TC07975

VAT – default surcharge assessment pursuant to s 59 Value Added Tax Act 1994 – electronic submission of VAT return pursuant to Regulation 25A Value Added Tax Regulations 1995 and online payment of VAT - whether reasonable excuse established for late payment of VAT – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00991

BETWEEN

ST JAMES MARKETING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA

The Tribunal determined the appeal on 28 September 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases), having first read the Notice of Appeal (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

INTRODUCTION

1. The Appellant (St James Marketing Limited) appeals against HMRC's decision to issue a VAT default surcharge assessment issued for the period 09/19, pursuant to s 59 of the Value Added Tax Act 1994 (hereinafter referred to as 'VATA'). The default surcharge arose as follows:

Date surcharge issued	**Legislation**	**Description**	**Amount**
15/11/2019	Section 59 VATA	09/19 default surcharge assessment at 10%	£829.86

BACKGROUND FACTS

2. The Appellant first registered for VAT with effect from 1 October 2016. The Appellant submits VAT returns on a quarterly basis and has done so since first registering for VAT. The Appellant has been mandated to submit VAT returns electronically, pursuant to reg 25A of the Value Added Tax Regulations 1995 SI 1995/2518 (hereinafter referred to as 'the VAT Regulations') and payment of VAT is made online.

3. The Appellant first entered the default surcharge regime during the period 12/18 and a Surcharge Liability Notice ('SLN') was issued by HMRC. Payment for the period 03/19 was received 12 days late, on 19 May 2019. HMRC therefore issued a SLN Extension and the Appellant was liable to a further surcharge. The percentage applicable for this default was 2%. This resulted in a surcharge of under £400 and a penalty was not therefore charged. Payment for the period 06/19 was received 23 days late, on 30 August 2019. HMRC therefore issued another SLN Extension and the Appellant was liable to a surcharge of 5% on this occasion. A penalty was not charged due to the amount of the surcharge.

4. In relation to the decision under appeal, and the period 09/19, the Appellant made payment on 10 November 2019, which was three days after the due date. A SLN Extension was issued once more and the surcharge applicable was 10%. The amount of the surcharge was £829.86. On 21 December 2019, the Appellant requested a review of the decision to issue a surcharge. HMRC upheld the surcharge by a response issued on 23 January 2020.

5. The Appellant the lodged an appeal with the Tribunal on 26 February 2020.

THE APPEAL

6. Neither party has requested an oral hearing. I was satisfied that I had sufficient information before me upon which to reach a fair and just decision on the papers, having regard to the terms of the Procedure Rules.

Documents

7. In determining this appeal, I had before me a Court Bundle consisting of 204 pages (pages A1 to D83), which included the following documents:

(1) HMRC's Statement of Case and supporting documentation; and

(2) The Appellant's notice of appeal, letters of appeal and supporting documentation.

HMRC's case

8. HMRC's written case can be summarised as follows:

(1) The Appellant has been in the default surcharge regime from the period 12/18 onwards.

(2) The Appellant has not explained why it was not possible to file the return for the period 09/19 by the due date. The Appellant further has not explained how the problems with the banking service prevented the Appellant from filing a VAT return by the due date.

(3) Credit and debit card payments need three days to clear into HMRC's account. For payment to reach HMRC on 10 November 2019, the Appellant would have to have made payment by 7 November 2019. If card payment was attempted on 5 November 2019, the payment would not have been received until 8 November 2019, which is after the due date.

(4) HMRC acknowledge that Lloyd's customers experienced issues with online banking and these may have existed at the due date of the 09/19 return. The Appellant has not however provided any evidence of any attempt to make payment to HMRC at any point up to the due date. The Appellant further has not provided evidence in the form of messages from the bank concerning failed payment attempts. There is no record, on HMRC systems, of the Appellant reporting any difficulties with filing the VAT return or making payment, prior to the due date.

(5) Since the Appellant's VAT registration, the Appellant's registered address has not changed from 64 Collingwood Way. All correspondence was issued to this address. The SLN and SLN Extension(s) were not returned undelivered. The notice for the period 09/19 included a financial element.

(6) The directors have ultimate responsibility for the timely submission of the VAT return and payment of any tax due. The Appellant did not exercise reasonable foresight and due diligence. Upon registering for VAT, the Appellant has a duty to familiarise itself with VAT obligations. The Appellant did not make any arrangements with HMRC, prior to the due date, in relation to any of the defaults. The Appellant could have contacted HMRC for advice.

(7) There is a statutory obligation on a taxpayer to make a return and pay VAT by the due date. Standard paragraphs are included within the notes on the reverse of the SLNs. The surcharge has been issued in line with legislation. The default surcharge under appeal is the third default within the current surcharge period. As such, the appropriate percentage is 10%. The surcharge applies even if payment is one day late. The level of the default surcharge is specified in s 59 VATA and, as such, HMRC has no discretion as to the amounts to be levied.

(8) The potential effect that payment of the surcharge may have on the Appellant's finances would not be considered to be a reasonable excuse warranting the removal of the surcharge.

(9) The default surcharge is not disproportionate.

Appellant's case

9. The Appellant's grounds for appealing against the decision can be summarised as follows (see letter of appeal dated 7 December 2019 from Mr Hamish Reid to HMRC):

(1) The Appellant was not aware that any other correspondence had been received from HMRC in relation to VAT payments being late, apart from the notice relating to 09/19. No SLN or SLN Extension has ever been received.

(2) The payment for the period 09/19 was late due to computer issues when it was not possible to access online banking. The computer issues were out of the Appellant's control. Once the issue with online banking was resolved, payment was made without further delay. Previous payments were late due to illness.

(3) The Appellant is a small business and to pay a surcharge will cause financial hardship.

10. Having considered all of the documentary evidence, cumulatively, I proceed to make findings of fact and give reasons for the decision.

FINDINGS OF FACT AND REASONS FOR DECISION

11. The Appellant appeals against a VAT default surcharge assessment issued for the period 09/19. The assessment is in the sum of £829.86. An appeal to the Tribunal against a penalty imposed in respect of VAT is governed by the provisions in VATA. From the papers before me, I make the following findings of fact:

Findings of fact

12. The Appellant's business activity is marketing management consultancy and the Appellant's registered address is 64 Collingwood Way. The Appellant's directors are Hamish Malcolm Reid and Nicola Reid. The Appellant registered for VAT with effect from 1 October 2016. The Appellant submits VAT returns on a quarterly basis and the Appellant has been mandated to submit VAT returns electronically. The normal method of payment has been via BillPay, whereby a taxpayer makes a credit or debit card payment via an HMRC external website. This requires three working days for the payment to reach HMRC's bank account.

13. The Appellant has been in the default surcharge regime from the period 12/18. The due date for the 12/18 period was 7 February 2019 for electronic payments and electronic VAT submissions. The Appellant's return was received on time on 2 January 2019. Payment was however received late, on 8 February 2019, which is one day after the due date. As payment was not received by the due date, a SLN was issued.

14. The due date for the 03/19 period was 7 May 2019 for electronic payments and electronic VAT submissions. The Appellant's return as received on time, on 1 May 2019. Payment was however received late, on 19 May 2019, which is 12 days after the due date. As payment was not received by the due date, a SLN Extension was issued. The Appellant was further liable to a surcharge. The applicable surcharge percentage was 2%. As the surcharge was under £400, HMRC did not charge the penalty.

15. The due date for the 06/19 period was 7 August 2019 for electronic payments and electronic VAT submissions. The Appellant's return was received late on 8 August 2019 and payment was received on 30 August 2019, which was 23 days after the due date. As payment was not received by the due date, a SLN Extension was issued and the Appellant was liable to a surcharge. The surcharge percentage applicable was 5%. As the surcharge was under £400, HMRC did not charge the penalty.

16. The due date for the 09/19 period was 7 November 2019 for electronic payments and electronic VAT submission. The Appellant's return and payment were received late, on 10 November 2019, which is three days after the due date. As payment was not received by the due date, a SLN Extension was issued. The Appellant was also liable to a surcharge and the surcharge percentage applicable was 10%. The amount of the surcharge was £829.86 and a penalty was charged.

Discussion

17. The issues under appeal are firstly, whether HMRC were correct to issue the VAT default surcharge assessment in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the default which has occurred.

18. In *Perrin v R & C Commrs* [2018] BTC 513, at [69], the Upper Tribunal said this:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

19. No penalty can therefore arise in any case where the taxpayer is not in default of an obligation imposed by statute.

20. HMRC bear the burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse. The factual prerequisite is therefore that HMRC have the initial burden of proof: see *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC) in the context of a discovery assessment. The standard of proof is the civil standard; that of a balance of probabilities.

Q. Were HMRC correct to issue the default surcharge assessment in accordance with s 59 VATA?

21. The Appellant does not challenge the chronology set out by HMRC in relation to the dates that VAT returns were submitted and payment of VAT made. These matters therefore do not appear to be in issue between the parties. The Appellant's case is that there is a reason for the default that has occurred. In relation to whether the Appellant is in default of an obligation imposed by statute, I have found that in relation to the decision under appeal and the period 09/19, the due date was 7 November 2019 for electronic payments and electronic VAT submission. The Appellant's return and payment were received late, on 10 November 2019, which is three days after the due date.

22. Prior to this, the Appellant had already entered the default surcharge regime, in relation to the 12/18 period. This is because payment for that period was received late, on 8 February 2019. Payment should have been received by 7 February 2019. At that point, HMRC issued a SLN. Following on from the initial default, for the period 03/19 payment was received 12 days late, on 19 May 2019, when it should have been received on 7 May 2019. For the period 06/19, I have found that payment was received 23 days late on 30 August 2019.

23. The legislation makes it clear that there is a statutory obligation to both file a VAT return on time and to pay VAT on time.

24. Section 59(1) VATA provides that a person is in default in respect of a period if he has not furnished a VAT return for that period, or paid the VAT shown as payable on that return by the due date. Where a person defaults in respect of a period, the Commissioners may serve a "surcharge liability notice", specifying a period (a surcharge period), which ends 12 months after the last day of the period for which he was in default. Subsection (3) of s 59 provides that:

> "if a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the [taxpayer], the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purpose of this section, that existing period and its extension shall be regarded as a single surcharge period."

25. Subsection (4) of s 59 provides that if a person defaults in respect of a period ending within a surcharge liability period and has outstanding VAT for the period, he becomes liable to a surcharge. Subsection (5) of s 59 provides that that percentage depends on how many defaults have occurred within the surcharge period. If the default is the first in the surcharge period the surcharge is at 2%. It rises to 5% for the second, 10% for the third and 15% for the fourth and subsequent defaults.

26. It is therefore clear that a first default, which may be the making of a VAT return or in making payment of VAT after the due date, does not give rise to any liability to a surcharge, but triggers the issue of a SLN. That notice creates a surcharge period, which begins on the date the notice is issued and ends on the first anniversary of the VAT period for which the default arose. If there is a second default in respect of a VAT period, which ends within that surcharge period, and the aggregate value of the defaults in respect of that VAT period is more than nil, the defaulting trader is liable to a surcharge calculated at a specified percentage of the aggregate value of the defaults in respect of that VAT period. Where a default occurs within a surcharge period, that surcharge is extended.

27. Having regard to the chronology, the findings of fact and the statutory provisions, I am satisfied that there has been a default in relation to an obligation imposed by statute. Subject to consideration of whether there is a reasonable excuse for the default that has occurred, I am satisfied that the penalty has correctly been imposed by HMRC.

Q. Has the Appellant established a reasonable excuse?

28. Section 59(7) VATA provides a relief for excusable defaults, as follows:

"(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (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 … was dispatched … such … 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 dispatched, 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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served)."

29. Section 71 VATA limits the types of conduct which may afford a reasonable excuse within s 59(7)(b) by providing that an insufficiency of funds to pay any VAT due is not a reasonable excuse; and where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse. The Appellant does not however argue that the default occurred as a result of insufficiency of funds.

30. There is no statutory definition of 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and 'is a matter to be considered in the light of all the circumstances of the particular case': *Rowland v R & C Commrs* (2006) Sp C 548, at [18]. The test I adopt in determining whether the Appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 ("*Clean Car*"), in which Judge Medd QC said this:

"The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

31. That decision was in the context of an error in a return but the legislative provision relating to a reasonable excuse was in the same form as that which is in s 59(7) VATA.

32. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word "reasonable" imports the concept of objectivity, whilst the words "the taxpayer" recognise that the objective test should be applied to the circumstances of the

actual (rather than the hypothetical) taxpayer. Therefore, the excuse must be objectively reasonable and the test must be applied to the facts of the individual case. Furthermore, where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

33. The test of reasonableness is therefore clearly an objective test. What is also required however is to ask whether what the taxpayer did was a reasonable thing that a responsible taxpayer would have done, taking into account the subjective attributes of the taxpayer in question. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question: *David Collis v HMRC* [2011] UKFTT 588 (TC). The decision depends upon the particular circumstances in which the failure occurred.

34. The Appellant has raised two distinct arguments, in relation to why the default occurred.

35. Firstly, the Appellant submits that the SLN and SLN Extensions were not received. Having considered all of the documents before me, I am satisfied that the Appellant did, in fact, received the SLN and the SLN Extensions. This is because the SLN Extension, which is the subject of the decision under appeal, was issued to exactly the same address as that to which the SLN and earlier SLN Extensions were issued. I am satisfied that the SLN and the SLN Extensions were issued to the address that HMRC had on file for the Appellant. The Appellant has not disputed that the address held by HMRC is the correct address. The evidence before me shows that the Appellant's principal place of business and correspondence address is 64 Collingwood Way.

36. The Interpretation Act 1978, at s7 (which relates to service by post), provides that:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

37. There is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries. The notices are therefore deemed to have been delivered, unless the contrary is proved.

38. I do not find it credible that the Appellant would only have received one out of the number of SLN Extensions issued by HMRC (namely the SLN Extension which included a financial element). I find that there is considerable force in HMRC's submission that the

Appellant may have failed to have regard to the SLN and the SLN Extensions issued prior to the SLN Extension relating to the decision under appeal because the earlier SLN(s) did not include a financial element as no penalty was charged.

39. Secondly, the Appellant submits that the default for the period 09/19 was as a result of problems with online banking that were beyond the Appellant's control. HMRC are not disputing that the Appellant's bank had problems. I find however that there is also considerable force in HMRC's submission that there is no evidence to show that the Appellant made an attempt to make payment of VAT by the due date, i.e., at least three days prior to the due date.

40. In relation to the period 09/19, both the VAT return and payment were received late. It is not clear how the problems with the online banking service would have prevented the Appellant from filing the return on time. The Appellant has not explained why the return was filed late for this period. In relation to late payment of VAT for the period 09/19, by the Appellant's own written evidence (see letter dated 7 December 2019 from Mr Reid to HMRC) the attempt to access the online banking service to make payment was made on 5 November. I find that the attempt by the Appellant to make payment on 5 November was already a late attempt, in circumstances were the Appellant was already in the default surcharge regime. This is because the incontrovertible fact is that the due date for submission of the VAT return and for payment for the period 09/19 was 7 November 2019.

41. I have found that the Appellant has been mandated to submit returns electronically under the VAT Regulations. Payment of VAT is also made online and online payments require three days to clear. Payment on 5 November 2019 would therefore have only reached HMRC on 8 November, which is one day late. Whilst the Appellant may have honestly believed that minor delays were permissible, having registered for VAT and having been mandated to submit VAT returns and make payment electronically, I find that this initial belief is not objectively reasonable. I find that the Appellant registered for VAT as long ago as 2016 and it is therefore reasonable to expect the Appellant to be familiar with the deadlines that are applicable and the time required for online payments (as well as the consequences of missing deadlines). This obligation falls upon the directors.

42. The Appellant has provided documentary proof of the online banking problems at Lloyds Bank with the Notice of Appeal and this shows that Lloyd's Bank was having issues from 7.13am on 2 November 2019. The document entitled *"Problems and outages for Lloyd's Bank"* shows that there were also problems on 14 November 2019, 15 November 2019, 22 November 2019 and 25 November 2019. The Appellant has not provided any evidence to show that there were problems with online banking between 3 November and 4 November 2019, which would have enabled HMRC to receive payment on time.

43. Prior to the Notice of Appeal, the Appellant's case was that attempts to make payment were made on 5 November 2019 (see letter dated 7 December 2019). Indeed, it is only in the

Notice of Appeal dated 26 February 2020 that the Appellant has departed from the letter dated 7 December 2019 by saying the following:

> *"The delay was caused by a computer malfunction at Lloyd's Bank when I tried to make payment on 2 November 2019…"*

44. I find that the Notice of Appeal is a significant departure from the letter of appeal dated 7 December 2019. I find that the Appellant appears to have attempted to reconcile the default with the only day that Lloyd's Bank were experiencing problems prior to the due date, as shown by the documentary evidence submitted by the Appellant. Even if I were to accept that the Appellant had attempted to make payment of VAT in a timely manner on 2 November 2019, and not 5 November 2019 as earlier claimed, I find that there is then no evidence to show what further attempts were made by the Appellant after the problems that existed with online banking on 2 November 2019 (for instance between 3 and 4 November 2019). I find that the Appellant still does not explain why the VAT return was not submitted on time.

45. I further find that there is no evidence before me to support a finding that the Appellant attempted to contact HMRC to discuss any problems that the Appellant may have been experiencing in relation to making payment of VAT, prior to the default surcharge assessment being issued. The only other correspondence sent by the Appellant to HMRC is the letter dated 21 December 2019. The Appellant does not suggest that attempts were made to contact HMRC by telephone at any other stage.

46. I have borne in mind the recent comments of the Tribunal in *Hesketh* [2018] TC 06266 about whether ignorance of an obligation to file could excuse late filing. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse.

47. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [8], Judge Mosedale stated the following:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

48. As held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

49. It is therefore trite law that ignorance of the law cannot come to the defence of a violation of the law. The onus is upon an appellant to ensure that he or she properly understands their obligations under the law. In this regard, the directors have ultimate responsibility. I conclude that the Appellant does not have a reasonable excuse.

50. The percentage of the surcharge charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. It is plain that the Tribunal has no statutory power to discharge a penalty because of a perception that it is unfair. Since the requirement to make VAT payments is imposed by law, the issue of proportionality further does not arise.

51. In reaching these findings, I have applied the test set out in *Clean Car*.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 15 DECEMBER 2020