



[2020] UKFTT 0079 (TC)

TC07574

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04415

VAT – default surcharge – whether reasonable excuse – whether proportionate – appeal dismissed

BETWEEN

LOGAN TECHNICAL RESOURCING LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House on 17 January 2020

Mr Louw, director of the Appellant, attending by telephone

Ms Halima Rashid, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. This was the appeal of Logan Technical Resourcing Ltd (“the Company”) against VAT default surcharges for late payment of its VAT. There were 14 surcharges, beginning in period 01/15 and ending in 05/19. They totalled £10,052.05.
2. Mr Louw, the Company’s director and only employee, appealed the surcharges on the basis that the Company had a reasonable excuse; he also submitted that the surcharges were disproportionate.
3. For the reasons explained in the main body of this decision, I found that the Company did not have a reasonable excuse, and that the surcharges were not disproportionate. I therefore refused the appeal and confirmed the surcharges. The relevant provisions of the legislation are in the Appendix.

PROCEDURAL BACKGROUND

4. A hearing was listed to take place on 30 October 2019 to hear:
 - (1) the Company’s application to make a late appeal against the surcharges, and
 - (2) the substantive appeal against the surcharges, if permission were granted.
5. Mr Louw did not attend that hearing; he emailed HMRC to say he was unable to arrange childcare and that he was happy for the hearing to go ahead in his absence, and he copied the Tribunals Service on that email exchange.
6. Having considered the issues and applied the relevant law, the Tribunal decided to give the Company permission to make late appeals, issued a summary decision, but postponed the hearing of the substantive appeal, to give Mr Louw another opportunity to attend.
7. Shortly after that hearing, I issued Directions. These included directions that:
 - (1) both parties provide dates to avoid;
 - (2) Mr Louw provide the following documents and information to Ms Rashid at HMRC by 13 December 2019 and that HMRC include that further information in the Bundle for the next hearing:
 - (a) copies of statements for all bank accounts into which the Company had received money for work carried out, for the period from 1/2/14 to 28/2/18;
 - (b) copies of the Company’s statutory accounts, including a full profit and loss account and notes to the accounts, for the accounting periods which ended in 2014, 2015, 2016 and 2017;
 - (c) a copy of the contract(s) between the Company and any factoring companies, between February 2014 and March 2018; and
 - (d) certain specified other information, including the dates Mr Louw was overseas following, or in relation to, the death of his father.
8. The Directions also stated that if Mr Louw did not attend the relisted hearing, the Tribunal was likely to make its decision based on the evidence before it.

9. HMRC provided dates to avoid, but Mr Louw did not. He also failed to comply with any of the other directions. The hearing was listed for 17 January 2020 to begin at 2pm.

10. At 3.17 pm on 16 January 2020, the day before that listed hearing, Mr Louw emailed Ms Rashid (but not the Tribunal) saying he was unable to attend because his son was ill and unable to attend his nursery, and he was unable to arrange childcare. Ms Rashid advised Mr Louw to contact the Tribunal, and she copied that email to the Tribunal along with her own message, in which she said she and a colleague had set aside time to travel to the hearing on the following day and to attend the hearing.

11. The emails were referred to me. I decided that it was in the interests of justice not to postpone the hearing. I took into account the following factors:

(1) Mr Louw had been warned that if he did not attend the relisted hearing, the Tribunal would be unlikely to postpone it again;

(2) he had failed to comply with any of the directions;

(3) although he had stated he was unable to obtain childcare so as to allow him to attend the hearing the following afternoon, he had not provided any particulars, such as details of any efforts he had made to obtain childcare or any proof of those efforts; I noted that he had also failed to attend the earlier hearing because of childcare commitments;

(4) Ms Rashid and her colleague had set aside time and made arrangements to come to the hearing. A further postponement would result in wasted time and costs for both HMRC and the Tribunals Service, and

(5) postponements adversely affect the position of other taxpayers, whose hearings would be further delayed if this appeal was re-listed for a second time.

12. That decision was emailed to Mr Louw before 8 am on the day of the hearing. Mr Louw contacted the Tribunals Service and said he would be available to attend by telephone, and this was arranged.

THE SURCHARGES UNDER APPEAL

13. The Schedule below sets out the surcharges which were under appeal, and in relation to which the Company was issued with a financial surcharge.

Default	Period	VAT	Percentage	Surcharge
4	01/15	3,623.59	10	362.35
5	04/15	5,406.12	15	810.91
6	04/16	11,814.86	15	1,772.22
7	07/16	3,050.11	15	457.51
8	10/16	1,152.31	15	172.84
9	1/17	855.87	15	128.38
10	7/17	7,857.22	15	1,178.58
11	11/17	10,325.35	15	1,548.80
12	2/18	19,517.25	15	2,927.58
13	2/19	3,615.38	15	542.30
14	5/19	1,003.95	15	150.59
				10,052.05

14. In addition to the defaults listed in the Schedule, the Company also appealed the Surcharge Liability Notice (“SLN”) for period 04/14 and the Surcharge Liability Extension Notices (“SLENs”) for the next two periods. An SLN does not give rise to a financial penalty and the two following SLENs were below HMRC’s assessing tolerance. The Schedule therefore begins at default number 4.

15. The surcharges under appeal are those up to and including the quarter ending 05/19. If the Company has continued to pay and file its VAT late, HMRC are likely to have issued further surcharges. Mr Louw is to note that any such surcharges are not covered by this appeal, and so are not included in the Schedule.

THE EVIDENCE

16. The Tribunal was provided with a helpful bundle of documents from HMRC, which included:

- (1) correspondence between the parties, and between the parties and the Tribunal;
- (2) a table setting out the Company’s defaults;
- (3) the Company’s VAT returns;
- (4) notes and transcripts of telephone calls between Mr Louw and HMRC’s contact centre; and
- (5) copies of debt management notes from HMRC’s system.

17. In addition, Mr Louw gave oral evidence. As explained in more detail below, during that evidence he contradicted statements he had previously made in correspondence sent to HMRC; he also contradicted his own oral evidence given in the course of the hearing. I found his evidence to be unreliable and that he was not a credible witness.

18. Based on the evidence provided, and taking into account my finding on Mr Louw’s credibility, I make the following findings of fact. There are additional findings of fact later in this decision notice.

THE FACTS ABOUT THE COMPANY’S BUSINESS

19. The Company supplies construction workers, and sometimes site managers, to mechanical and electrical companies throughout the UK. It has a “vast database” of possible workers and seeks to match them with vacancies. It does this by advertising on social media and by using an “outsourcer” based in India which links up to the “job boards” where workers post their details; the outsourcer identifies possible workers and forwards their details to Mr Louw. Mr Louw vets all potential workers to ensure they have the right to work in the UK and that they have appropriate skills.

20. The Company had 7-8 clients during the relevant period, but was heavily dependent on one main client. It uses a factoring company to collect its debts, and is paid around £700-£800 per week by that company; in some weeks the sum received exceeds £1,000.

THE ISSUES IN THIS APPEAL

21. There was no dispute that the Company had paid its VAT late for the periods set out in the Schedule. The issues in the case were whether the Company had a reasonable excuse, and whether the surcharges were disproportionate.

REASONABLE EXCUSE

The law

22. The Value Added Taxes Act s 59(7) provides that a person who would otherwise be liable to a surcharge satisfies the Tribunal that there is a reasonable excuse for the VAT not having been paid by the due date, the surcharge will be cancelled. VATA s 71(1) reads:

“For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct-

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

23. Although the statute provides that an insufficiency of funds is not a reasonable excuse, in *Steptoe v R&C Commrs* [1992] STC 527 (“*Steptoe*”) the Court of Appeal found by a majority that the underlying reason for that insufficiency of funds can constitute a reasonable excuse. Donaldson LJ summarised the majority position as follows:

“if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

24. In *Perrin v HMRC* [2018] UKUT 156 (“*Perrin*”) at [81] the Upper Tribunal explained how to establish whether a person has a reasonable excuse:

- (1) Establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer’s own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
- (2) Decide which of those facts are proven.
- (3) Decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default. In doing so, the FTT should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

25. Mr Louw put forward a number of points which he submitted gave the Company a reasonable excuse, and Ms Rashid made submissions in response. I have considered each of those points below, and have gone on to decide in relation to each point whether the relevant facts were proven and if so whether they amounted to an objectively reasonable excuse.

The factoring company

26. Mr Louw’s main point related to the factoring company, and I consider that first.

The evidence

27. Mr Louw said that the Company was at the mercy of its factoring company, which “holds onto his VAT” and will not pay it over to the Company unless all clients “are within their terms of business, which is very seldom”. The Bundle also contained the following evidence:

(1) On 21 February 2018 Mr Louw wrote to HMRC saying he had renegotiated the factoring contract and “one of the stipulations I’ve negotiated...is that the VAT will be released without fail every quarter regardless of my clients’ compliance with their terms”.

(2) On 18 September 2019 he emailed the factoring company asking them to confirm, for the purposes of his appeal, that (my emphasis) “in the event of my client not paying an invoice...or if they go over their terms [your] policy is to withhold my margin along with the VAT until the account has been brought up to date, this has happened, not recently to be fair.”

(3) The company responded the following day saying that it would withhold “your margin which includes the VAT equivalent not being released” if there was a “negative balance” on the Company’s cost centre, and that this could occur if clients failed to pay their invoices, or exceeded the agreed credit limit, or “there are disputed invoices which are not true”.

The submissions

28. Mr Louw said that the involvement of the factoring company meant that the Company did not have the VAT to pay over to HMRC by the due dates.

29. Ms Rashid submitted that:

(1) Mr Louw had been directed to provide the contracts with the factoring company, but had failed to do so.

(2) He had also been directed to provide bank statements to support his submissions about the alleged cash flow consequences of the factoring company’s involvement, and had failed to do so.

(3) The Tribunal therefore has no reliable evidence on which to find as a fact that the problems with the factoring company caused the Company’s failure to pay its VAT on time.

(4) In any event, the issue here was insufficiency of funds, which was barred from being a reasonable excuse by VATA s 71(1)(a). Although *Steptoe* states that the reasons for an insufficiency may constitute a reasonable excuse, that is only the position where the trader has shown that he has exercised “reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date”. Even assuming that Mr Louw was correct that the problem was caused by the factoring company, on his own case this was a recurring, constant problem and Mr Louw had not taken the necessary steps to manage or mitigate the position.

Are the facts proved, and whether there is a reasonable excuse

30. In deciding whether Mr Louw had proved that the factoring company was responsible for the Company’s defaults, I take into account Mr Louw’s failure to provide the key evidence, namely the contracts and the bank statements, despite having been directed to provide them by the Tribunal. It is also relevant that:

(1) Mr Louw himself said in his email to the factoring company in September 2019 that there had been no recent failure to pay the VAT over to the Company; and

(2) the defaults occurred both before and after Mr Louw’s letter to HMRC saying that the terms of his factoring agreement had changed.

31. I therefore agree with Ms Rashid that Mr Louw has failed to show that the factoring company caused the Company to be short of funds for any of the VAT periods for which the surcharge is in dispute. As a result, I find that this fact is not proved.

32. I also agree with Ms Rashid that even if I had come to the opposite conclusion, it would not have availed Mr Louw, for the reasons put forward by Ms Rashid at §29(4) above.

His accountant

33. Mr Louw's evidence at the Tribunal was that delays by his accountant had caused delays in paying the VAT. The only relevant document in the Bunde was a letter from Mr Louw to HMRC dated 15 February 2017 saying that his accountant had been in Colombia and "unreachable", but that he had "now found a new accountant". However, Mr Louw told the Tribunal that he had always had the same accountant and there had been no change. His oral evidence thus contradicted that in his earlier letter.

34. Taking into account the evidence provided and our assessment of Mr Louw's credibility, we find that he has failed to prove that any part of the delays were due to the Company's accountant.

35. In addition, VATA s 71(1)(b) provides that "where reliance is place 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". Thus, even if I had accepted Mr Louw's evidence about the accountant, I would find that this did not provide the Company with a reasonable excuse.

His father's death

36. In early February 2017, Mr Louw wrote to HMRC, saying that "my personal circumstances have also affected my ability to pay these surcharges as my father died in August last year which took me out of the country for a large period". The Directions asked for further evidence, but none was provided. At the hearing, the Tribunal asked Mr Louw when his father passed away, and he said this had happened in 2015. This was another contradiction between the statements he had previously made to HMRC and his oral evidence.

37. Ms Rashid submitted that the Tribunal should find that there was no reliable evidence that the death of Mr Louw's father had affected the Company's business.

38. We find as a fact that Mr Louw's father passed away in early 2015. We agree with Ms Rashid that there is no reliable basis on which the Tribunal was able to make a finding that this had affected the Company's business. It follows that this fact cannot provide the Company with a reasonable excuse.

The downturn in the Company's business

39. Mr Louw's evidence-in-chief, given at the beginning of the hearing, was that:

- (1) the Company was struggling to survive;
- (2) the business of his major client had declined and that the Company in consequence had suffered "a massive downturn";
- (3) he had been "unable to drum up new business"; but
- (4) the Company had recently "taken a turn for the better".

40. Ms Rashid asked Mr Louw in cross-examination when the downturn had occurred, and he at first sought to avoid answering the question, saying instead “I was paying around £1,000 per week in VAT”. On the question being repeated, he said “when the business started in 2014 it was a slog and 2015 was a struggle” but by 2016 business was “decent” and in 2017 and 2018 the Company was on “an even keel”.

41. Ms Rashid submitted that this response was inconsistent with Mr Louw’s evidence-in-chief, and that in any event this point was simply another way of putting forward the “insufficiency of funds point”, in relation to which she referred back to her earlier submissions.

42. I agree with Ms Rashid on both points. There is no reliable basis on which I could make a finding of fact as to the state of the Company’s business, and even if there had been a downturn, this would not provide the Company with a reasonable excuse, for the same reasons at §29(4).

Mr Louw’s personal financial circumstances

43. Mr Louw submitted that the Company’s cashflow issues meant that he had to use the VAT received in order to live. In his evidence-in-chief he said:

- (1) he had two young children;
- (2) his wife had taken two periods of maternity leave, reducing their family income;
- (3) he was responsible for paying the mortgage and the household bills; and
- (4) when he paid over VAT to HMRC, this was “to the detriment of my living conditions”.

44. In answer to questions from the Tribunal Mr Louw said that his wife owned the house in which they live, with the deposit paid for by her parents and that she also pays the mortgage which is in her name. However, after having given that evidence, he paused and said he paid rent to his wife in order to live in the property.

45. Ms Rashid submitted that his evidence as to his straightened circumstances was not credible, and that even if it was, his use of VAT (which belongs to the Crown) to pay personal costs cannot provide the Company with a reasonable excuse.

46. I again agree with Ms Rashid. Mr Louw’s evidence on this point was not only internally contradictory and lacking in credibility, it also contradicted his earlier evidence that the VAT had been withheld by the factoring company. In any event, the use by a director of VAT collected from clients cannot provide the Company with a reasonable excuse.

Conclusion on reasonable excuse

47. It follows from the above that the Company does not have any objectively reasonable excuse for its failures to pay the VAT by the due dates.

PROPORTIONALITY

48. Mr Louw said that the total of the surcharges was disproportionate and they should be reduced. Ms Rashid relied on the Upper Tribunal’s decision in *HMRC v Trinity Mirror* [2018] UKUT 421 (TCC), where the UT said, with reference to an earlier UT decision and *HMRC v Total Technology* [2012] UKUT 418 (TCC):

“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 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.

66. However, we accept that, applying the tests we have described, the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgment, given the structure of the default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances. 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.”

49. As is clear from the above, the UT held that the default surcharge provisions had been designed by Parliament and were proportionate. Although the UT went on to say that there might be a “wholly exceptional case” where the imposition of the surcharge was disproportionate, this was not such a case. The Company had been subject to default surcharges over a long period, was familiar with the rules, and there was nothing unusual about its facts, so as to bring it within such an exception.

50. I thus find that the surcharges were not disproportionate and refuse this ground of appeal

OVERALL DECISION AND APPEAL RIGHTS

51. For the reasons set out above, the Company’s appeal is refused, and surcharges totalling £10,052.05 are confirmed.

52. This document contains full findings of fact and reasons for the decision. If the Company is dissatisfied with this decision, it 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.

53. 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.

**ANNE REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 05 FEBRUARY 2020

THE LEGISLATION
VATA s 59 Default Surcharge

(1) Subject to subsection (1A) below If, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

- (a) the Commissioners have not received that return, or
- (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

- (a) a taxable person is in default in respect of a prescribed accounting period; and
- (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) 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 of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

- (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;
- (b) in relation to the second such period, the specified percentage is 5 per cent;
- (c) in relation to the third such period, the specified percentage is 10 per cent; and
- (d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (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,

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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section, the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

VATA s 71 Construction of sections 59 to 70

(2) For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not reasonable excuse; and

(b) where reliance is place 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