



[2019] UKFTT 0322 (TC)

**TC07150**

*VAT - default surcharge – Section 59 Value Added Tax Act 1994 - whether Appellant has reasonable excuse for late payment of VAT - No – Whether penalty disproportionate - No Surcharge Upheld and Appeal Dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/00253**

**BETWEEN**

**LUNDHILL AGRICULTURE LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: PRESIDING MEMBER Mr G.NOEL  
BARRETT  
MEMBER MRS SONIA GABLE**

**Sitting in public at Sheffield MJC on 13<sup>th</sup> May 2019**

**Appellant not in attendance and not represented**

**Mr Alexander Dents litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

42. This is an appeal by Lundhill Agriculture Limited (“the appellant”) against an assessment for a default surcharge for late payment of VAT as follows:-

Quarter	VAT	Due Date	Rate of Surcharge	Amount of Surcharge
08/18	£ 3,178.87	30.09.18	10%	£ 317.88

2. The assessment resulted from the appellant’s fourth default in accounting for its liability to VAT on time. It followed a Surcharge Liability Notice (“SLN”) which was issued to the appellant on 30.10.17, after its first default, for late payment of its VAT in the sum of £1,139.95 for the quarter 08/17, by virtue of which, the appellant entered into the default surcharge regime.

3. The appellant defaulted a second time by making late payment of VAT in the sum of £2,654.85 for the quarter 11/17 when a penalty at the rate of 2% would usually have been imposed. As however the penalty at the 2% rate amount to less than £400, no penalty was actually imposed for this second default, because HMRC do not collect penalties at the 2% or 5 % rate which amount less than £400. A Surcharge Liability Extension Notice was issued.

4. The appellant defaulted for a third time by making late payment of VAT in the sum of £3,068.26 for the quarter 05/18 when a penalty at the rate of 5% would usually have been imposed. As however the penalty at the 5% rate amount to less than £400, no penalty was actually imposed for this third default, because as mentioned previously HMRC do not collect penalties at the 2% or 5% rate which amount less than £400. Again however a Surcharge Liability Extension Notice was issued.

5. The appellant then defaulted a fourth time by making late payment of VAT in the sum of £3,178.87 for the quarter 08/18 when a penalty at the rate of 10% amounting to £317.88 was imposed and again a Surcharge Liability Extension Notice was issued.

6. The appellant was also late in filing its VAT Returns on each of the 4 occasions.

7. The appellant appeals against this surcharge, firstly on the basis that it has a reasonable excuse for late payment; and secondly on the basis that the amount of the surcharge is disproportionate to its default.

8. The appellant did not attend the hearing. Mr Marcus Wood on behalf of the appellant had however emailed both the Tribunal and HMRC on 15 February 2019 confirming that nobody on behalf of the appellant would be attending the hearing; that the appellant did not wish to submit any further documentation; asking for the documentation already submitted on behalf of the appellant be taken into account by the Tribunal; and asking the Tribunal to make a decision in the absence of any representative for the appellant.

9. We decided in view of this, in accordance with section 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that the appellant had been properly notified of the hearing and that it was in the interests of justice to proceed with the hearing in the appellant's absence.

## **THE LAW**

10. By section 59(1)(a) and (b) of the Value Added Tax Act 1994 (VATA) a person shall be regarded as being in default for that period:

“if by the last day on which a taxable person is required ..... to furnish a return ..... HMRC have not received that return, or have received that return but have not received the amount of VAT shown on the return ....”.

11. Under Regulations 25(1) and 40(1) VAT Regulations 1995, if the tax payer is on a quarterly basis for returns, (as the appellant was) the returns and their related tax payments are due on or before the end of the month next following each calendar quarter. Where however the taxpayer files his return or pays tax electronically HMRC allow a further seven days from the end of the month next following each calendar quarter for such electronic filing and payment.

12. On a first default occurring, HMRC serve a Surcharge Liability Notice (SLN) on the taxable person. On subsequent defaults HMRC serve a Surcharge Liability Notice Extension (SLNE). Although no surcharge is imposed on the SLN, if any further defaults are made by the taxable person before the expiry of the first anniversary of the last day of the period referred to in the SLN, then the taxable person becomes liable to a surcharge being the greater of the specified percentage or £30.

13. With each SLN and subsequent SLNEs, HMRC provide the taxable person with notes explaining what amounts to a default and the consequences which will flow from further defaults. Those notes also advise the taxable person to contact HMRC's local Debt Management Unit if they expect to have difficulty paying VAT on time.

14. The specified surcharge percentages are set out in Section 59(5) VAT as follows:

- (a) in relation to the first prescribed period the specified percentage is 2%.
- (b) in relation to the second such period the specified percentage is 5%.
- (c) in relation to the third such period the specified percentage is 10%.
- (d) in relation to such period after the third the specified percentage is 15%.

15. HMRC do not however issue a surcharge at the rate of 2% or 5% if it calculates it to be less than £400. Nevertheless the percentage surcharge continues to increase in accordance with paragraph 13 above, for each subsequent default.

16. Section 59(7) VATA provides that a taxable person shall not be liable to the surcharge and shall not be treated as having been in default, if he satisfies the Tribunal there is a reasonable excuse for late filing of the VAT return or the late payment of the VAT thereon.

17. Section 71(1) VATA provides that:

- “(a) an insufficiency of funds to pay any VAT is not a reasonable excuse; and
- (b) where reliance is placed on any 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”.

18. Section 108 Finance Act 2009, as summarised, provides that there is no liability to a default surcharge for a period where contact is made with HMRC by the Tax Payer prior to the due date in order to arrange Time to Pay and that Time to Pay is agreed by HMRC.

19. References to “taxable person” and “Tax Payer” within the legislation include companies as corporate personalities as well as individuals.

## **THE EVIDENCE AND OUR FINDINGS OF FACT**

20. The standard of proof is the ordinary civil standard being “on the balance of probabilities”.

21. The burden of proving that the penalty is due and has been correctly calculated, falls upon the respondents and we are satisfied that they have established this from the evidence they have provided in the Document and Authorities Bundle.

22. We are also satisfied that HMRC properly notified the appellant, on several occasions, not only of the likelihood of penalties arising for late payment of its VAT or late submission of its returns, but also as to the actual penalty that was then imposed upon them. Indeed the appellant makes reference to having received the surcharge notices and is fully aware of the amount of the penalty.

### **Reasonable Excuse**

23. The burden of establishing a reasonable excuse falls upon the appellant.

24. This is an objective test and in accordance with *Rowland –v- HMRC (2006) STC (SCD) 536* at paragraph 18:

“is a matter to be considered in the light of all the circumstances”

25. It is unfortunate that the appellant provides little if any evidence as to why it submitted its VAT return late and also made payment late. It did not for example provide any evidence as to any specific unforeseen or inescapable events which befell its business and which then directly resulted in its inability to pay its VAT or make its return on time.

26. Instead, what the appellant seeks to rely upon, in both its letter to HMRC requesting a review and in its subsequent appeal to this tribunal, is its confusion as to how the incremental penalties for VAT defaults actually operate. More particularly as to why, after not having been charged a penalty at the 2% and 5% rate, a penalty at the 10% rate was then imposed.

27. We are not prepared to accept that the appellant's confusion as to the operation of the legislation, no matter how genuinely held, can amount to a reasonable excuse.

28. There are two tribunal cases on this point; *Garnmoss Ltd t/a Parnham Builders –v- HMRC [2012] UKFTT 315 TC* where Judge Hellier said at page 3 paragraph 12:

“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 for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus the default cannot be ignored....”

And *Coates –v- HMRC [2012] UKFTT 477 (TC)* where Judge Brannan states at paragraph 32:

“The test contained in the statute is not whether the tax payer has an honest and genuine belief but whether there is a reasonable excuse.”

29. In our judgment, for the reasons we have provided the appellant has failed to establish that it had a reasonable excuse for the late payment of VAT for the quarter under appeal.

### **Proportionality**

30. The question of whether or not this tribunal has the power to determine whether or not a particular penalty, (as decided upon by Parliament), is or is not proportionate to the particular “default” was examined in great detail by the Upper Tribunal in the case of *HMRC –v- Total Technology (Engineering) Limited [2012] UKUT 418 (TC)* (Total) and again more recently by the Upper Tribunal in *HMRC –v- Trinity Mirror PLC [2015] UKUT0421 (TCC)* (Trinity Mirror)

31. Decisions of the Upper Tribunal in those cases are binding on this Tribunal.

32. In Total the payment was only one day late; previous defaults had been due to innocent errors; the taxpayer had an excellent compliance record prior to the first of the defaults; the amount of the penalty at 5% was £4,260.26 and the tax payer's profits were around £50,000 per year.

33. Mr Justice Warren and Judge Bishopp said at page 26 para 81:

“..... the VAT default surcharge regime penalises only the failure to deliver a return and to make payment of the tax owed by the due date .... It is to be noted that the penalty does not increase as time goes by; the penalty is for failure to do something by a due date, not a penalty for continuing failure to put right the original default .....”

34. At page 31 para 99 they concluded:

“In our judgment there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are however some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the Tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed”.

35. In Trinity Mirror, again the payment was only one day late. The amount of the penalty at the 2% rate was £70,906.44, this penalty being dictated by the large amount of VAT paid late amounting to £3,545,324.

36.. Mrs Justice Rose (President of the Upper Tribunal) and Judge Roger Berner said at page 16 paragraph 65:

“We agree with the tribunal in Total Technology that the default surcharge regime, viewed as a whole, is a rational scheme. The penalties are financial penalties calculated by reference to the amount of tax unpaid at the due date. Although the penalties may vary with the liability of the taxable person for the relevant VAT period, and increase commensurately with an increase in such liability ( and consequently, such default) the penalties are not entirely open ended. The maximum liability for a fifth or subsequent period of default is 15% of the amount unpaid. In common with the Upper Tribunal in Total Technology, we consider that the use of the amount unpaid as the objective factor by which the amount of the surcharge varies is not a flaw in the system; to the contrary, the achievement of the aim of fiscal neutrality depends on the timely payment of the amount due, and that criterion is therefore an appropriate, if not the most appropriate factor.”

37. At page 16 paragraph 66 they concluded:

“Although the absence of a maximum penalty means that the possibility of a proper challenge on the basis of proportionality cannot be ruled out, we cannot ourselves readily identify common characteristics of a case where such a challenge to a default surcharge would be likely to succeed”

38. And at page 16 paragraph 68:

“Although payment was only delayed by one day, we accept that 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. That, as we have described, is entirely consistent with the fiscal neutrality aim of the directive. It would not be possible therefore, in our view, for the fact that the payment was only one day late, to render an otherwise proportionate penalty disproportionate.”

39. We are, as we have said, bound to follow these decisions of the Upper Tribunal and are not therefore prepared to find that the penalty imposed on the appellant was disproportionate.

## **DECISION**

40. In our judgment for the reasons we have provided, the Appellant does not have a reasonable excuse for the defaults.

41. Nor do we find, again for the reasons we have provided, following the Upper Tribunal decisions in Total and Trinity Mirror, that the default surcharge was disproportionate either in the context of the number of defaults by the appellant, or as to the amount of the default surcharge in proportion to the appellant's sales, net of VAT.

42. We therefore dismiss the appeal and confirm the penalty in the sum of £317.88.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

43. 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.

**G. NOEL BARRETT**  
**TRIBUNAL PRESIDING MEMBER**

**RELEASE DATE: 22 MAY 2019**