. The absence of key staff members as in this instance was foreseeable. The Appellant did not take appropriate or sufficient steps to ensure that it met its VAT payment obligation. A reasonable and competent business person would have ensured that there were arrangements in place to cope with the absence of key members of staff.

39. The Respondent 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.

20 40. The level of the Default Surcharge is specified in s 59 VATA 1994 and as such HMRC have no discretion as to the amounts to be levied.

41. HMRC contend that the surcharges have been correctly issued in accordance with s 59(4) of the VAT Act 1994, payment having been received by HMRC after the due date and the Appellant has failed to show that it had a reasonable excuse for the late payment.

25 **Conclusion**

42. 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 determined by the number of defaults in any surcharge liability period.

30 43. 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 periods. There is no definition of “reasonable excuse” in VAT legislation.

35 44. Although hospitalised, Mr Raza was able to submit the return but unable to access the Appellant Company’s online banking facilities. He appears to have prepared for submission of the return and payment of the VAT prior to his admission to hospital. He was therefore aware of the due date for making the 10/16 return, payment of its VAT and the potential consequences of late payment.

45. We accept HMRC's submission that he could have arranged a payment in advance, but it appears Mr Raza assumed he would have no difficulty making an on line payment while in hospital.

5 46. Mr Raza clearly tried his best, but for reasons which are not entirely clear, was unable to arrange an on line transfer of funds on 7 December 2016. We have to conclude that Mr Raza experienced a difficulty which he was not expecting. That is an unforeseeable event beyond his control, otherwise he would have made the VAT payment when filing the return.

10 47. In all the circumstances we conclude that the Appellant has shown a reasonable excuse for the late payment of VAT due in period 10/16.

48. The appeal is accordingly allowed.

15 49. 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.

20

**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 21 AUGUST 2017

25