



TC06018

Appeal number: TC/2016/03998

VAT – default surcharge – whether payment made on due date – whether reasonable excuse – whether disproportionate – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BLACKHAWK LONDON LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE REDSTON
MR JOHN AGBOOLA**

**Sitting in public at the Tribunal Centre, Fox Court, Brooke Street, London on 26
May 2017**

The Appellant was not represented

**Mrs Mary Donnelly, Officer of HM Revenue & Customs Appeals and Reviews
Unit, for the Respondents**

DECISION

1. Blackhawk London Limited (“the company”) appealed against a VAT default surcharge of £5,970.69 for the period 1 December 2015 to 29 February 2016 (“Period 02/16”).

2. The Tribunal decided that the company’s appeal was dismissed and upheld the surcharge. A summary decision was issued shortly after the hearing; the company has now asked for this full decision.

The lack of representation

The previous listings

3. This was the fourth listed hearing of this appeal. Ms Shirleen Farley, the company’s office manager, asked for the hearings listed on 14 September 2016, 10 January 2017 and 4 April 2017 to be postponed. The Tribunal allowed those postponements, as explained below.

4. Ms Farley applied on 19 August 2016 to postpone the hearing listed for 14 September 2016, because her father was unwell. HMRC did not object to the postponement. Ms Farley said she anticipated being able to attend a hearing after Christmas.

5. On 14 September 2016, the Tribunal asked the parties for dates to avoid in January and February 2017. Mrs Donnelly, HMRC’s presenting officer, provided the Tribunal with her dates. Ms Farley replied on 19 September 2016, saying she was “unable to specify which days I am available for” because she had “appointment schedule in Jan and Feb 2017 but awaiting notification of such by ways of a phone call or a letter. So as of now I am unable to confirm”.

6. On 22 September 2016, the Tribunal relisted the hearing for 10 January 2017. On 4 January 2017, Ms Farley emailed the Tribunal, saying “due to illness I will be unable to attend. Please can this matter be deferred until the end of March”. HMRC did not object to the postponement, but had already incurred the costs of flights from Northern Ireland, where Mrs Donnelly is based.

7. On 5 January 2017 the Tribunal asked the parties for dates to avoid in the period from 20 February to 28 April 2017. Mrs Donnelly provided her dates, but Ms Farley did not respond. On 13 March 2017, Ms Farley emailed the Tribunal saying “it is unfortunate but I will have to reschedule the appeal to 6 June 2017 due to some unfortunate events”. HMRC objected because the reasons given were non-specific, and because further travel costs had been incurred.

8. The Tribunal asked Ms Farley to elaborate on her reasons, and she said that “the delay is unavoidable as the Director’s father has died and he is being buried abroad”. Mrs Donnelly asked for further details and was told that “one of the director wish to be there alongside our accountant and myself”.

9. HMRC continued to object to the postponement. As the application was contested it was referred to a judge, who allowed the postponement on the basis that “the director of the appellant is not able to attend due to the death of his father and attendance at the funeral overseas”. As it was Ms Farley and not the director who was planning to attend the hearing, there appears to have been a misunderstanding. In any event, that hearing was postponed, and on 12 April 2017 the case was relisted for 26 May 2017

This appeal

10. On 17 May 2017, Mrs Donnelly informed Ms Farley that she would book her flights in two days time. No reply was received.

11. At 16.17 on the day before the hearing, Ms Farley emailed the Tribunal to say she was unable to attend the hearing due to “health issues and lack of staff”.

12. We delayed the start of the hearing until 10.25 in case Ms Farley had changed her mind. We then asked Mrs Donnelly for HMRC’s view as to whether there should be a further postponement.

13. Mrs Donnelly submitted that in all the circumstances it was in the interests of justice for the hearing to proceed. She referred to the Ms Farley’s very late postponement request; the comprehensive Bundle prepared for the hearing which contained both parties’ evidence; HMRC’s abortive travel costs; and Ms Farley’s written submissions which set out the company’s case.

The relevant legal considerations

14. The Tribunal considered Rules 2 and 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 33 reads as follows:

“Hearings in a party's absence

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.”

15. It was clear from Ms Farley’s email that the company had been notified of the hearing. We considered whether it was in the interests of justice to proceed. Rule 2(2) says:

“Dealing with a case fairly and justly includes--

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.”

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16. The relevant factors here are (a), (c) and (e).

(1) In relation to (a), the company’s appeal concerns a straightforward VAT default surcharge, and HMRC have already incurred significant costs.

10 (2) In relation to (c), the lack of a representative means that Ms Farley cannot put forward her evidence orally. But we have her submissions and the evidence she has provided, including her account of what happened, and the company’s bank statements.

15 (3) In relation to (e), the Tribunal had been provided with the evidence in the Bundle, which runs to 140 pages, and the written submissions of both parties. In our judgment, we had sufficient information properly to consider the issues. Furthermore, this is the fourth listed hearing of the case, so there has already been considerable delay. Tribunal time has been allocated on three previous occasions, which is likely to have caused delays to other court users. As Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506
20 at [28], the interests of justice include:

“the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases...”

25 17. In addition, we noted the lack of specificity in Ms Farley’s very late request for a further postponement. Her email does not explain:

- (1) the nature, extent or severity of the health issues;
- (2) whose health issues are being referred to; and
- (3) if it is Ms Farley who has health issues, why another person could not have represented the company.

30 18. Taking all relevant matters into account, we were satisfied that it was in the interests of justice to proceed.

The evidence

19. The Bundle provided for the hearing included the correspondence between the parties and between the parties and the Tribunal. It also contained:

- 35
- (1) a schedule of the company’s defaults;
 - (2) a copy of the related VAT return;
 - (3) the company’s Lloyds bank statements for 7 and 8 April;
 - (4) extracts from HMRC’s contact database recording communications between HMRC and the company; and

(5) HMRC's ledger for the company for the relevant period.

Facts not in dispute

20. From the evidence provided we make the following findings of fact, which were not in dispute. We make further findings of fact later in our decision.

5 21. The company had been in the default surcharge regime continuously since period 08/12. It had 13 previous defaults and the surcharge rate had been at 15% since period 08/13.

22. The company banked with Lloyds and did not have an overdraft facility.

10 23. For period 02/16, VAT of £39,804.61 was due on 7 April 2016 if paid electronically. The company paid the VAT in two instalments of £19,904 and £19,900.

The issues in the case

24. There were three issues in dispute:

15 (1) whether the VAT was paid on 7 April 2016, as the company contends, or on 8 April 2016, as HMRC contends;

(2) if the VAT was paid on 8 April 2016, whether the company has a reasonable excuse for the late payment; and

(3) if there is no reasonable excuse, whether the surcharge was disproportionate.

20 **The legislation**

25. The relevant legislation is set out as an Appendix to this decision. A key provision is Value Added Taxes Act 1994 ("VATA"), s 59(4), which reads:

25 "(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—

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,

35 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)."

The first issue: when the company paid the VAT

The parties' submissions

26. Ms Farley said that both payments had been made on 7 April 2016. She also stated that:

5 (1) she tried to pay using the HMRC website but in relation to the second payment she received the following error message:

10 “‘confirm form resubmission’ this webpage requires data that you entered earlier in order to be properly displayed. You can send this data again, but by doing so you will repeat any action this page previously performed. Press the reload button to resubmit the data needed to load this page.”

15 (2) As a result she was scared to make the payment again in case the company was debited for double the amount, so she tried to make the second payment online. However, “the amount could not be authorised by my bank and I had to wait for the Directors to confirm the amount with our bank”.

27. Mrs Donnelly relied on the evidence set out below in support of HMRC’s position that the payments had been made on 8 April 2016.

20 (1) The HMRC contact database contained a contemporaneous note of a telephone conversation between Ms Farley and HMRC on 20 April 2016. It records that Ms Farley “confirmed that [the company] made 2 pyts of £19,900 on 8/4/2016”.

(2) The company’s bank statements showed two payments made on 8 April, one of £19,900.00 and one of £19,904.61.

25 (3) On 16 August 2016, HMRC emailed Ms Farley and said that, if the company’s case was that it had given instructions to the bank to make payment on 7 April 2016, it should provide HMRC with a letter from the bank explaining what had happened. No such letter was provided, and neither was any other related supporting evidence, such as instructions given by the company to the bank.

30 (4) On 7 April 2016, the company’s bank account contained only £29,105, less than the VAT due.

(5) On 8 April 2016, £50,000 was transferred from another account into the company’s bank account, and the payments to HMRC were debited after that transfer.

35 28. Mrs Donnelly submitted that the evidence was irrefutable. The bank statements showed that the payments had been made on 8 April, and they could not have been made sooner because there were insufficient funds in the company’s bank account, and no overdraft facility.

40 29. She acknowledged that the HMRC computer had taken some time to match the company’s second payment with its VAT account, and that this indicated there had been some difficulty with that payment. However, the evidence showed that both

payments had been made on 8 April, so the computer problem was irrelevant to the issue the Tribunal had to decide. She added for completeness that the company had not been disadvantaged as a result of the late allocation of the second payment to its VAT account.

5 *Further findings of fact*

30. Having considered all the evidence we find the following further facts.

31. On 7 April 2016, the company's bank account contained £29,105, less than the total amount of VAT due. The company could not have paid the full VAT amount on that date because it did not have the funds in its account, or an overdraft facility.

10 32. On 8 April 2016, £50,000 was transferred to the company's bank account from another account. After that transfer, the two VAT payments were debited to the company's bank account. The VAT was therefore paid a day late.

33. Ms Farley had a problem with the HMRC computer on 8 April 2016, but that was after the due date.

15 34. On 20 April 2016, Ms Farley told HMRC that the company had made two payments on 8 April 2016.

Decision on the first issue

35. On the basis of our findings of fact, the first issue is decided in favour of HMRC. It is also clear that VATA s 59(7)(a) does not apply.

20 **The second issue: whether the company has a reasonable excuse**

36. If a company has a reasonable excuse, the surcharge will not be due, see VATA s 59(7)(b).

25 37. The term "reasonable excuse" is not defined in the legislation, but in *The Clean Car Co Ltd v C&E Commrs* [1991] VATTR 234 Judge Medd QC gave the following helpful guidance:

30 "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

35 38. Ms Farley submitted that she had tried to make the payment on time but that there had been a problem with the HMRC website. However, we have found as a fact that no payment was made until 8 April 2016. Any difficulty she had with the second of the two payments made on that day cannot provide the company with a reasonable excuse, because the VAT was already late.

39. Ms Farley also submitted that the following “extenuating circumstances” should be considered:

5 (1) the director had suffered “deep depression” following his father’s death. However, it is clear from the postponement applications that the director’s father did not pass away until 2017, so his death cannot provide the company with a reasonable excuse for failing to pay the VAT by the due date, around a year earlier; and

10 (2) the company has lost a major client and two staff have left. Ms Farley did not explain when these events occurred, or why, in her submission, they are relevant to the company’s failure to file on time in April 2016.

40. We find that the company does not have a reasonable excuse for the late payment of its VAT for the 02/16 period.

The third issue: proportionality

15 41. Ms Farley submitted that the surcharge was disproportionate and “would impose more hardship on a company barely able to survive”. She relied on *Energys Holdings UK Ltd v HMRC* [2010] UKFTT 20 (TC) and *Total Technology (Engineering) v HMRC* [2011] UKFTT 473 (TC). In both cases the First-tier Tribunal had found the surcharges to be disproportionate.

20 42. Mrs Donnelly rightly pointed out that *Total Technology* had been appealed to the Upper Tribunal, under reference [2012] UKUT 418(TC). The Upper Tribunal had decided that the surcharge regime as a whole was proportionate. It allows a trader to pay late once, without a surcharge being levied; it “resets the clock” if the following four returns and payments are made on time; it provides for the surcharge to increase with the number of defaults, and the amount of the surcharge is directly linked to the
25 VAT paid late.

30 43. Despite the regime as a whole being proportionate, the Upper Tribunal also found that it is possible for a particular surcharge to be disproportionate. But this only the position if the surcharge is “not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted”. The Upper Tribunal also said at [99]:

35 “...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. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime...”

44. There is nothing in the facts of this case which takes the surcharge out of the normal range and it is not disproportionate.

45. Ms Farley referred to two other Tribunal decisions, but neither concerned default surcharges. They were not relevant to the company’s case.

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Decision and appeal rights

46. We have found that the VAT was paid one day late, that the company had no reasonable excuse, and that the surcharge was not disproportionate. We therefore dismiss the company’s appeal and uphold the surcharge.

5 47. 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.

10 48. The application must be received by this Tribunal not later than 56 days after this decision is sent to the company. 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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**ANNE REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 24 JULY 2017

THE LEGISLATION

VATA s 59 Default Surcharge

- 5 (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
10 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.
- 15 (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
20 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
25 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.
- 30 (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,
- 35 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
40 (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.
- 50 (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.

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(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—

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

(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
15 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—

20 (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.

25 (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,

30 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.

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(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

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

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

(d) 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
45 reasonable excuse.

(2)