



**TC03650**

**Appeal number: TC/2014/00219**

*VAT default surcharge - whether reasonable excuse - no - whether surcharges disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ROBERT CONLEY & JANE BAKER**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL S CONNELL**

**The Tribunal determined the appeal on 15 April 2014 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 dated on 24 December 2013 and HMRC's Statement of Case received by the Tribunal service on 4 February 2014, the Appellants submitting no Reply.**

## DECISION

### The Appeal

1. Robert John Conley and Jane Baker ('the Appellants') appeal against a default surcharge of £729.66 imposed by HMRC on 11 October 2013, in respect of the VAT period ended 31 August 2013, for their failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 5% of the VAT due of £14,593.35.
2. The point at issue is whether the Appellants have a reasonable excuse for making the payment late.

### 10 Background

3. The Appellants have been in the VAT default surcharge regime from period 05/12.
4. The Appellants paid VAT on a quarterly basis. 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.]
5. In respect of the default period, as payment was made by giro. The due date for payment was 7 October 2013. The return was received on time and the VAT payment made on 9 October 2013, two days late.
6. 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 : -
- 25                    '(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) .....
- 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 7. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the Appellants 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.

### Appellants contentions

8. The Appellants do not dispute that their VAT payment for the period 08/13 was late.

9. The Appellants' grounds of appeal as submitted by their accountants are that:

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- 1) "Mr. Conley had two eye operations in April 2013 which caused book keeping and health issues needing time for recovery.
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- 2) Mr. Conley had to take legal action against the purchasers of industrial premises sold a few years previously and his legal representatives dealt with the court case for 12 and 13 June 2013. Mr. Conley has had to prepare himself for barristers and legal meetings as well as have personal court appearances. This has caused pressure on other business administration including VAT reporting.
- 15
- 3) Mr. Conley is in custody of his aged mother requiring much time and attention on a weekly basis.
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- 4) He feels that the 5% surcharge at £729 is disproportionate to the offence (VAT should have been due with HMRC by 7 October 2013 at the latest and their client made payment on 9 October). The surcharge is disproportionate to the offence by most reasonable financial calculations of recompense."

### HMRC's contentions

10. The Appellants entered the Default Surcharge Regime following a default in period 05/12. They then defaulted again in period 08/12, prior to the default under appeal.

25 11. The potential financial consequences attached to the risk of default should have been known to the Appellants from the information printed on the 05/12 Surcharge Liability Notice.

12. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

30 *"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."*

35 13. The reverse of each 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).

14. The requirement for submitting timely payments can in any event 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](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

5 15. The agent states that Mr Conley had two eye operations in April 2013, which  
caused bookkeeping and health issues. HMRC appreciate that there is obviously  
recovery time required for such operations. However, for the period 05/13, for which  
it would be more likely that these operations would have affected, both the return and  
10 payment were received on time. Therefore it is not clear how then this could have  
affected the submissions for the period 08/13.

16. In respect of the legal action requiring Mr Conley's time and attention which the  
agent states caused pressure on other business administration, as this occurred in the  
lead up to the court case of 12 and 13 June 2013 which is sixteen weeks prior to the  
due date of period 08/13 (7 October 2013), again it is not clear how this could have  
15 affected the submissions for this period. The period that this event could have had an  
effect on would have been 05/13, which was in fact submitted by the due date on 28  
June 2013 for the return and 4 July 2013 for the payment.

17. The agent has advised that their client is in custody of his aged mother, requiring  
much time and attention on a weekly basis. The inference here is that this is Mr  
20 Conley's mother. Whilst it is appreciated that Mr Conley has caring responsibilities,  
the business (a Public House) is a partnership, and therefore Ms Baker is equally  
responsible for ensuring the timely submission of both the return and payment.  
HMRC contends that this equally applies to the other points raised by the agent  
concerning Mr Conley's reasons for late payment of the 08/13 liability.

25 18. The Appellants say that the surcharge is unfair and disproportionate. The case of  
*Total Technology (Engineering) Limited v HMRC*, heard in the Upper Tribunal held  
that:

- 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
- 30 2) The Tribunal found that the VAT default penalty regime does not breach EU law on the principle of proportionality.
- 3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:
  - 35 (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'

40 The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp  
decided that none of these leads to the conclusion that the Default Surcharge regime

infringes the principle of proportionality. HMRC say that the penalty is determined by the number of defaults and amount paid late. The penalty imposed is therefore commensurate with the default, and unless devoid of reasonable foundation cannot be held to be unfair.

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19. HMRC contend the above judgement supports HMRC's position that the default surcharge regime itself is proportionate, and that HMRC was correct in charging a default surcharge in respect of the late payment for the accounting period 08/13 in accordance with the VAT Act 1994 s 59(4), payment having been received by HMRC after the due date.

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### Conclusion

20. The Appellants were clearly aware of the due date for payment of their VAT and the potential consequences of late payment.

15 21. The burden of proof is on the Appellants to show that they have a reasonable excuse for the late payment of VAT for the period 08/13.

22. There is no statutory definition of 'reasonable excuse', which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse

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23. As HMRC say, it is not clear how the first and second grounds of appeal could have affected the payment for the period 08/13. With regard to the third ground of appeal, again, as HMRC say, the Appellants business is a partnership and therefore Ms Baker is equally responsible for ensuring the timely submission of both the return and payment. In this case there was no unexpected or unforeseeable event which caused the Appellants to overlook the VAT payment liability. The Appellants operate a Public House, running on a cash basis, so any VAT would be collected at the point of sale and prior to the due date. This cash should therefore have been available to the Appellants to meet their VAT obligation. The grounds of appeal put forward do not therefore constitute a reasonable excuse as recognised by law.

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24. The Appellants also say that the surcharge is unfair and disproportionate. For the reasons submitted by HMRC, and set out in paragraph 18 above, this is not a ground of appeal which can be considered by the Tribunal.

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25. In the Tribunal's view, for the reasons given above, the Appellants have not shown a reasonable excuse for their failure to submit, by the due date, payment of VAT due of £14,593.35 for period 08/13.

26. The appeal is accordingly dismissed and the surcharge upheld.

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27. 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 S CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 May 2014**

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