

[2017] UKFTT 570 (TC)



**TC06015**

**Appeal number: TC/2017/00212**

*VAT- default surcharge - payment made seven days late - cash flow shortage  
- Appellant awaiting payments from customers - whether reasonable excuse  
- no - whether penalty disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**ASTEC SYSTEMS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER DAVID EARLE**

**Sitting in public at Fox Court, Brooke Street, London on 4 April 2017**

**Mr Derek Blanche, Director and Mr Jean Marie Harzo, Financial Controller of the  
Appellant Company**

**Mr Thomas Nicolson, Officer of HMRC, for the Respondents**

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## DECISION

### The Appeal

5 1. Astec Systems Limited ('the Appellant') appeals against a default surcharge of £4,864.28 imposed by HMRC, in respect of the VAT period ended 31 August 2016, for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the VAT due of £32,428.55.

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### 10 Background

3. The Appellant's business is that of a security systems supplier based in London. The Appellant has been registered for VAT since 1994.

15 4. The Appellant has been in the VAT default surcharge regime from period 05/11, when a non-financial Surcharge Liability Notice was issued. Prior to the defaults under appeal there had been eighteen previous defaults.

5. No financial penalty was issued on the first default 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.

20 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 subsequent defaults within a specified period result in assessment to default  
30 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.

35 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 businesses 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 08/16 default, as payment was made electronically (Faster Payment Scheme), the due date was 7 October 2016. The return was received on time on 23 September 2016, but the VAT payment was made on 14 October 2016, seven days late.

10 11. The Appellant's proprietor had been in contact with HMRC throughout earlier default periods with regard to the Company's ongoing cash flow problems and had agreed several Time to Pay arrangements. There were substantial outstanding arrears at the point when payment for Period 08/16 fell due.

15 12. The Appellant had made a part payment of the VAT due for Period 11/14. For Periods 02/15, 05/15, 08/15 and 11/15 the VAT remained outstanding but was subject to Time to Pay Arrangements.

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

20 ' (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 –

25 (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

30 (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.'

35 14. 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 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**

40 15. The Appellant's grounds of appeal are that the Company was suffering cash flow problems, brought about by circumstances beyond the proprietors' control. The Appellant's representative Mr Jean Marie Harzo who is the Financial Controller, in an e-mail dated 12 December 2016, addressed to HMRC said, ad verbatim:

“Please find herewith your received letter of our appeal. We feel obliged to respond to this decision as we think we have a reasonable excuse for our payment to be late by 7 calendar days.

5 Our Bank Account was overdrawn by more than £46,000.00 up until 13 October. We received late payments (out of our control); totally a few thousands of pounds from customers on 14 October 2016 and we received the confirmation of further late payments (out of our control); would be made the following week, which then enable us to use our remaining bank overdraft to pay HMRC our VAT amount £32,428.55 on the same day (14<sup>th</sup> October). These are not little amounts for us and not ensuring payment confirmation on already late payment would have taken the company beyond our overdraft facility without any guarantees to be able to meet our PAYE tax payment 19<sup>th</sup> and our direct debit on 25<sup>th</sup>. If our bank had not paid that direct debit to HMRC we would have been failing in our debt payment plan and been served for a winding down action letter. Which in turns would have triggered redundancies and projects would have been falling apart.

15 This is why I have explain in my first letter of appear that we were not deliberately withholding money without considering the proper safety cash flow management on top of very difficult period, work and people employment been put at risks. We believe the company manages all risks properly, are committed to our recovery program/plan; we believe we had a reasonable trading concerns in Mid-October to have taken these 7 days to make very important decision and gratefully able to paid that VAT due amount on top of our current taxes 19<sup>th</sup> and debt payment plan on 25<sup>th</sup> (direct debit) and avoid irreparable situation.”

#### **HMRC’s contentions**

25 16. The first default was recorded for Period 05/11 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.

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

- 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](http://www.gov.uk/hmrc)
- E-VAT return acknowledgement.

35 18. 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](http://www.hmrc.gov.uk/payinghmrc/vat.htm)”

*“Think ahead*

- 5
- 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.”
- 10
19. 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.
- 15
20. With effect from the period 04/15 each notice issued details on the reverse as to how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA s 59(5).
- 20
21. 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.
- 25
22. 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.
23. 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.
24. HMRC maintain that VAT is never the property of the company; the money belongs to the Crown at all times and must be paid over as the law requires.
- 30
25. Having traded since 1994, it would clearly have become a known factor to take into account and within the normal hazards of trade for which provision could reasonably be made in business planning.
- 35
26. HMRC's web pages has a “VAT Payment deadline calculator” which advises when paying by Faster Payment for Period 08/16 “the last day you can pay is 7 October 2016”.

27. The Appellant's proprietors, in letters of 23 January 2012, 26 October 2012, 10 August 2015 and 27 July 2016 requested a review of the Default Surcharges.
28. HMRC enclosed with their letters of reply dated 9 February 2012, 27 November 2012 and 18 September 2015 "Top Tips on how to avoid VAT surcharges" and in a letter of 19 October 2016 provided a further information sheet titled "How to avoid VAT surcharges" which advises:
- "If you can't pay the full amount file your return on time and phone the Business Payment Support Helpline on 0845 302 1435 before the due date.
  - In the information sheets reference HMRC 06/15 and HMRC12/15 phone the Payment Support Helpline on 0300 200 3835 before the due date."
29. HMRC, in a letter of 31 March 2016, agreed a Time To Pay arrangement which included the VAT outstanding at that time. The letter advised. "This arrangement is for this debt only. If you don't keep to it, we'll consider legal action to recover the amount due. You must pay any future amounts due to HMRC on time."
30. For Period 08/16 the VAT Return was submitted on 23 September 2016, fourteen days before the due date and the quantum of VAT due for this period was known from this point onwards.
31. The Appellant, having contacted HMRC in the past with regards to Time to Pay arrangements, could have telephoned to advise their position, and could have avoided the surcharge, but chose not to do so.
32. The Appellant provided a copy extract from its bank account statement for the period from 7 October 2016 to 18 October 2016.
33. The extract shows that the opening balance was overdrawn by £56,634.91 on 7 October 2016. Payments received on that day being £10,533.61 resulting in an overdrawn balance of £46,101.13. The VAT due for the Period 08/16 was £32,428.55.
34. Had the Appellant chosen to pay the VAT due on 7 October 2016 and not their other debts, the resulting overdrawn balance would have been £78,529.68.
35. When the VAT of £32,428.55 was paid on 14 October 2016, this resulted in an overdrawn balance of £76,292.36.
36. The Appellant in a letter of 19 January 2016 advised "The Company has a £100,000 overdraft facility with the Bank." This being the case and no further information available with regard to the overdraft limit, there was enough "headroom" on 7 October 2016 for the Appellant to have paid the VAT due for the Period 08/16.
37. HMRC in their letter of 28 February 2017 requested further information with regard to the company's cash flow difficulties, including confirmation of the overdraft limit in place at that time but no response was received.

38. VAT Act 1994 s 71(1)(a) excludes an insufficiency of funds from being a reasonable excuse for late payment of VAT.

39. When a late payment occurs a surcharge accrues. The length of the delay is immaterial. Therefore a surcharge applies even if payment is one day late.

5 40. The rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount due.

41. The Appellant has been in default since period 05/11. The underlying reason for the defaults has not been addressed by the company and as such there is no reasonable excuse for the insufficiency.

10 42. 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. However no reasonable excuse has been provided.

### **Conclusion**

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

20 44. Legislation lays down the surcharges to be applied in the event of VAT being paid late. Surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period.

45. 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. An insufficiency of funds cannot without more be a reasonable excuse for late payment of VAT.

25 46. No reason has been provided to indicate a change in circumstances such that, in contrast to the established historic late payment pattern, payment for the appealed period would have been made on time.

30 47. As HMRC say there was clearly enough “headroom” in the Appellant Company’s agreed overdraft facility on 7 October 2016, for it to have paid the VAT due for the Period 08/16. There was little difference in the overdrawn balance on 7 October 2016 and 14 October 2016. The Appellant could therefore have paid the VAT due on the due date but appears to have chosen not to.

35 48. Proprietors of a Company exercising reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular date, would have put measures in place to ensure payment was made on time or contacted HMRC to request a deferment of payment.

49. The Appellant has not provided any grounds which contain a reasonable excuse for the late payment of VAT for the Period 08/16. The Appellant did not take appropriate or sufficient steps to ensure that the company met its VAT obligations.

50. 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 but has not discharged that onus.

51. The appeal is accordingly dismissed and the VAT default surcharge for 08/16 of £4864.28, confirmed.

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.

**MICHAEL CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 21 JULY 2017**