



TC05689

Appeal number: TC/2016/03707

VAT – default surcharge penalty – VAT paid late – yes – whether there was a reasonable excuse – no – challenge to proportionality of penalty – held not disproportionate – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE BAKER STREET KITCHEN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE: ANNE SCOTT
MEMBER: LESLIE BROWN**

Sitting in public at North Shields on Wednesday 15 February 2017

Mr M Stirgess for the Appellant

Ms Oliver, Presenting Officer for HMRC, for the Respondents

DECISION

Introduction

1. This was an appeal in respect of the Default Surcharge penalty levied in terms of Section 59 Value Added Tax Act 1994 (“VATA”) for the late payment of VAT for the period 01/16. That penalty was quantified in the sum of £2,1253.47, being 15% of the tax concerned.
2. It is not disputed that the payment was late.

The Legislation

3. Section 59 VATA sets out the provisions in relation to the default surcharge regime. Under Section 59(1) a taxable person is regarded as being in default if he fails to pay by the due date the amount of VAT shown on the return as payable in respect of that period.
4. Section 59(4) provides that:-
 - “Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—
 - (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
 - (b) has outstanding VAT for that prescribed accounting period,he shall be liable to a surcharge equal to whichever is the greater for the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.”
5. The legislation provides that HMRC may serve a surcharge liability notice on the defaulting taxable person, which brings him within the default regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. Section 59(5) sets out those percentage rates. A new default, made within the surcharge liability period, gives rise to a default surcharge being charged. The first surcharge thereafter is at 2%, increases to 5% for a second default within the period, 10% for a third and 15% for all subsequent defaults within the specified period.
6. Section 59A VATA provides that 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.

The Facts

7. The appellant is a partnership and the owners are Mr Mark Stirgess and Ms Marie Neeson and the business, which is a licensed café, has been registered for VAT since April 2014. The appellant has been mandated to submit the VAT returns and payments electronically. It is not disputed that the appellant has been in the default surcharge regime from period 10/14 onwards. The most recent surcharge,

prior to this one, was for the period 10/15 and the appellant conceded in a letter dated 15 April 2016 that that surcharge at 10% was correctly applied.

8. Period 01/16 had a due date of 7 March 2016 for electronic VAT returns and the VAT return was received before that due date on 27 February 2016. HMRC then notified the appellant of the due date for payment. The appellant had registered to pay VAT by way of Direct Debit and HMRC's web pages under the heading "VAT payment deadline calculator" make it explicit that for the period 01/16 "The date the money will be taken from your account is 10 March 2016".

9. HMRC duly requested the VAT due from the appellant's bank account on that date.

10. When the direct debit was presented, the appellant did not have sufficient funds in the account to cover the payment. The bank have confirmed that that was the case. The direct debit was returned.

11. At close of business that day the appellant's bank told the appellant that the Direct Debit had not been honoured. The appellant did make immediate arrangements to transfer funds into the account but, of course, the time for payment had passed.

12. HMRC did not re-present the Direct Debit and the appellant paid the VAT by Faster Payment Service on 3 April 2016.

13. The Surcharge Liability Notice Extension ("SLNE") was issued on 11 March 2016.

Discussion and Decision

14. In terms of the relevant law if either a return or a payment is late, then a surcharge automatically accrues. The rate of surcharge is prescribed by law and neither HMRC nor the Tribunal have the power to reduce the amount. The fact that the previous defaults had triggered lesser or no monetary liability for the penalties, does not change the fact that the appropriate percentage is 15%.

15. As we indicate at paragraph 6 above, a surcharge will not be enforced if the appellant has a reasonable excuse for the late payment.

16. There is no statutory definition of reasonable excuse. We were not referred to, but agree entirely with, the Upper Tribunal in *ETB (2014) Ltd v HMRC*¹ and, of course, that is binding upon this Tribunal.

17. At paragraph 15, Judges Sinfield and Clark summarise their understanding of the meaning of "reasonable excuse" and that reads as follows:-

¹ 2016 UKUT 424 (TCC)

5 “In summary, the question to be asked when considering whether someone has a reasonable
excuse for failing to pay an amount of tax on time because of a cash flow problem is whether
the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be
regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax
was due on a particular date, could have avoided the insufficiency of funds by the exercise of
reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then
the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not,
without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard
would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as
10 having a reasonable excuse for the VAT having been paid late until it would be reasonable to
expect the taxpayer to have found alternative funding or taken other action to counteract
insufficiency.”

18. HMRC relied on Judge Hellier in *Garmoss Ltd v HMRC*² where he stated at
paragraph 12

15 “What is clear is that there was a muddle and a *bona fide* mistake was made. We all make
mistakes. This was not a blameworthy one. But the Act does not provide shelter from mistakes,
only for reasonable purposes. We cannot say that this confusion was a reasonable excuse”.

We agree with that analysis.

19. In this instance the appellant knew or should have known that the Direct Debit
20 would be presented on 10 March 2016. Accordingly there should have been sufficient
funds in the account to honour that Direct Debit; there were not. Mr Stirgess told us
that he did have funds in other accounts. He stated that he had relied on his bank to
call him and tell him that he did not have adequate funds so he could authorise a
transfer of funds from one of his other business ventures. They did not do so until
25 close of business on the due date.

20. Section 71(1) VATA reads as follows:-

“71(1) For the purpose of any provision ... which refers to a reasonable excuse for any
conduct—

- (a) an insufficiency of funds to pay any VAT is not a reasonable excuse; and
30 (b) 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”.

21. In certain circumstances the underlying reason for the insufficiency of funds
might amount to a reasonable excuse. The underlying reason here is that Mr Stirgess
35 apparently relied upon his bank so both legs of Section 71(1) are engaged. We find
that a prudent taxpayer should have ensured that the funds for payment of the tax
were in the relevant bank account at the correct time. The bank simply state that there
were insufficient funds in the account on 10 March 2016 and that they drew that to the
appellant’s attention. It does not suffice for the appellant to rely on the bank to advise
40 that there is an insufficiency of funds. It is the appellant’s responsibility.

² 2012 UKFTT 315 (TC)

22. The fact that HMRC did not re-present the Direct Debit, does not and cannot amount to a reasonable excuse, since there were no funds in the account until after the due date. It does not matter if the payment is one day late or many days late. The surcharge will still be applied. In any event we note that the SLNE was issued on 11 March 2016 but the payment was made on 3 April 2016.

23. In all these circumstances we find that the appellant has not established that there was a reasonable excuse for the late payment.

24. Like many other taxpayers the appellant has argued that the default surcharge regime is unfair. However, the Upper Tribunal in *HMRC v Trinity Mirror*³ made it explicit that because the amount unpaid is the objective factor by which the amount of the surcharge varies there is not a flaw in the system. In this case the surcharge for the period 01/16 is less than 2½% of the total value of sales net of VAT and therefore it is within the bounds of proportionality.

25. For all these reasons we find that the payment was late and that there was no reasonable excuse for that late payment. The penalty has been correctly calculated in accordance with the relevant legislation and we therefore confirm the penalty. The appeal is dismissed.

26. 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.

JUDGE ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2017

³ 2015 UKUT 421 (TCC)