



**TC03162**

**Appeal number: TC/2012/11170**

*VAT default surcharge – insufficiency of funds – payment one day late –  
whether reasonable excuse – no – whether penalty disproportionate – no –  
Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TAYLORS MORTGAGE SERVICES LIMITED  
t/a TAYLORS PROPERTY SERVICES**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL S CONNELL  
SUSAN STOTT**

**Sitting in public at Nottingham MJC Carrington Street Nottingham on 6  
August 2013**

**Ms Tessa Ward-Smith for the Appellant**

**Mr Tom Eyre, Officer of HM Revenue and Customs, for the Respondents**



## DECISION

### The Appeal

1. This is an appeal by Taylors Mortgage Services Limited, trading as Taylors Property Services, (“the Appellant”) against a VAT default surcharge of £2,678.52, for its failure to submit, in respect of its VAT period ended 31 August 2012, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the VAT due of £26,785.20.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### Background

3. The Appellant Company’s main business activity is that of an estate agency.
4. Prior to the default for 08/12 the Appellant had previously defaulted on VAT payments in period 08/11 when a VAT surcharge liability notice was issued and again on 02/12 and 05/12.
5. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Section 59 of VATA requires a VAT return and payment of VAT due on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].
6. 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.
7. 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 filing and payment. The due date for the 08/12 period was 7 October 2012.
8. The Appellant paid VAT on a quarterly basis. The Appellant’s return was received by HMRC on 26 September 2012 and was therefore on time. Payment was made late by one CHAPS payment on 8 October 2012.



9. 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(s). Section 59 (7) VATA sets out the relevant provisions : -

5                   ‘(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 –

10                   (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

15                   (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 ..’

20                   10. The burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question. It is s 59(7)(b) VATA on which the Appellant seeks to rely on the basis that for reasons set out below the VAT was paid late because it was suffering severe cash flow shortages.

11. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

25                   ‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct –

                  (a) any insufficiency of funds to pay any VAT is not reasonable excuse.’

30                   12. Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, precedent case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

13. The onus of proof rests with HMRC to show that the surcharges were 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 a balance of probabilities.

35                   Appellant’s Case

14. The Appellant does not dispute that its VAT payment for the period 08/12 was due on 30 October 2012 or that it was late making payment. It is agreed that the payment if made electronically was due on 7 September 2012, but that payment was made late on 8 October 2012.

40                   15. In its notice of appeal to the Tribunal the Appellant’s stated grounds of appeal were that the business was struggling because of the economic climate and cash flow



problems. The Appellant deals with re-possession sales and it often takes thirty days or more for customers accounts to be paid.

16. The company's financial problems were so bad that it had made four people redundant and closed one of its branches. Following the introduction of better credit control VAT was now paid on time.

17. A 10% surcharge was disproportionate and excessive taking into account the fact that the payment was only one day late, the Appellant's cash flow difficulties, and that it would only add to the Appellant's financial problems

#### HMRC's Case

18. Mr Eyre for HMRC said that the potential financial consequences attached to the risk of a default would have been known to the Appellant after the issue of the Surcharge Liability Notice in October 2011, given the information contained in the Notice. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

'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.'

19. The requirements for submitting timely electronic payments can also 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.

20. Also the reverse of each default 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).

21. Therefore HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

22. With regard to the Appellant's grounds of appeal, it is specifically stated in s 71(1) VATA that an insufficiency of funds to pay any VAT is not a reasonable excuse.

23. Insofar as the Appellant argues that the surcharge is entirely excessive or disproportionate to the modest delay which occurred, 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.



(2) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:

(a) The number of days of the default

(b) The absolute amount of the penalty

5 (c) The ‘inexact correlation of turnover and penalty’

(d) The ‘absence of any power to mitigate’

and decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality. The penalty was therefore not disproportionate.

10 24. Mr Eyre for HMRC said that the Appellant’s stated grounds of appeal in the notice of appeal to the Tribunal were clearly not grounds of appeal. The company had been given time to pay in respect of earlier VAT payments and there was no reason why could not have requested time to pay in respect of the August 2012 VAT providing of course that the arrangement was requested and agreed with HMRC  
15 before the due date for payment. The VAT did not belong to the company; they were public funds which should not have been used by the Appellant for ordinary everyday trading purposes.

### Conclusion

20 25. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

26. The Appellant’s main ground of appeal is that it was suffering cash flow shortages caused by delays in receiving payments from customers. In essence, the reason for the late payment of VAT was insufficiency of funds.

25 27. In *Customs & Excise Commissioners –v- Steptoe [1992] STC 757* the tax-payer argued that although the proximate cause of his default was insufficiency of funds, the underlying cause of that insufficiency, namely the unexpected failure by a major customer to pay him on time, amounted to a reasonable excuse. The Court determined on a majority that the statutory exclusion of insufficiency of funds as an excuse did not preclude consideration of the underlying cause of insufficiency and that a trader  
30 might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test had to be applied strictly.

35 28. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure, the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person’s exercise of reasonable foresight, due diligence and a



proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

5 29. Having considered the Appellant Company's circumstances and the background facts and circumstances leading up to the default, the Tribunal accepts that the underlying cause of the default was a general shortage of funds. However VAT was paid only one day late and a prudent tax payer in circumstances similar to that of the Appellant would have put in place appropriate precautionary measures to avoid that delay. There was no evidence that the company applied to HMRC for time to pay  
10 prior to the date of default and it does not appear to have made any attempts to raise funds from other sources.

15 30. Ms Ward-Smith said that following the default in August 2012 the Appellant had put in place more robust credit control mechanisms and its VAT compliance record has now improved. It had been late in making its VAT payments in three previous periods before the default period under appeal. There had therefore been a pattern of the Appellant failing to adhere to its VAT payment obligations. Had it improved its systems earlier than it did, the VAT default of 08/12 could have been avoided.

20 31. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal's view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 08/12 period.

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

25 33. 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)"  
30 which accompanies and forms part of this decision notice.

**MICHAEL S CONNELL**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 19 December 2013**