



TC03400

Appeal number: TC/2013/06915

VAT default surcharge - VAT paid late - Appellant mistakenly understood direct debit to be in place - also awaiting CIS refund due from HMRC - whether reasonable excuse - no - VAT remained unpaid at date of appeal - s84(3)A VATA - Appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

J & K FARRAGHER LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 MR JOHN WILSON**

**Sitting in public at Alexandra House, The Parsonage Manchester on 7 January
2014**

The Appellant Company did not attend and was not represented

Ms Helen Roberts, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. J & K Farragher Limited (“the Appellant”) appeals against a default surcharge of £2,555.12, for its failure to submit payment of VAT due, in respect of its VAT period ended 05/13, by the due date. The surcharge was calculated at 15% of the VAT payable of £17,034.17.

2. The Appellant did not attend the hearing. The Tribunal was satisfied that the company had been given notice of the time, date and venue of the appeal hearing and 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 has been registered for VAT since April 2011.

5. The Appellant had previously defaulted on VAT payments in period 02/12 when a VAT surcharge liability notice was issued and again in four further periods prior to the default period under appeal.

6. 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 1995].

7. The 05/13 period had a due date of 30 June 2013 for filing of its return and payment of the VAT due. The Appellant submitted the VAT return on the 25 June 2013 and therefore the return was received by HMRC on time.

8. 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. The due date for the 05/13 period, if payment was made electronically was 7 July 2013.

9. From a payment received by HMRC on the 25 June 2013, the sum of £1,569.94 was allocated to the 05/13 period, leaving a balance outstanding of £15,464.23.

10. On 12 July 2013 HMRC issued a surcharge of £2,555.12 in respect of the 05/13 VAT default.

11. At the date of appeal to the Tribunal on 8 October 2013, the outstanding VAT remained unpaid.

Relevant legislation

12. 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 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.

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(s). 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 –

(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

(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 ..’

13. Section 84 VATA states: that an appeal to the Tribunal cannot be entertained unless the outstanding VAT has been paid:

‘(1) Reference in this section to an appeal are references to an appeal under section 83 (2) ...

(2) ...

[(3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (ra) or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.]

[(3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this

subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC]

5 [(3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if —

- (a) HMRC are satisfied (on the application of the appellant), or
- (b) the Tribunal decides (HMRC not being so satisfied and on the application of the appellant),

10 that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship.

14. Subject to the provisions of s 84 VATA the burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question.

15 15. 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.

Appellant's Case

20 16. The Appellant does not dispute that its VAT payment for the period 05/13 was due on 30 June 2013.

25 17. On 30 July 2013 the Appellant's accountant submitted an appeal to HMRC on behalf of his client. The grounds of appeal were that there were sufficient funds in the company's bank account to meet the payment and that the Appellant was at a loss to understand why payment had not been made. He added that at the time the VAT was due, his client was awaiting a refund of over £33,000 from HMRC in respect of overpaid CIS.

30 18. On 31 July 2013 the accountant wrote to HMRC Debt Management and Banking advising that the Appellant would be arranging an immediate payment of the £17,034.17 due per the return (although in fact the amount outstanding at that time was £15,464.23).

35 19. The Appellant's accountant lodged a Notice of Appeal with the Tribunal on 8 October 2013. The stated grounds of appeal were that the Appellant was "*under the impression that HMRC had a direct debit in place to enable collection of VAT and sufficient funds were available in the company bank account. It would appear that at some stage the system failed and J & K Farragher Ltd were not aware of this at the time. J & K Farragher Ltd would therefore contend that the non payment was a result of a failure in either the banking systems or the Revenue's systems and the surcharge should be set aside*"

20. The appeal dated 30 July 2013 was treated as requesting a review of HMRC's decision. The review decision was that HMRC's decision to impose the penalty should be upheld.

21. The Notice of Appeal does not make reference to the CIS refund due to the Appellant and it is assumed that the Appellant did not wish to pursue that ground of appeal.

HMRC's Case

22. HMRC say that 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 02/12, particularly given the information contained in the Notice which on the reverse states:

15 '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.'

23. 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.
- 20 • On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

24. There had been three further defaults, and 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).

25 Ms Roberts for HMRC said that although the Appellant did not appear to be pursuing its previous ground of appeal that CIS refunds were due and that there was no assertion that the Appellant was suffering an insufficiency of funds, to reclaim CIS deductions, these had to be set against the company's monthly or quarterly liabilities. Where a payment is due at the end of the tax year the company should make a request for a repayment in writing to HMRC. It was not clear whether the Appellant had submitted a request in writing but in any event the Appellant was not permitted to offset the refundable CIS monies against VAT due without HMRC's consent.

26. Therefore HMRC say that the surcharge was correctly issued in accordance with the VAT Act 1994 s 59(4).

35 27. Ms Roberts said that irrespective of any grounds of appeal put forward by the Appellant, under s 84(3)A VATA the appeal should not be entertained due to the VAT not having been paid to HMRC. In such circumstances the Tribunal could not entertain the appeal. HMRC apply under the Tribunal Procedure (First-tier Tribunal)

(Tax Chamber) Rules 2009(S.I.2009/273 (L.I)) and Rule 8 (2) (a), for the appeal to be struck out.

Conclusion

5 28. The Appellant was clearly aware of the due date for payment of its VAT and the potential consequences of late payment. It is aware of the default and appears to have made no attempt to remedy the situation because VAT for the period under appeal has not been paid as at the date of this appeal.

29. The Appellant does not have a right of appeal. Pursuant to s 84(3)A VATA the appeal is struck out and the surcharge of £2,555.12 is upheld.

10 30. 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 S CONNELL

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TRIBUNAL JUDGE

RELEASE DATE: 10 March 2014