



TC06228

Appeal number: TC/2017/05259

VAT default surcharge - Appellant unable to transmit VAT because of bank's £10,000 limit on a FPS transfer - whether reasonable excuse - no - whether penalty disproportionate - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

XEN JEWELLERY DESIGN LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE: MICHAEL CONNELL
MEMBER: JULIAN STAFFORD**

**Sitting in public at the Magistrates Court, Market Square, Hull on 11 September
2017**

Mr Michael Fuller and Mrs Susan Fuller directors of the Appellant Company

Ms Sophie Brown, Officer of HMRC, for the Respondents

DECISION

The Appeal

- 5 1. Xen Jewellery Design Limited (“the Appellant”) appeals against a VAT default surcharge of £2,022.40, for its failure to submit in respect of its VAT period 12/16, by the due date, payment of VAT due. The surcharge was calculated at 10% of the VAT due of £20,224.00
2. The point at issue is whether the Appellant has a reasonable excuse for making the late payment.

10 **Background**

3. Prior to the default under appeal the Appellant had previously defaulted on VAT payments in periods in 03/16 when a surcharge liability notice was issued and again in two further periods.
4. The Appellant has been mandated to both render returns and pay the tax due electronically from 2013. Its usual method of payment has been by the Faster Payment Service (FPS).
- 15 5. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires a VAT return and payment of VAT due, on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations
- 20 1995].
6. 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 filing and payment.
- 25 7. Period 12/16 VAT fell due on 31 January 2017. The VAT payment for 12/16 was therefore due, if paid electronically, no later than 7 February 2017. The return was received on 2 February 2016. The VAT was paid by two instalments, one of £10,000 on 8 February and one of £10,224 on 9 February 2017.
- 30 8. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. 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
- 35 surcharge regime so that any 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. On 17 February 2017, HMRC issued a default surcharge assessment to the Appellant in the sum of £2,022.40 calculated at the 10% rate due to three previous defaults.

10. 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(s). Section 59 (7) VATA 1994 sets out the relevant provisions : -

10 ‘(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 –

15 (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

20 (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 ..’

11. It is s 59(7)(b) on which the Appellant seeks to rely. The burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question.

25 12. Section 71 VATA 1994 - Construction of sections 59 to 70 states:

‘For the purposes of any provision of section 59 ... which refers to a reasonable excuse for any conduct:

30 (1) Where reliance is placed on any other person to perform a task, neither the fact of that reliance nor any deleteriousness or inaccuracy on the part of the person relied upon is a reasonable excuse.’

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

35 **Appellant’s Case**

14. The Appellant does not dispute that its VAT payments for the periods under appeal were late.

15. On 3 March 2017, the Appellant’s accountants wrote to HMRC saying:

5 “We refer to the attached penalty notice which our client received dated 17 February. The reason why the payment was made one day late was that our client was of the understanding that a Direct Debit mandate was in place and that it would not be necessary to make the payment. Upon realising that the amount was not being collected by a Direct Debit, our client tried to make the payment using online banking but unfortunately the bank would only allow him to transfer £10,000 per day. Upon our recommendation, he did telephone your office and inform you of this.”

16. In a subsequent letter to HMRC following imposition of the VAT default surcharge, Mr Fuller, director of the Appellant Company said:

10 “The date the VAT was due we paid half the amount. When trying to pay the full amount by electronic banking our system (HSBC Banking) unbeknown to us had put a limit on any transactions of £10,000.

15 This left half of the VAT payment unpaid. I then went directly to the bank to try and make the remaining half of the payment to no avail as the staff could not authorise the payment even though the funds were there. I stress at this point we tried without success to pay the full amount of the VAT due on the due day.

Having failed to make the second half of the payment on the due day I called the tax office and spoke to one of your officers explaining the situation.

20 His reply was “Pay what you can now and try again, we are aware of your predicament”. My office was unable to process payment of the second half of VAT bill until the following day.

We have since been in touch with our bank and changed our payment system, this allowing us to make any payments from our account up to £100,000 in any one day.”

25 17. On 3 April 2017, at the request of the Appellant, the decision to impose a penalty was reviewed by HMRC but upheld.

18. On 20 June 2017 the Appellant lodged a Notice of Appeal with the Tribunal Service. The Appellant reiterated the above grounds of appeal and also expressed the view that the penalty was excessive and unfair.

30 19. At the hearing Mr Fuller said he thought that the ‘due date’ was 8 February 2017. The Company had sufficient funds in its account to pay the full amount of VAT due. He produced copy bank statements to verify that. He acknowledged that they should have been aware of the £10,000 limit on their account. It had now been increased to £100,000.

35 20. Mrs Fuller explained that their business was run by a manageress and they had placed too much reliance on her. They had not been aware of the previous defaults. They had been trading for 14 years and prior to 03/16 had never previously defaulted on their VAT payments and since they had reassumed greater control over their business VAT payments had been paid on time.

40 21. Mrs Fuller said that they had perhaps not been diligent enough but they still felt that the surcharge was ‘a bit extreme’.

HMRC's Case

22. Ms Brown for HMRC said that the onus of proof rests with HMRC to demonstrate that a penalty is due. Once so established, the onus is then on the Appellant to demonstrate there is a reasonable excuse for late payment. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

23. There is a statutory obligation on a person required to make a return, to pay the VAT to HMRC. 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."

24. The VAT payment for period 12/16 was late and therefore the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

25. The first default was recorded for period 03/16 and 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 this point onward, given the information printed on the Surcharge Liability Notice issued.

26. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice for period 06/15, when a Surcharge Liability Notice was issued, particularly given the information contained in the Notice which on the reverse states:

'Please remember your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.'

27. Given the default history and information available, the Appellant would have been aware of the potential fiscal consequence of a further default prior to the period subject to appeal.

28. The requirements for submitting timely electronic payments can also be found -

- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

29. Also, the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

30. The Appellant has however not shown a reasonable excuse for the late payment.

Conclusion

31. The proprietors of the Appellant Company were clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

5 32. Value Added Tax Act 1994 (“VATA”), ss 59 and 71 set out the reasonable excuse provisions which apply to the default surcharge.

10 33. Mr and Mrs Fuller appear to have delegated control of the business to a manageress. They incorrectly thought that the VAT was paid by direct debit, were unaware of the previous defaults and were also unaware of the £10,000 limit on transmitting FPS payments. Even if this was in part as a result of having placed a degree of reliance on their manageress, s 71 VATA 1994 makes it clear that ‘where reliance is placed on any other person to perform a task, neither the fact of that reliance nor any deleteriousness or inaccuracy on the part of the person relied upon is a reasonable excuse’.

15 34. To decide whether a reasonable excuse exists the Tribunal should ask itself whether, notwithstanding the proprietor’s exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular date, they would not have avoided the default which occurred. Clearly that is not the case in this appeal.

20 35. The burden of proof is on the Appellant to show that it has a reasonable excuse for the default. Having considered the background facts and circumstances leading up to the default, the reason for the late payment was not an unforeseeable or unexpected event outside the proprietor’s control. The primary cause of the default was because the Company did not have in place an arrangement with its bank whereby sufficient monies could be transmitted to HMRC on the due date. That is not a reasonable
25 excuse.

30 36. Mr and Mrs Fuller say that the surcharge is excessive. A first default results in a trader being placed in the Default Surcharge regime for a specified surcharge period and being put on notice that he may be liable to a Default Surcharge of 2% if there is a further default in that surcharge period. A second default in the surcharge period, in addition to a penalty of 2% of the VAT paid late leads to the trader being informed that the next default may result in a surcharge of 5% of any VAT paid late. Similarly a third default, in addition to a penalty of 5% of the VAT paid late leads to a warning that the next default may result in a surcharge of 10% of any VAT paid late. The default surcharge regime is therefore geared to the amount paid late and whether it is
35 a first, second, third, fourth or fifth default. To that extent the surcharge is applied mechanically but also proportionately, and in the context of a surcharge of £2,022.40 for a fourth consecutive default, cannot be regarded as excessive.

37. The appeal is accordingly dismissed and the surcharge of £2,022.40 upheld.

40 38. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 21 NOVEMBER 2017