



TC07042

Appeal number: TC/2017/06155

VAT default surcharge - appellant unable to logon to HMRC's Gateway system to make payment by electronic transfer - Web chat discussion with HMRC did not assist - appellant appeared to be using wrong ID number but that was not apparent at the time - whether reasonable excuse - on the facts - yes - appeal allowed

FIRST-TIER TRIBUNAL

TAX

PETER GERARD FARRELL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 8 February 2019 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 28 July 2017 and HMRC's Statement of Case received by the Tribunal and the Appellant on 19 September 2017 with enclosures. The Tribunal wrote to the Appellant on 27 September 2017 stating that if the Appellant wished to reply to HMRC's Statement of Case he should do so within 30 days. The Appellant replied on 6 October 2017.

DECISION

The Appeal

1. Peter Gerard Farrell ('the appellant') appeals against a default surcharge of £590.55 imposed by HMRC, in respect of the VAT period ended 31 March 2017, for his failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 5% of the VAT due of £11,811.18.
2. The point at issue is whether or not the appellant has a reasonable excuse for making late payment.

Background

3. The appellant's business is that of a firm of solicitors and is based in Glasgow. The business has been registered for VAT since October 1991 under the VAT reference ('VRN') 556 7237 17, originally as a partnership of Graeme B Paton and the appellant, the business being transferred to the appellant as a going concern with effect from 1 April 2001.
4. The appellant has been in the VAT default surcharge regime from period 03/16 when a non-financial Surcharge Liability Notice was issued. Prior to the default under appeal there had been two previous defaults.
5. No financial penalty was issued on the first default but a Surcharge Liability Notice was issued. No financial penalty was issued on the second default because the penalty fell below the £400 de minimis level. The penalty under appeal is the appellant's third default.
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.]
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 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.
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 normally pays its VAT electronically by direct debit, and in the default quarter made payment by direct debit, but late.

10. The Period under appeal, 03/17, had a due date of 30 April 2017 for electronic payments and electronic VAT submission. The return was received on 11 May 2017 being 11 days later than the due date and payment was received on 16 May 2017 being 6 days later than the due date where payment is made by direct debit.

11. The appellant requested a review of HMRC's decision to impose the surcharge for the Period 03/17 on 26 May 2017. The outcome of the review was that the surcharge should stand, the appellant being advised of the decision by letter on 4 July 2017.

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 –

- (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
- (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.’

13. Section 108 Finance Act 2009, specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange Time to Pay, and this is agreed by HMRC.

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

15. The appellant's grounds of appeal are that he was unable to access his online account due to changes made by HMRC without his knowledge or agreement. In a letter to HMRC dated 26 May 2017, appealing the surcharge, he said:

"I have today received your VAT notice of assessment of surcharge and surcharge liability notice extension dated 12 May 2017, and wish to seek a review. You say that I am responsible for not paying my VAT on time when in fact the blame lies with you.

As you are aware, VAT payments can only be paid online. I attempted to pay my VAT on time on Friday 05 May 2017 but was prevented from doing so because the system did not recognise either my ID number or password (which at that time were 1267632 and 96Y8M2xD, having been updated by you from the previous ID number of 207170547188 and previous password at some point last year, I think around August 2016). What puzzled me was that these numbers were saved on my machine and had been recognised previously.

After a number of failed attempts to gain access to the account, I contacted your webchat helpline on said date and chatted with Alexander who was unable to resolve the problem, and suggested that I contact technical support for assistance. This I did, only to be met with a response that there was no-one available to speak to me until Monday 08 May. Thereafter, over the course of 06 and 07 May, I tried unsuccessfully to gain access to the account, thinking that there was simply a blip in the system.

On Monday morning, 08 May 2017, first thing I managed to speak to one of the technical support team (I think her name was Claire) and explained the problem. She told me that the ID number I quoted of 1267632 was incorrect and stated that she would send out a new ID number in the post. She was not able to explain why the difficulty had arisen, save to say that the system had been updated recently. She also said that it would take 5 working days for me to receive the new ID number, and because of that she could not make arrangement to accept payment of the Tax on 08 May. I asked her at least to take a note of my phone call which she agreed to do so.

In due course, I received what was supposed to be a new ID number, but it turned out to be nothing more than my original number of 207170547188 allocated to me when I first registered with VAT online. Moreover, when I entered this number it recognised it as saved, as well as the original password. I was then able to get access to the online account to pay my VAT.

At no time was I ever informed that you had reverted to my original ID number. Had I been so advised, I would have been able to gain timeous access to the account for payment. In these circumstances, I cannot see how I can be held to blame for what appears to be a clear failure on your part and particularly the system operated by you, and it is on that basis I seek a review.

Finally, please note that although your notice is dated 12 May 2017, it was not received until today, 26 May 2017. If, as you state on the notes which accompany the notice that I can appeal to an independent tribunal within 30 days of this letter this means that I have until 09 June to do this. Kindly ensure therefore that a decision is made on this review before that date."

16. On 4 July 2017 HMRC replied to the appellant saying that he had not shown a reasonable excuse for the late payment. HMRC had spoken to their technical team and had no record of the appellant contacting HMRC on “5 July 2017”. This was a typographical error and HMRC meant to say 5 May 2017. HMRC went on to say that they would never change a user ID unless the customer loses it or the customer enters it incorrectly.

16. In his Notice of Appeal of 28 July 2017 to the Tribunal the appellant states:

“HMRC give two reasons for their decision. Firstly, they state they have no record of a web chat taking place on “Friday 05 July 2017”. Secondly they confirm that they would never change a user ID unless the customer lost it or it was entered incorrectly. In short, they state that any error would not be at their instance. I shall deal with each reason in that order.

So far as the web chat is concerned, I have no doubt that it took place and what makes it particularly memorable is the fact that this was the first time I had used such a service and that the person I engaged with was called Alexander. In fact, the web chat ended badly with the following exchange.

Alexander: You will have to contact our support team on Monday (08.05.17)

Me: But that will put me at risk of a penalty notice because Sunday (07.05.17) is the last day for payment.

Alexander: I am sorry but I cannot be of any further help.

Me: Alexander, to be frank, you haven't been of any help at all.

I do not know if Alexander took umbrage at my last remark and deleted any record of our chat or that HMRC does not keep a proper record of web chats but I can assure you it did take place.

Turning to the issue of whether HMRC changed the user ID off their own back without my knowledge, I have clear evidence to confirm this. Fortunately, I have managed to garner this evidence from a Browser Password Recovery Report, which I have recovered from my computer.

You will see that there are 5 relevant entries. It starts with an ID number of 1267632 and password 96Y8M2xD and presumably this was a holding ID number and password used by HMRC before they actually allocated a user, such as myself, his own ID number. The next entry reveals the ID number of 207170547188 that was specifically allocated to me and for which I provided my own password (that I have redacted for security reasons). You will then observe that there was a change in these numbers which was made by HMRC last year, I think around about August. This change was not made at my insistence but carried out by HMRC, so I was told, as a result of them updating their records.

Not surprisingly as a result of this change, I experienced the same problems that I encountered on this occasion, namely not being able to access my account because it would no longer recognise the ID number I had been allocated 207170547188.

Significantly, you will see that the last entry shows that HMRC reverted to my original ID number and again this was done without my knowledge and explains the reason why I was unable to gain access to the account timeously thinking as I did at that time that the correct ID and password were the ones that had been changed last year.

In all these circumstances, I do not agree that the HMRC will never change a user ID without consent unless "the customer loses it or the customer enters it incorrectly".

Accordingly I do not think that the HMRC decision was a reasonable one and hope that my appeal will be successful."

17 In an internal HMRC email exchange on 1 September 2017, Mr Jones of HMRC's legal services department said to Mr Carpio of HMRC's PT operations department:

"I refer to earlier emails you have had with Jess Parlour regarding this trader and want to clarify something which an advisor on the Help Desk said when the trader telephoned on the 8 May 2017.

Basically the advisor said that following the recent upgrade of the Gateway then stored passwords etc. were removed this was after trader mentioned that he got a message saying this. Trader was then advised no log on attempt recorded on system.

Is it possible the upgrade reverted back to previous ID and Password as he is adamant that he used the correct ID etc. also he's produced a computer log showing the user ID he has used in his appeal to the Tribunal.

He also again refers to the Webchat he says took place and he did mention this when he phoned in on 8th May. He says he couldn't get through to the Help Desk on the 5th after he had finished his Webchat although that's what he was told to do.

In your email to Jess you seem to indicate that had he contacted us before the due date then his ID and Password would have been set whilst he was on the phone, would this have been the case.

The reason I am seeking some clarification the upgrade may have had in regards to the user IDs and passwords is because we have another trader who has appealed to the Tribunal who also says he couldn't login to file his 03/17 return as his ID had been in his words "closed", something which he says he didn't do. In this case, however, even though he phoned after the due date he was re-enrolled whilst on the phone.

It would seem just from these two cases that the upgrade to the Gateway service may have caused problems with user IDs and passwords."

18. In reply on 4 September 2017 Mr Carpio said:

"The system cannot revert user's ID back to anything else. Once you have the user ID that never changes. They were trying to login with something that wasn't even in the right format to be a user ID (a seven digit number) this is most likely an ID for something else that the PC saved. He says that they were recognised previously it is impossible as user IDs have always been 12 digits..."

Regarding the other case user, IDs don't close either, though what may have happened is the service was removed from that account by them or adviser, which would mean when they log into it the 80s no longer available..."

19. On 6 October 2017 following receipt of HMRC's Statement of Case, the appellant responded:

"I have the following Reply to make in response to your letter:-

1) Despite its initial denial that a web chat ever took place (see HMRC letter dated 04 July 2017), it now concedes that it happened and the transcript which is now available is pretty much in line with what I recall. Significantly, as you see from the transcript, the web chat exchange ended with "Alexander" suggesting that I "contact the VAT helpline to appeal any fines" I might "get for late submissions".

2) It is also plain that there appears to have been a glitch in the system that operated at the time (see email by Steven Jones to Benjamin Carpio dated 01 September 2017) where it is disclosed that "another trader who has appealed to the tribunal" also could not log in to file his 03/17 return. I suspect that the glitch had something to do with HMRC updating its system at that time.

3) I believe given all these circumstances that I took all reasonable steps to pay my VAT timeously, and ask that the appeal be allowed."

HMRC's contentions

19. HMRC apologise for the fact the Appellant was advised that there was no record of the Webchat to which he refers as this has now been traced. Copy extracts are set out below:

"(07:32 PM) PETER FARRELL: I HAVE BEEN UNABLE TO LOG ON BECAUSE FOR SOME INEXPLICABLE REASON MY STORED ID NUMBER AND PASSWORD ARE NOT RECOGNISED. THIS HAS NOT HAPPENED BEFORE.

(07:32 PM) Alexander: It may be when you enter the password if you have caps lock stuck on.

(07:37 PM) Alexander: I'm still here - You do still have caps lock on Peter.

(07:39 PM) Peter Farrell: I KNOW FOR THIS CHAT BUT NOT WHEN I TRIED TO LOG ON AGAIN. CAPS ON OR OFF I CAN'T GET ACCESS TO PAY MY VAT WHICH IS DUE ON 7TH AT LATEST OTHERWISE I COULD FACE PENALTY.

(07:39 PM) Alexander: How many times have you tried to log in now?

(07:40 PM) Peter Farrell: AT LEAST 4 TIMES MAYBE 5 AND ONCE I EVEN PUT IN THE DETAILS MANUALLY. STILL NO LUCK.

(07:41 PM) Alexander: The account will be locked in that case for 2 hours.

(07:41 PM) Alexander: I advise that you contact the VAT technical helpline for advice on what is stopping you from logging in.

(07:42 PM) Alexander: You can chat to them here - <https://www.gov.uk/government/organisations/hm-revenue-customs/contact/vat-online-services-helpdesk>

(07:45 PM) Peter Farrell: I tried to contact the technical adviser but no luck. Said that I sent invalid message. Any other suggestions?

(07:46 PM) Alexander: You can call that department, you will find the contact number on that link I've sent.

(07:47 PM) Peter Farrell: is it still open for business at this time?

(07:47 PM) Alexander: Opening times: 8am to 6pm, Monday to Friday

(07:48 PM) Peter Farrell: but that is the problem, Monday is the 8th and I need to pay my tax by the 7th.

(07:49 PM) Alexander: You can only try to webchat with them. Unfortunately I cannot help you any further. If you wait 2 hours then click on forgotten user ID and password online, you'll be able to reset them.

(07:51 PM) Peter Farrell: Well really Alexander you haven't been any help at all if you think about it.

(07:52 PM) Alexander: Well you are talking to the wrong helpdesk as I've tried to tell you, SO yes that's right I can't help you

(07:53 PM) Alexander: I suggest you contact the VAT helpline to appeal any fines you may get for late submissions Peter.”

20. It will be seen that the advisor explained to the appellant that he was unable to help with resetting his log on details and provided a link to the appropriate page on HMRC's internet site which gave the contact details for the VAT Webchat team. HMRC are unable to comment on the appellant's statement that he was unsuccessful in accessing that chat room.

21. It is to be noted that the advisor did advise the appellant to try logging in again after 2 hours and that if he was still unable to log on, to use the online User ID and Password reset function. The appellant has not indicated whether either of these options were tried prior to him contacting HMRC by telephone on 8 May 2017.

22. Had the appellant utilised either of the options detailed above, then it is possible that he would have been able to access his online account and submit the 03/17 return on or before the due date.

23. With regards to the log on printout provided by the appellant, HMRC can only say that the user ID of 1267632 is not in fact a Government Gateway logon ID, these are always 10 digits in length.

24. HMRC maintain that in view of the advice given to the appellant which may have allowed him to reset his user ID and password on or prior to the due date, which he appears to have not taken, no reasonable excuse exists which would allow for the removal of the surcharge in respect of the 03/17 Period.

25. The first default was recorded for Period 03/16 and 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, given the information printed on the Surcharge Liability Notice issued.

26. 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
- E-VAT return acknowledgement.

27. Included within the notes on the reverse of Surcharge Liability Notices(s), 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"

"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."

28. 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.

29. 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).

30. 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.

31. 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.

32. 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.

33. In accordance with VATA 1994 s 59 (4) the surcharge was correctly issued in each instance where payment was received after the due date.

34. The rates of surcharge are laid down in law and neither the Commissioners nor the Tribunal have the power to reduce the amount because of mitigating circumstances, VATA 1994 s 70 not applying to surcharges issued under s 59 of said act.

35. Liability to VAT surcharge is governed by VAT Act 1994 (VATA 1994) s 59 and the reverse of each notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the s 59(5) of the said Act.

36. As the surcharge notices are computer generated by an automated process, it is not possible to provide copies of the actual notices issued to the appellant, but examples of the notices are included within the bundle of documents.

37. The fact that the previous default surcharge notice did not contain a financial element may be relevant. The appellant may not have realised they were default surcharge notices because of this, whereas they immediately recognised the notice for period 03/17 as it included a financial element.

38. In relation to any argument that the fines are unjustified and thereby disproportionate, the Upper Tribunal release its decision in *The Commissioners for Her Majesty's Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 421 (TCC) (*Trinity Mirror*). That decision creates a binding precedent on appeals before the First-tier Tribunal considering issues of proportionality.

39. In *Trinity Mirror* the Upper Tribunal stated that:

- The default surcharge regime, viewed as a whole, is a rational scheme (In agreement with the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC)(Total Technology)) (paragraph 65);

Using the amount unpaid as the objective factor by which the amount of surcharge varies is not a flaw in the system; to the contrary, it is appropriate as the achievement of the aim of fiscal neutrality according to EU law depends on the timely payment of the amount due (paragraph 65);

- Whilst it could not absolutely rule out the possibility that a default surcharge might be disproportionate, given the structure of the regime, this is likely to occur only in a wholly exceptional case.(paragraph 66);

It could not readily identify characteristics of a case where a challenge to a default surcharge (on grounds that the surcharge is disproportionate) would be likely to succeed (paragraph 66);

- It did not endorse the suggestion that exceptional circumstances that might give rise to a disproportionate penalty could include cases such as *Energys* [2010] UKFTT 20 (TC) where there had been what was described as a 'spike' in profits for a particular VAT period for which the surcharge had been imposed, even if the consequent liability for VAT was of a different order of magnitude than was normal for the trader concerned(paragraph 67);
- It accepted that the scheme of the default surcharge regime is to impose a penalty for failing to pay VAT on time, and not to penalise further for any subsequent delay in payment (paragraph 68), in line with the decision of the Upper Tribunal in *Total Technology* (in particular paragraph 88);
- The surcharge of £70,906.44 incurred by Trinity Mirror PLC could not be regarded as disproportionate by reference to EU law or the European Convention on Human Rights (paragraphs 71 and 72).

40. The Upper Tribunal judgment in *Trinity Mirror* supports the position that the default surcharge in respect of the late payment of VAT for the accounting period 04/17 is not disproportionate and therefore complies with EU law [and the European Convention on Human Rights].

41. The surcharges have been correctly issued in accordance with s 59(4) of VATA 1994, payment having been received by HMRC after the due date, and the appellant has failed to show that it had a reasonable excuse for the late payment.

Conclusion

42. 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.

43. The burden of proof is on the appellant to show that he has a reasonable excuse for the late payment of VAT for the default periods. There is no definition of “reasonable excuse”.

44. It seems reasonably clear from what HMRC say that the appellant was using a wrong ID number. He was advised to discuss matters with the VAT technical helpline

but was unable to do that at the time he was speaking to the adviser - 7.53pm, as the technical helpline had already closed and his next opportunity would have been on 8 May 2017, by which time a penalty would have been applied. It is not clear whether it was possible for the appellant to web chat with the helpline. The conclusion reached by the advisor appeared to be that he should appeal any penalties issued. He was advised to wait for two hours (his account would have been locked for that length of time) and then click on forgotten user ID and password online which would allow him to reset them. The appellant doesn't appear to have done this.

45. When the appellant spoke to HMRC's technical support on 8 May 2017 he was told that the ID number he had been using was incorrect and that a new ID number would be sent to him. The adviser was not able to explain how the difficulty had arisen other than to say that there had been recent upgrades to the Gateway system. This was also mentioned in an email exchange between Mr Jones and Mr Carpio although discounted by Mr Carpio as a reason why the appellant was unable to log on. The advisor told the appellant that she was not able to make arrangements to accept payment of the tax on 8 May 2017.

46. It is not clear why the appellant's account was locked for two hours. Furthermore the confusion could have been avoided if the Webchat advisor had informed the appellant that the user ID of 1267632 was not in fact a Government Gateway logon ID, which are always 10 digits in length and not 7 digits.

47. It is not clear why HMRC did not have the facility when the appellant spoke to Alexander, of assisting him in identifying his correct ID number or at least allowing him to change it before the following day, 6 May 2017, which was effectively the last opportunity for for the appellant to log on and pay the VAT due before a penalty was imposed.

48. In all the circumstances I have to conclude that the appellant made reasonable efforts to pay the VAT due before the deadline and therefore conclude that the appellant has shown a reasonable excuse for the late payment of VAT due in period 03/17.

49. 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: 14 MARCH 2019