



TC03156

Appeal number: TC/2013/02136

VAT – Default Surcharge Penalties – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PEOPLE WITH PASSION LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE DR K KHAN
MRS MARYVONNE HANDS**

Sitting in Northampton on 4 November 2013.

Neither the Appellant nor a representative appeared.

Martin Foster, presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. The Appellant appeals against a default surcharge for the late payment of VAT in the sum of £1,246.60 levied for the period 11/12 at the rate of 15%.

5 2. The records of HMRC show that the return was received on 7 January 2013 and payment made on 10 January 2013 with the due date being 7 January 2013. The payment was therefore made late.

3. The Appellant had been served a Surcharge Liability Notice which expired on 30 November 2013 and were therefore in the surcharge regime. The point at issue is
10 whether or not the Appellant has a reasonable excuse for making the payment late.

Background

(1) The Appellant pays VAT on a quarterly basis. Section 59 of the VAT Act (“VATA”) 1994 requires a VAT return and payment of VAT by cheque due on or before the end of the month following the relevant calendar quarter. The due
15 date for the Appellant’s 11/12 period was 7 January 2013. The Appellant’s payment was received 3 days late and this is not disputed. The tax assessed on the return was for the sum of £8,810.69.

(2) The Appellant had previously defaulted on VAT payments and a VAT Surcharge Liability Notice was issued.

20 (3) During the previous default surcharge, HMRC cancelled a penalty after having received a letter from NatWest bank explaining that there were issues with their online banking facility.

(4) Section 59 VATA 1994 sets out the provisions in relation to the Default Surcharge Regime. Under section 59(1) a taxable person is regarded as being in
25 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.

4. Once in default, the Commissioners may serve a Surcharge Liability Notice on the defaulting taxable person which brings them within the Default Surcharge
30 Regime. This means that subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rate. The percentage rates are determined by reference to the number of periods in respect of which a taxable person is in default during the Surcharge Liability Period. With the first default after the issue of the Surcharge Liability Notice the specified percentage is
35 2%. The percentage increases to 5, 10 and 15 for the second, third and fourth defaults.

5. A taxable person who is in default may nevertheless escape that penalty if they can show that they have a reasonable excuse for the late payment which gives rise to the default surcharge or surcharges. Section 57(7) VATA 1994 sets out the relevant
40 provisions:

“(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfy the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

5 (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

10 (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 ...”.

6. Under s.59(7)(b) the burden falls on the Appellant to establish that there has
15 been a reasonable excuse for the late payment in question.

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

“(1) For the purposes of any provision of s.59 which refers to a reasonable excuse for any conduct –

20 any insufficiency of funds to pay any VAT due is not a reasonable excuse.”

8. 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.

25 9. The initial onus of proof rests with HMRC to show that the surcharge has been correctly imposed. If this is established, the onus then shifts to the Appellant to demonstrate that there was a reasonable excuse for the payment of tax. The standard of proof is the ordinary civil standard of a balance of probabilities.

Appellant’s case

30 (1) The Appellant does not dispute that the VAT payment for the period 11/12 was made late.

(2) Through their accountants (R Rajani & Co Ltd) on 20 March 2013, they made the following representations:

35 (i) “You will be aware from your records that our client has previously made lump sum payments for their VAT liability mainly due to the economic climate and has struggled to keep the business the afloat over the past few years”.

40 (ii) “Mr Cardinale recently took over the management of the Company’s bookkeeping after his partner left the practice at the end of May 2012. Until that time he was unaware of the level of surcharges and penalties

incurred. Since then our client has done his utmost to pay his VAT, PAYE and all other HMRC's obligations between May 2012 to date and has actually paid all VAT liabilities and penalties to date.

5 We accept the fact that there was a delay in paying the funds over to HMRC, however this was purely and administrative error and our client fully intended to pay on time. Our client is now aware of the filing dates and we will ensure that our client is advised of the due dates in the future."

10 10. The Appellant is making two points. The first point is that there was an administrative error in dealing with the payment and secondly that the departure of a partner (it is not explained if this is a business partner) meant that the returns were late.

HMRC's case

15 (1) The Appellant does not have a reasonable excuse on grounds of administrative error or the departure of their partner. They say that arrangements were not made to make the payment on time and this should have been done.

(2) The Surcharge Liability Notice was still in operation and the Appellant had been in default previously. HMRC had agreed to cancel the default for the period of 05/12 and it was made clear at the time that if there was a further default then there would be a financial penalty.

20 Conclusions

(1) The Tribunal dismisses the appeal since there is no ground for a reasonable excuse.

25 (2) The Appellant was aware of the time limits for making their returns and payments. This would have been clear given that they had negotiated with HMRC with regard to previous late payments and warned that further late payments would result in a financial penalty.

30 (3) The fact that trading conditions and the economy are in difficulties is not a reasonable excuse. If the Appellant was experiencing cash flow difficulties it would have been appropriate to seek help from HMRC's Business Payment Support Service (BPSS) and to establish a time to pay arrangement.

35 (4) The fact that a partner (and it is not clear whether this is a business partner) prepared the books and was no longer available to do so is not a reasonable excuse. Where a person relies on a third party to effect their VAT compliance and this is not done does not give rise to a reasonable excuse. For there to be a reasonable excuse, there must have been an unexpected or unplanned event. The fact that the partner left was foreseeable and the Appellant could have made the necessary arrangements to employ another person to file the returns on time.

5 Whilst the Tribunal has some sympathy with the Appellant, the fact that they have now taken steps to pay all their tax liability on time, should have been done at an earlier date especially since they were well aware of the payment dates given their previous discussion with HMRC when a surcharge penalty had been waived. The Tribunal can find no reasonable excuse in the circumstances.

10 11. 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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DR K KHAN
TRIBUNAL JUDGE

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RELEASE DATE: 16 December 2013