



**TC004345**

**Appeal number: TC/2014/05135**

*VALUE ADDED TAX – default surcharge – Section 59 Value Added Tax Act 1994 - whether there was a reasonable excuse for the default – no – whether the penalty was disproportionate to the default – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GARLAND HOFF LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JANE BAILEY  
MRS SHAMEEM AKHTAR**

**Sitting in public at Plymouth Appeals Centre on 9 March 2015**

**Mr Garland for the Appellant**

**Mrs Ashworth, HMRC presenting officer, for the Respondents**

## DECISION

1. This is an appeal against the decision of HMRC dated 13 August 2014, to  
5 confirm the imposition of a default surcharge in the amount of £417.04 for the  
Appellant's delay in paying VAT of £20,852.17 shown as due under its VAT return  
for the quarter ending 31 March 2014.

### **Application to appeal out of time**

2. The first issue to be determined was whether this appeal, which had been filed  
10 with the Tribunal 6 days late, should be admitted. Mr Garland was invited to explain  
the reasons for the slight delay. He explained that the company had initially been  
unsure about making an appeal given the size of the surcharge but that as this was a  
matter of natural justice, it had eventually been determined that an appeal should be  
submitted. By its earlier email to the Tribunal the Appellant had also stated that the  
15 decision of HMRC dated 13 August 2014 had not been received until 20 August 2014  
and a relevant staff member had been on leave at that time. HMRC did not oppose  
the application for permission to appeal out of time.

3. Having in mind the over-riding objective to deal with cases fairly and justly, we  
granted the Appellant permission to appeal out of time.

### **20 Facts relevant to this appeal**

4. Mr Garland set out the background to this appeal in his submissions and  
provided further detail in response to questions from the Tribunal and HMRC. We  
accept Mr Garland's evidence in its entirety. Further facts were provided in the  
papers accompanying HMRC's Statement of Case.

25 5. The Appellant is a small tour operator which has been in business for 25 years.  
The Appellant's liability to VAT is calculated under the Tour Operators Margins  
Scheme (TOMS). Mr Garland explained that when adjustments to TOMS had come  
about, a subsidiary company, Garland Hoff Travel Limited, had been set up in order  
to enable the Appellant to operate trader to trader under TOMS. Due to the  
30 technicalities of TOMS, the two companies were not grouped in the same VAT group.

6. Mr Garland noted that over the previous five years there had been an increase in  
visits from HMRC and that these appeared to be triggered whenever a refund VAT  
return was submitted. On a recent occasion the Appellant's local HMRC officer had  
identified that there was a management charge between the Appellant and Garland  
35 Hoff Travel Limited, and that VAT should be applied to this charge. The effect of  
applying VAT to the management charge was that the Appellant would recover and  
pay VAT to HMRC, and Garland Hoff Travel Limited would pay the Appellant and  
then reclaim from HMRC the VAT paid. Therefore, although the Appellant  
considered it a moot point as to whether this VAT charge was technically required, it  
40 did not anticipate cash flow issues as the VAT would be paid and reclaimed in the  
same period. Consequently the Appellant charged Garland Hoff Travel Limited VAT

of £20,852.17, and this charge was reported in the following quarterly returns for both the Appellant and for Garland Hoff Travel Limited.

7. It appears from the papers submitted that the repayment return for Garland Hoff Travel Limited was submitted on 23 April 2014. This was accompanied by an email  
5 from the Appellant's financial controller to the local HMRC officer referring to the management charge and explaining why the VAT return submitted was a repayment return.

8. Mr Garland explained in evidence that he had been assured by his local HMRC officer that the repayment would be with Garland Hoff Travel Limited in time for the  
10 Appellant to make payment. In response to a question, Mr Garland explained that he had not asked his local HMRC officer for a formal deferred payment date as he had not realised there was such a facility.

9. It appears from the email correspondence which was included in the bundle before us that the repayment due to Garland Hoff Travel Limited had been processed  
15 by HMRC on 30 April 2014 but was not received by Garland Hoff Travel Limited until 6 May 2014. Mr Garland's evidence was that the Appellant's financial controller had checked the bank account every day in order to check when the repayment arrived. The Appellant was not willing to make payment until the repayment had been received. In response to questioning Mr Garland explained there  
20 was no imminent cash flow issue for the Appellant but it was a very busy time of the year and the VAT in question was a large amount to have outstanding when other financial obligations might arise. Although he had been aware of the local HMRC officer's email dated 2 May 2014 to the Appellant's financial controller, which stated that payment had been authorised, Mr Garland was aware that the local HMRC officer  
25 was a "only a small cog" in a very much bigger machine and over 25 years in business Mr Garland was aware of other HMRC payments which appeared to have been authorised but had then gone awry or taken a considerably longer period of time to arrive than originally expected. Therefore Mr Garland considered it prudent to ensure that the repayment had arrived in Garland Hoff Travel Limited's account  
30 before the Appellant made payment.

10. Following receipt of the repayment by Garland Hoff Travel Limited on 6 May 2014, on 7 May 2014 the Appellant submitted its payment return and instigated  
35 payment to HMRC. As the Appellant uses electronic submission, the due date for both the return and receipt of payment was 7 May 2014. The return was submitted on time. However, as the Appellant made payment by BACS, payment was not received by HMRC until 12 May 2014. In response to questioning, Mr Garland stated that payment to HMRC was always by BACS and that the Appellant's financial controller had processed this payment in the usual way. Mr Garland's expectation was that payment by BACS would usually take three working days. However, Mr Garland had  
40 rung his local HMRC officer on the day that payment was instigated in order to let him know that the Appellant's payment had been instigated.

11. Unfortunately for the Appellant, it was already in a surcharge default period, having been one day late in its payment of the VAT due for the quarter ended 31

October 2013. On that occasion the Appellant was issued with a surcharge liability notice notifying it of the relevant surcharge period but no surcharge was raised.

12. In July 2014 HMRC had raised a surcharge of £417.04 on the Appellant (calculated at 2% of the outstanding VAT of £20,852.17) in respect of the payment  
5 due to be made by 7 May 2014 but received by HMRC on 12 May 2014.

13. The Appellant appealed against the imposition of this surcharge on the basis that it had a reasonable excuse. HMRC rejected the Appellant's appeal and confirmed the surcharge in its letter of 13 August 2014. The Appellant appeals against HMRC's decision to this Tribunal.

## 10 **The relevant legislation**

14. Section 59(1) of Value Added Tax Act 1994 ("VATA 1994") provides that if a person has not provided a VAT return, or paid the amount of VAT shown on that return as due, by the last date on which a VAT return for a particular accounting period is required, then that person is to be regarded as being in default.

15 15. Where a person is in default under Section 59(1) then Section 59(2) enables HMRC to serve a surcharge liability notice on that person, specifying a surcharge period.

16. Section 59(4) provides that, while in the default period, a person who is in default in respect of an accounting period within the default period (either by filing a  
20 VAT return late or by late payment of the VAT shown on a return as due) shall be liable to a surcharge. The surcharge is the greater of a prescribed percentage of the outstanding VAT for the relevant period, and £30.

17. Section 59(5) provides that in relation to the first default while in the surcharge period, the prescribed percentage is 2%.

25 18. However, under Section 59(7), a person who would otherwise be liable to a surcharge is not liable if either:

30 "(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".

19. Section 71 VATA 1994 qualifies Section 59(7) by specifically excluding from the categories of reasonable excuse: an insufficiency of funds to pay any VAT due,  
35 and reliance on any other person to perform a task.

## **Burden and standard of proof**

20. The burden of proof lies first upon HMRC to establish that the Appellant was in a default period and that, while in this default period, the Appellant filed its return late or made late payment of the amount of VAT shown in the return as having been due. Once the surcharge has, on the face of it, been established, the burden of proof in establishing that there was a reasonable excuse for late submission lies upon the Appellant. The standard of proof is the civil standard of the balance of probabilities.

### **The Appellant's submissions**

21. Mr Garland accepted that the Appellant's payment had been received by HMRC after the due date of 7 May 2014 but stated that the appeal was made on the basis of natural justice and equity. In his well-presented submissions, Mr Garland argued that the Appellant's delay had been due to delays on the part of HMRC. Although reliance on HMRC making repayment was specifically excluded from being a reasonable excuse, Mr Garland submitted that it was unfair for the Appellant to be held to a higher standard than HMRC had itself adopted.

22. Mr Garland noted that HMRC payments to the Appellant had previously gone astray and submitted it was ordinary prudence for a business to confirm receipt of a large sum before making onward payment of that amount. Mr Garland also submitted that Garland Hoff Travel Limited and the Appellant were linked in that Garland Hoff Travel Limited had only been set up in order to enable trader to trader transactions under TOMS. Therefore, Mr Garland submitted, the two companies should be seen together.

23. Mr Garland noted that HMRC were in a neutral position given the nature of the VAT charge which the Appellant's local HMRC officer had suggested should be applied to the management charge. If HMRC had processed the repayment to Garland Hoff Travel Limited earlier then the Appellant could have made the payment to HMRC earlier.

24. In his reply Mr Garland accepted that on the wording of the legislation the Appellant was in default and did not have a reasonable excuse, but he appealed to this Tribunal to act on a wider view of natural justice.

25. Finally, on the question of proportionality, Mr Garland addressed us on the wider aspect of whether it was proportionate for a Tribunal hearing to be required in order to resolve the Appellant's appeal. Mr Garland suggested it should have been possible for HMRC to have compromised the Appellant's appeal.

### **HMRC's submissions**

26. At the Tribunal's invitation Mrs Ashworth, for HMRC, began by leading us through the relevant parts of Sections 59 and 71 VATA 1994.

27. Mrs Ashworth submitted that the three issues to be determined were:

- a) Whether the surcharge had been assessed correctly;

- b) Whether the Appellant had a reasonable excuse for the default; and
- c) Whether the surcharge was proportionate.

28. On her first point Mrs Ashworth took us through the facts set out above and submitted that the surcharge had been imposed in accordance with Section 59.

5 29. Mrs Ashworth submitted that the Appellant had no reasonable excuse for the  
late payment of VAT. In support of this submission Mrs Ashworth referred to the  
Appellant's conscious decision not to instigate payment of the VAT due until 7 May  
2014 and argued that it was the Appellant's choice to delay instigating payment until  
10 the due date and it was not reasonable for the Appellant to have waited until the  
repayment had been received by Garland Hoff Travel Limited before it made payment  
for the VAT due; reliance on another party being specifically excluded as a  
reasonable excuse by Section 71 VATA 1994.

15 30. Mrs Ashworth also argued that in any event there was no need for the Appellant  
to wait for Garland Hoff Travel Limited to actually receive the repayment as the  
Appellant should have been confident that the repayment would be received in due  
course once the Appellant's financial controller had received the email confirming  
that the repayment had been released. On this point Mrs Ashworth also noted that the  
Appellant and Garland Hoff Travel Limited were separate legal entities.

20 31. Finally Mrs Ashworth noted that if the Appellant had paid by CHAPS (with  
payment of a fee) instead of BACS, the payment due would have been received by  
HMRC on time.

25 32. On the question of proportionality, Mrs Ashworth referred to the Decision of the  
Upper Tribunal in *Revenue and Customs Commissioners v Total Technology  
(Engineering) Limited* [2012] UKUT 418 and argued that the surcharge regime as a  
whole was not disproportionate. Mrs Ashworth accepted that a surcharge could be  
disproportionate in individual cases but submitted that it was not disproportionate in  
the Appellant's case.

### **Decision**

30 33. It was not in dispute that there had been a delay in payment and that, as the  
Appellant was in a surcharge default period, it was on the face of it liable to a default  
surcharge.

35 34. On the issue of reasonable excuse we have sympathy for the Appellant and the  
situation in which it found itself. Mr Garland described the Appellant's behaviour as  
prudent and we appreciate why, against a background of some previous repayments  
having gone awry, the Appellant was reluctant to make payment of VAT amounting  
to £20,852.17 without Garland Hoff Travel Limited first receiving repayment of the  
same amount of VAT from HMRC.

35. However, under Section 71(1) VATA 1984, neither reliance on HMRC to make  
repayment at an earlier date, nor temporary insufficiency of funds caused by the delay

in HMRC making repayment can be treated as being a reasonable excuse for late payment of VAT. Therefore we hold that there was no reasonable excuse for the Appellant's delay in making payment of VAT shown on the return for the quarter ended 31 March 2014 as being due.

5 36. On the issue of proportionality we can understand Mr Garland's frustration that HMRC do not have the power to reduce a default surcharge once imposed, making it necessary to appeal to the Tribunal in order to cancel a surcharge. However, on the question of whether the surcharge imposed is so disproportionate to the Appellant's default that the surcharge must be set aside, we agree with HMRC that the surcharge  
10 of £417.04 imposed in this instance is not disproportionate to the default.

### **Conclusion**

37. We therefore dismiss this appeal and confirm the surcharge of £417.04.

38. 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  
15 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.

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**JANE BAILEY**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 8 April 2015**