



**TC06138**

**Appeal number: TC/2017/04611**

*VAT – default surcharge – reliance on a third party – reasonable excuse –  
no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**M F SOCIAL WORK SERVICES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT**

**The Tribunal determined the appeal on 27 September 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Letter of Appeal received on 2 June 2017 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 1 August 2017.**

## DECISION

### Preliminary issues

1. In terms of Rule 20 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) any appeal to this Tribunal should take the form of a Notice of Appeal and should include details of the name and address of the appellant. In this instance the Letter of Appeal was a letter dated 24 April 2017 from the appellant’s representative and addressed to HM Revenue & Customs. It was dated 24 April 2017, which is before the Review Conclusion letter dated 22 May 2017, which was issued to the appellant. It would appear that that letter, together with the Review Conclusion letter, was simply forwarded to the Tribunal.

2. Furthermore, the appellant did not intimate the identity of the representative in accordance with Rule 11 of the Rules until 16 June 2017.

3. I have had due regard to Rule 2 of the Rules and now formally waive the necessity to comply with Rules 20 and 11.

### The decision under appeal

4. The decision that has been appealed is the decision of the respondents (“HMRC”), confirmed on review, on 22 May 2017 to impose a default surcharge for the VAT period 12/16 in the sum of £383.06.

### Background

5. The appellant has been registered for VAT from 12 September 2012. The appellant has been in the default surcharge regime from the period 03/16 onwards and that meant that by 12/16 any further default would attract a surcharge at the rate of 10%.

6. The VAT returns for the periods 03/16, 06/16 and 09/16 had all been lodged late on 29 November 2016. The final payments of the tax due for periods 03/16, 06/16 and 09/16 were all made late.

7. Surcharge Liability Notices (“SLN”) were issued on 13 May, 12 August and 11 November 2016. The notes on the reverse of the SLNs included the following paragraph:

“If you don’t submit your return and make sure that payment of the VAT due has cleared to HMRC’s bank account by the due date you will be in default. Each time you default, we will send you a Surcharge Liability Notice.”

8. The due date for receipt of the VAT return and payment of the tax due for period 12/16 was 7 February 2017. On 17 February 2017, as no return had been lodged and no tax paid, a further SLN was issued. The return was submitted on 13 April 2017 which was 65 days after the due date and a further SLN was issued.

9. The tax payable of £3,840.63 was paid in two payments namely on 28 February 2017 which was 21 days late and 25 April 2017 which was 77 days late. No explanation for the late payment of tax has been offered.

10. On 24 April 2017, the appellant's representative's request for an "appeal" was treated by HMRC as a request for a review.

11. The only explanation provided, in that request for an appeal, was that the previous accountant had been responsible for filing VAT returns and had not done so. It was argued that it was unfair for the appellant to suffer a default surcharge for something for which the previous accountant had been responsible.

12. That review upheld the original decision.

### **The relevant law**

13. There is no dispute about the applicable law.

14. Section 59 of the VAT Act 1994 ("VATA") and Regulations 25(1) and Regulation 40(1) of the Value Added Tax Regulations 1995 require VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter.

15. 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. HMRC may then serve a SLN 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.

16. HMRC has discretion to allow extra time for both filing and payment when these are carried out by electronic means. Under that discretion, HMRC allow a further seven days for electronic filing and payment.

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

"(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 –

(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 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.”

5 18. Section 71(1) VATA provides:-

“For the purposes of any provision of section 59 ... which refers to a reasonable excuse for any conduct:

- 10 (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and  
(b) where reliance is placed on any other person to perform a task, neither the fact of that reliance nor any deleteriousness or inaccuracy on the part of the person relied upon is a reasonable excuse.”

15 19. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the appellant to demonstrate that there was a reasonable excuse for the late filing and payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

### **Discussion and Decision**

20 20. The default surcharge system seeks to ensure businesses that fail to pay VAT on time do not gain a commercial advantage (by way of what amounts to an interest free loan) over the majority of tax payers that do pay on time. The system therefore imposes a financial penalty on traders who are persistently late in paying their VAT.

21. There is no doubt that in this case both the return and the payment of tax were late and that the appellant was exposed to a 10% default surcharge in 12/16.

25 22. Has the appellant established that there was a reasonable excuse? The short answer is that no excuse has even been offered for the late payment of tax and a bland assertion that the previous accountant was culpable in respect of the late filing and the surcharge was unfair does not suffice.

30 23. As I indicate above, section 71(1)(b) VATA expressly excludes reliance on a third party as the basis for a reasonable excuse. Therefore, the appellant’s stated reliance on the accountant is not something that can be considered when determining whether there is a reasonable excuse.

24. The appellant knew, or ought to have known, that the previous three returns had been lodged late. When those were filed on 29 November 2016 appropriate actions should have been put in place to ensure timeous filing of returns. It appears that nothing was done.

35 25. The two payments of tax for this period were not linked in any discernible way to the late submission of the return. The payments were made online by debit/credit card via an external website (“Bill Pay”) as all previous payments had also been made.

26. I have had regard to the principles outlined by the Upper Tribunal in *Total Technology (Engineering) Limited v Commissioners for HM Revenue & Customs*<sup>1</sup> and most recently in *Commissioners for HM Revenue & Customs v Trinity Mirror*<sup>2</sup>. In the light of those principles and on the facts of the present case I do not consider that the default surcharge in this case is in any sense disproportionate.

27. In all the circumstances the appeal is dismissed and the default surcharge is confirmed.

28. 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.

**ANNE SCOTT  
TRIBUNAL JUDGE**

**RELEASE DATE: 28 SEPTEMBER 2017**

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<sup>1</sup> 2012 UKUT 418 (TCC)

<sup>2</sup> 2015 UKUT 421 (TCC)