



**TC06099**

**Appeal number: TC/2017/00637**

*VAT default surcharge - payment made one day late - the appellant 'got muddled up' with his dates - whether reasonable excuse - on the facts - no - appeal not allowed*

**FIRST-TIER TRIBUNAL**

**TAX**

**DISASTER RECOVERY NORTHAMPTON LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER MARYVONNE HANDS**

**Sitting in public at Nottingham Justice Centre Carrington Street Nottingham on 21  
June 2017**

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

**Mr Noor Katelia, Officer of HMRC, for the Respondents**

## DECISION

### The Appeal

1. Disaster Recovery Northampton Limited (“the Appellant”) appeals against a  
5 default surcharge of £903.30 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 15% of the VAT due.

2. No one from the Appellant Company attended the hearing. The Appellant had  
10 been notified of the time date and venue of the appeal hearing. The Tribunal therefore  
decided that it was in the interests of justice to proceed.

3. The point at issue is whether or not the Appellant has a reasonable excuse for  
making late payment.

### Background

4. The Appellant’s business is that of providing general and specialised cleaning  
15 services. The business is based in Northampton.

5. The Appellant has been registered for VAT with effect from May 2004.

6. The Appellant has been in the VAT default surcharge regime from period 07/15  
20 when a non-financial Surcharge Liability Notice was issued. Prior to the default under  
appeal there had been four previous defaults.

7. No financial penalty was issued on the first default in 07/15 but a Surcharge  
Liability Notice was issued. Financial penalties in respect of the second, third and  
fourth defaults were issued at 2%, 5% and 10%, but waived because they all fell  
25 below the de minimis level of £400, which allows HMRC a concessionary discretion  
not to levy a penalty. The penalty under appeal is the Appellant’s fifth default.

8. 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.]

9. Under s 59(1) a taxable person is regarded as being in default if he fails to make  
30 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  
35 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  
40 second, third and fourth default.

10. 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.

5 11. 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.

10 12. In respect of the 10/16 default, as payment was made electronically (Faster Payment Scheme), the due date was 7 December 2016. The return and the VAT payment were both received on 8 December 2016, one day late.

15 13. 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 –

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.’

30 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**

35 15. The Appellant’s grounds of appeal, as set out by Mr James Cory Director of the Company in the Notice of Appeal to the Tribunal, are:

“I have taken on the bookkeeping and was advised that the VAT had to be paid by the end of week five - which I have done - but apparently it’s one month +7 days. I was two days late as I got my days muddled up. I am asking that the surcharge be reconsidered as I was only a couple of days late and I will set up a direct debit for future payments ...”

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## HMRC's contentions

16. The first default was recorded for Period 07/15 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,  
5 given the information printed on the Surcharge Liability Notice issued.

28. The director(s) have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

17. 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](http://www.gov.uk/hmrc)
  - E-VAT return acknowledgement.

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

15 *"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](http://www.hmrc.gov.uk/payinghmrc/vat.htm)"

*"Think ahead*

- 20
- 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."

25 19. 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.

30 20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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>

27. 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.

28. 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.

29. 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:

“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.

5 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)”

30. The Appellant says that he got muddled up with his dates. That does not amount to reasonable excuse for the late payment.

10 31. 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. In this instance because the default was the Appellant’s fifth default the surcharge was levied at 15% of the VAT payable.

15 32. The surcharges have therefore 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.

### **Conclusion**

20 33. 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.

34. 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. There is no definition of “reasonable excuse” in VAT legislation.

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

36. The Appellant Company’s proprietor knew the date by which the VAT had to be paid but simply got his dates muddled up. That is not an unforeseeable event beyond his control.

30 37. The fact that some previous default surcharge notices did not contain a financial element may be relevant. The Appellant may not have realised that they were default surcharge notices because of this. However the notice issued for period 07/16 included a financial element and the Appellant Company’s proprietor should have been aware that the company was in the surcharge regime and that a financial penalty would become payable in the event of a further default.

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38. Whilst the Appellant’s misunderstanding regarding the due date could be considered a genuine error, it does not amount to reasonable excuse. This is supported in a judgement by Judge Hellier in the case of *Garmoss Ltd v HMRC* – TC2001 where he said “What is clear is that there was a muddle and a bone fide mistake was made.

We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.”

5 39. Although the Appellant states that he intends to take steps to meet future VAT obligations this does not in itself provide a reasonable excuse for the cancellation of the surcharge.

40. We conclude that the Appellant has not shown a reasonable excuse for the late payment of VAT due in period 10/16, and accordingly the VAT default surcharge of £903.30 is confirmed and the appeal refused.

10 41. 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  
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 08 SEPTEMBER 2017**

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