



TC06901

Appeal number: TC/2018/02144

VAT – default surcharge – late payment – unaware of due date – whether reasonable excuse – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

REAL ESTATE STRATEGIES GLOBAL LIMITED Appellant

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 24 August 2018 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 Notice of Appeal dated 26 March 2018 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 12 July 2018.

DECISION

Introduction

- 5 1. The appellant appeals against a default surcharge in the amount of £1,301.40, being 10% of the VAT due for the 06/17 VAT period.

Background

- 10 2. The appellant registered for VAT with effect from 1 April 2013. They file returns and make payment electronically so that the due date for the return is seven days after the end of the month following the end of the VAT period. They pay by direct debit and so payment is collected automatically three working days after the due date or, if later, three working days after the return is submitted. They have been in the default surcharge regime from the 06/15 period for the purposes of s59 Value Added Tax Act (VATA) 1994, as follows:

- 15 (1) 06/15 – due date 7 August 2015, return received 19 August 2015, payment collected 24 August 2015. Surcharge Liability Notice issued.

(2) 09/15 – due date 7 November 2015, return received 9 November 2015. This was a repayment period and so no VAT was due and no default surcharge was levied. Surcharge Liability Notice Extension issued.

- 20 (3) 06/16 – due date 7 August 2016, return received 28 August 2016, payment collected 1 September 2016. As the surcharge of 2% of the VAT liability would have been less than £400, no financial element was applied. Surcharge Liability Notice Extension issued.

25 (4) 09/16 – due date 7 November 2016, return received 9 November 2016. This was a repayment period and so no VAT was due and no default surcharge was levied. Surcharge Liability Notice Extension issued.

- 30 (5) 12/16 – due date 7 February 2017, return received 8 February 2017, payment collected on 13 February 2017. As the surcharge of 5% of the VAT liability would have been less than £400, no financial element was applied. Surcharge Liability Notice Extension issued.

(6) 06/17 – due date 7 August 2017, return received 12 August 2017, payment collected 16 August 2017. Surcharge of 10% of the VAT liability was imposed, being £1,301.40

- 35 3. The appellant requested a review of the decision to issue the surcharge on 5 September 2017. A review conclusion letter upholding the surcharge was issued on 27 October 2017. The appellant provided additional information on 11 December 2017, which was considered by the Respondents (HMRC). A letter upholding the surcharges was issued on 24 January 2018. The appellant requested a further review on 12 March 2018 and was advised on 15 March 2018 that their only recourse was to this Tribunal.

- 40 4. The appellant appealed to this Tribunal on 26 March 2018.

Appellant's case

5. The appellant's case is that there is a reasonable excuse for the default, as follows:

- (1) They have never been sent the exact date for filing;
 - 5 (2) The information from HMRC is confusing as it makes repeated reference to missing the payment deadline and not the submission deadline;
 - (3) The VAT due has been paid on time;
 - (4) The HMRC guide to surcharges states that there is no surcharge if the VAT return is late and either the VAT has been paid in full by the due date, or
10 there is no VAT liability, or a VAT repayment is due. The appellant submitted that HMRC's own guidelines contradict the surcharge levied;
 - (5) The penalty is substantial and HMRC has suffered no loss; given the size of the penalty, there should be a significant onus on HMRC to be very clear on
15 dates with warnings. The computer generated reminder sent five weeks before the submission deadline does not even specify the exact deadline.
6. In correspondence with HMRC, the appellant also submitted:
- (1) that the surcharge for the 06/17 period had been overstated because "the
20 actual return should have been a net VAT payment of £10,321 and not £13,014 as submitted", but the surcharge had been calculated on the amount on the return submitted.
 - (2) It was a busy quarter at work which meant that they were distracted from the accounts;
 - (3) A member of staff had left and the recruitment process for a replacement also distracted them from the accounts;
 - 25 (4) The director was trying to move house; bank delays in that process were also causing a distraction from the normal routine;
 - (5) The director finds accounting on a "cash paid" basis confusing and so always submits a return for the amount relating to each quarter. The last quarter had a lot of invoices outstanding and he was busy chasing these. He was also
30 uncertain of one large invoice as to how it should be treated.
7. The appellant requested that the surcharge be cancelled accordingly.

HMRC's case

Validity of surcharge notices

8. HMRC noted that the appellant's name had been changed at Companies House
35 in January 2014 from "Malcom Frodsham Real Estate Strategies Limited" to "Real Estate Strategies Global Limited". This change of name has not been notified to HMRC although HMRC have now written to the appellant to inform them how to update their VAT registration details.

9. HMRC submitted that the change of company name does not affect the legality of the surcharge notices issued and that, by the nature of the appeal, the appellant accepts that the surcharge notices do in fact apply to them as Real Estate Strategies Global Limited.

5 10. HMRC submitted that the appellant's view that the surcharge was levied in contradiction of HMRC guidance was incorrect. The return submitted for the 06/17 period was not a nil or repayment return and payment was made late. Therefore, none of the conditions removing the liability to a surcharge in the guidance applied.

Late payment of VAT

10 11. HMRC submitted that:

(1) Regulation 40 of the Value Added Tax Regulations 1995 provides that a person required to make a VAT return shall pay HMRC the related VAT liability not later than the last day on which the return is required to be made;

15 (2) as the appellant pays VAT by direct debit, payment is collected automatically three working days after the payment deadline and will then be regarded as paid on time or, if later, three working days after the return has been filed in which case the VAT liability will have been paid late. This is set out on HMRC's website;

20 (3) the requirements for submitting timely electronic payments are set out in Notice 700, para 21.3, on HMRC's website, and on the acknowledgment of the electronic submission of a VAT return.

25 12. HMRC submitted that, although the appellant states that payment was made on time, the appellant has also acknowledged that the VAT return for the 06/17 period was submitted late. As the appellant makes payment by direct debit, the late submission of the return means that the payment was also received late.

Reasonable excuse

13. HMRC submitted that it was the appellant's responsibility to ensure that their VAT return and payments were made on or before the relevant due date.

30 14. HMRC submitted that the due date for filing of the appellant's returns is clearly stated in their VAT online account and on the return itself.

35 15. HMRC submitted that the specific due date cannot be given in general information because the due date will depend on the specific circumstances of the taxable person as, for example, a trader within the Payments on Account scheme will have a different due date. HMRC's website states that a taxable person's VAT online account will set out the due date and states further that this will usually be "1 calendar month and 7 days after the end of an accounting period". The email reminders sent to traders also direct them to check their VAT account for due dates.

16. HMRC submitted that they had no record of the appellant contacting them since first being issued with a default surcharge for the 06/15 VAT period. HMRC submitted that a reasonable trader, issued with several default surcharge notices, would have contacted HMRC to ensure that they were aware of the due date for submission and payment in order to avoid further defaults.

17. HMRC submitted that the additional reasons given by the appellant in correspondence do not amount to a reasonable excuse. A reasonable excuse is normally something unexpected or an unusual event that is either unforeseeable or outside the trader's control which prevents them from complying with their tax obligations. Case law has established that whether there is a reasonable excuse requires an assessment of the actions of the trader from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their tax obligations.

18. HMRC submitted that circumstances such as being busy, recruiting a replacement member of staff and moving house are a normal hazard of business and not something which would operate to prevent a trader from complying with their tax obligations.

19. HMRC further submitted that as the appellant chooses to account for VAT on a cash basis, they would only account for money received in the quarter and pay VAT on that amount. The fact that there were outstanding invoices is not, therefore relevant to whether there is a reasonable excuse for the delay. If the appellant was uncertain as to how to treat a particular invoice, they should have sought advice before the due date to avoid being in default.

Proportionality

20. HMRC submitted that the case of *Trinity Mirror* [2015] UKUT 421 (TCC) found that the default surcharge regime was a rational scheme and that using the amount unpaid as the objective factor by which the surcharge varies was appropriate to the aims of the system, and that the purpose of the surcharge regime is to impose a penalty for failure to pay VAT on time and not to penalise subsequent delays in payment. It was only in wholly exceptional cases that the surcharge might be disproportionate.

21. HMRC submitted that the decision in *Trinity Mirror* was binding on this Tribunal and that the surcharge for the 06/17 period was not disproportionate.

Decision

22. HMRC accept that the initial burden of proof lies with them to show that

- (1) VAT was paid late and the liability to the surcharge has been incurred; and
- (2) valid surcharge liability notices for the default periods were served on the appellant

23. Once HMRC has satisfied their burden of proof, then the burden shifts to the appellant to show that, on the basis of their grounds of appeal, a reasonable excuse exists and/or that the surcharges are disproportionate.

24. In each case the standard of proof is the usual civil standard, namely the balance
5 of probabilities.

Late payment of VAT

25. The appellant's grounds of appeal stated that the VAT was paid on time. No further detail and no evidence was put forward for this. I have assumed that the appellant considers that payment by direct debit means that the payment has been
10 made on time.

26. Payment by direct debit does not automatically mean that the VAT liability is paid on time: it is only if the return is submitted on time that the direct debit collection will be made on time. It is clear that HMRC cannot collect an amount before the taxable person has submitted a return stating the amount to be collected.

15 27. As the VAT return was submitted late, the direct debit was collected after the due date and I therefore find that the VAT liability was paid late and a liability to the surcharge has been incurred.

Validity of surcharge liability notices

20 28. I find, on the evidence submitted, that the default surcharge notices were properly sent out to the appellant's principal place of business and there is no evidence that they were not delivered. Indeed, the appellant has not submitted that the surcharge notices were not received.

25 29. The appellant has not submitted that the notices were incorrectly issued as the name of the company had changed, nor have they submitted that they did notify HMRC of the change in the company's name.

30 30. I find that the appellant has accepted by their grounds of appeal that the surcharge notices apply to them and that therefore the requirement in s76 VATA 1994 that the surcharge be notified to the appellant has been met.

30 31. I therefore find that the fact that there was a change in name of the appellant which was not notified to HMRC does not affect the validity of the default surcharge notices. It cannot, in any case, be correct that a taxable person could escape liability for a surcharge by changing their name and failing to notify HMRC.

35 32. The appellant stated in correspondence that the VAT liability in the return was incorrect, and so the surcharge was overstated, that VAT liability is information which the appellant has submitted to HMRC. In the absence of any properly submitted correction to that amount, the VAT liability on the return submitted must be regarded as correct and so the surcharge amount has been correctly calculated.

33. The appellant also argued that HMRC guidance states that no surcharge is due if the VAT payment is made on time and that, as they made payment on time, no surcharge should be applied. As set out below, I find that the appellant did not make the VAT payments on time and so the surcharge is due.

5 34. I therefore find that the surcharge notices were valid and correctly issued, notwithstanding the change in the company's name, and the surcharge amount for the 06/17 period was correctly calculated.

Proportionality

10 35. The appellant argued that the surcharge was disproportionate as HMRC had suffered no loss. I have had regard to the principles outlined by the Upper Tribunal in *Trinity Mirror*. In the light of those principles and on the facts of the present case I do not consider that the default surcharges in this case are disproportionate.

Reasonable excuse

15 36. The question to be considered, therefore, is whether the appellant has a reasonable excuse for the default in the 06/17 period.

37. s59(7) VATA 1994 provides as follows:

20 “ (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) ...

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge ...”

25 38. There is no statutory definition of “reasonable excuse” but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

30 “a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

39. The appellant argued that they had a reasonable excuse for the delay in filing returns because HMRC did not advise them of the due date for filing.

35 40. I find that the VAT online account clearly states out the specific due date for filing of a trader's VAT return and that both HMRC guidance and reminder emails inform a trader that the due date for filing can be found on the VAT online account. I find that the appellant was therefore advised of the due date for filing his VAT returns as he filed his returns online. Further, even if the appellant had not realised that the

due date was set out in the VAT online account I consider that, applying the *Clean Car* test, a trader with a responsible attitude to his duties as a taxpayer would have made enquiries as to the relevant due date to ensure that they complied with their filing obligations. Accordingly, I find that the appellant's lack of knowledge of the
5 due date for filing does not amount to a reasonable excuse for the delay in filing their VAT return and making payment on time.

41. The appellant also argued that they were distracted from their VAT filing because they were busy, were trying replace a member of staff and because the director was trying to move house and was facing delays caused by the bank.
10 Applying the *Clean Car* test, I consider that none of these factors (whether singly or in the aggregate) amounts to a reasonable excuse as I consider that a trader with a responsible attitude to his duties as a taxpayer would have made arrangements to ensure that the VAT return and payment was submitted on time in such circumstances.

15 42. The appellant further argued that they found accounting on a "cash paid" basis confusing, were busy chasing outstanding invoices and uncertain how to treat a particular large invoice. Applying the *Clean Car* test, I consider that none of these factors (whether singly or in the aggregate) amounts to a reasonable excuse. The appellant chose to account for VAT on a cash basis and has the option to revert to an
20 accruals basis if they prefer. As previously stated, being busy is not a reasonable excuse for the delay in filing their VAT return and making payment on time. In particular, chasing payment of invoices cannot be a reasonable excuse in relation to payment of VAT when on the cash basis as that basis only requires a business to account for VAT on invoices which have been paid, rather than on all outstanding
25 invoices. Finally, applying the *Clean Car* test, I consider that a trader with a responsible attitude to his duties as a taxpayer would have made enquiries as to how to treat the particular invoice in time to comply with VAT obligations.

Decision

43. I find that the payment was late and the surcharge was validly issued. As I find
30 that the appellant has not established a reasonable excuse for the default and that the surcharge was not disproportionate, the appeal is dismissed and the surcharge upheld in full.

44. This document contains full findings of fact and reasons for the decision. Any
35 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 21 DECEMBER 2018

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