



TC06106

Appeal number: TC/2017/00090

VAT default surcharges - payment instructions to bank given on time but receipt of payment by HMRC one day late in each of two defaults - payments made by FPS through bank which was not a direct participant in the Faster Payments Scheme caused delay in processing payments - whether reasonable excuse - no - whether penalty disproportionate - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

M L TILES LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SONIA GABLE**

Sitting in public at the Tribunal Hearing Centre, Chichester Street, Belfast on 14 June 2017

Mr Roy Creelman, accountant and Mr John Marks, director of the Appellant Company

Ms Siobhan Brown, Officer of HMRC, for the Respondents

DECISION

The Appeal

- 5 1. M L Tiles Limited ('the Appellant') appeals against a default surcharge of £1,233.62, in respect of the VAT period ended 30 June 2016, and against a default surcharge of £809.60, in respect of the VAT period ended 30 September 2016 imposed by HMRC for its failure to submit, by the due dates, payment of the VAT due. Both surcharges were calculated at 15% of the VAT payable.
- 10 2. The point at issue is whether or not the Appellant has a reasonable excuse for making the late payments.

Background

- 15 3. The Appellant's business is that of a tile retailer based in Bangor, Northern Ireland. The Appellant has been registered for VAT since 2009.
- 15 4. The Appellant has been in the VAT default surcharge regime from period 03/15, when a non-financial Surcharge Liability Notice was issued. Prior to the defaults under appeal there had been four previous defaults.
- 20 5. No financial penalty was issued on the first default for 03/15, but a Surcharge Liability Notice was issued. Financial penalties in respect of the second and subsequent defaults were levied as set out in paragraph 7 below.
6. 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.]
- 25 7. 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
- 30 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
- 35 second, third and fourth default.
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 electronic filing and payment.

9. If payment is by direct debit, HMRC will automatically collect payment from the business' 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.

5 10. In respect of the 06/16 default, as payment was made electronically (Faster Payment Scheme), the due date was 7 August 2016. The return was received on time on 2 August 2016, but the VAT payment was made on 8 August 2016, one day late.

10 11. In respect of the 09/16 default, as payment was made electronically (Faster Payment Scheme), the due date was 7 November 2016. The return was received on time on 4 November 2016, but the VAT payment was made on 8 November 2016, again one day late.

15 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 –

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 13. 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 a 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 14. The Appellant's grounds of appeal are that actual payment in respect of both default periods was made on time.

15. In respect of the 06/16 default the Appellant's bank statement shows that the payment to HMRC cleared on Friday 5 August 2016 by FPS. However the monies did not reach HMRC until Monday 8 August 2016. The Appellant asserts that the time taken by its bank or HMRC to process the payment was outside of its control.

16. In respect of the 09/16 default the Appellant asserts that payment was made on Monday 7 November 2016 by FPS. However the monies did not reach HMRC until Tuesday 8 November 2016. The Appellant again asserts that the time taken by its bank or HMRC to process the payment was outside of its control.

5 17. The Appellant also argues that the penalties are disproportionate and unfair given the fact that payment was received by HMRC only one day late for both defaults.

HMRC's contentions

10 18. The first default was recorded for Period 03/15 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, particularly given the information printed on the Surcharge Liability Notice issued.

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

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

- 15
- 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
 - E-VAT return acknowledgement.

20 20. 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."

"Pay your VAT on time

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

25 *"Think ahead*

- 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."
- 30

21. The 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.

22. 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 surcharge in accordance with VATA s 59(5).
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23. 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.
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24. 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.

25. 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.
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26. Having traded since 2009, the company proprietors would clearly have been aware of the deadline for payment of VAT.

27. The rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount due to mitigating circumstance per s 70 VAT Act 1994.
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28. The liability to pay a surcharge may be avoided where the failure timeously to despatch the return or make payment of the VAT declared to be due is attributable to a reasonable excuse - s 59(7)(b) VAT Act 1994. No reasonable excuse has been provided.
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29. Prior to the current default cycle the Appellant had requested a review of the surcharges for the periods 03/13 and 06/13. HMRC’s letters in response of 26 July 2013 and 14 October 2013, enclosed further information to assist in avoiding future defaults which included following:

30. *‘CHAPS and Faster Payments are the only method of same-day payment. Speak to your bank before making each payment to check if you can use these methods of payment, any restrictions on times for receipt of payment instructions, and any transaction or daily limits they may impose.’*
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30. With regard to period 06/16 the due date for payment was Sunday, 7 August 2016. The Appellant routinely submitted its VAT returns and payments electronically. When the VAT return was submitted for this period on 2 August 2016 the Appellant would have received an automated acknowledgement which informs the tax payer of the payment due date and advises them to check with their bank as to the cut-off times for making payments by way Faster Payment.
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31. HMRC's website clarifies the position as follows:

5 *'Provided both banks/building societies are direct participants in Faster Payments, payments are usually available almost immediately, although they can sometimes take up to 2 hours. These timescales can still apply if either the sending or receiving bank is not a direct participant of Faster Payment. However some payments will take longer, especially outside normal working hours. You should talk to your bank/building society if the speed of the payment is particularly important.'*

10 32. The Appellant's bank, the Bank of Ireland is not a direct participant in Faster Payments, and this appears to be what caused the delay in respect of both default periods.

33. In respect of the 09/16 default, HMRC consider that having received the Surcharge Liability Notice for the period of 06/16, the Appellant would have been aware of the potential fiscal consequences of further default but effectively repeated its mistake in 09/16.

15 **Conclusion**

34. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

20 35. 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 is determined by the number of defaults in any surcharge liability period.

36. There is no statutory definition of 'reasonable excuse'. The only reason the default surcharge can be mitigated is if the Appellant can prove it has a reasonable excuse.

25 37. The proprietors of a Company, exercising reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on a particular date, would have put measures in place to ensure payment was made on time.

30 38. Clearly had the proprietors of the Appellant company taken the advice of HMRC given in the VAT return acknowledgement notice and on HMRC's website, or simply checked with their bank whether payment by the FPS would reach HMRC the same day, where payment was being made via the Bank of Ireland, which was not a direct participant in Faster Payment Scheme, the mistakes and defaults would not have occurred.

35 39. 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.

40. We find that the Appellant has not provided any grounds which amount to a reasonable excuse for the late payment of VAT for the Periods 06/16 and 09/16. The Appellant did not take appropriate or sufficient steps to ensure that the Company met its VAT obligations.

41. Insofar as the Appellant argues that the surcharge is disproportionate, the case of *Total Technology (Engineering) Limited v HMRC* heard in the Upper Tribunal held that there is nothing in the architecture of the Default Surcharge system which makes it fatally flawed. In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:

- (a) The number of days of the default
- (b) The absolute amount of the penalty
- (c) The ‘inexact correlation of turnover and penalty’
- (d) The ‘absence of any power to mitigate’

10 - and decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality or fairness. The penalty in that case was therefore not excessive, unfair or disproportionate. The penalty is tax geared and levied on the amount of VAT paid late at a percentage applicable to and commensurate with the number of defaults.

15 42. Although the delay in payment in each case was only one day, the Appellant was nonetheless in default, and the amount of penalty imposed at 15% reflects the fact that there had been at least four previous defaults in that VAT default surcharge liability period. The Tribunal finds that the penalties were not disproportionate or unfair.

20 42. The appeal is accordingly dismissed and the VAT Default surcharges for 06/16 and 09/16, are confirmed.

25 43. 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.

30 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2017

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