



[2019] UKFTT 706 (TC)

TC07478

Appeal number: TC/2019/04021

VAT default surcharge - VAT not paid on time - member of staff had 'made mistakes' resulting in the late payment - five previous defaults - whether reasonable excuse - no - whether penalty unfair or disproportionate - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

STRATFORD GLASS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 25 October 2019 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 30 May 2019 and HMRC's Statement of Case received by the Tribunal and the Appellant on 17 July 2019 with enclosures. The Tribunal wrote to the Appellant on 8 August 2019 stating that if the Appellant wished to reply to HMRC's Statement of Case he should do so within 30 days. The Appellant did not reply.

DECISION

The Appeal

- 5 1. Stratford Glass Limited ('the appellant') appeals against a default surcharge of £1,431.60 imposed by HMRC, in respect of the VAT period ended 31 August 2018, for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the VAT due of £9,544.
2. The point at issue is whether or not the appellant has a reasonable excuse for making late payment.

10 **Background**

3. The appellant's business is that of supplying and fitting glazing products and is based in Stratford upon Avon. The business has been registered for VAT since May 1999 under the VAT reference (VRN) 729 5930 00.
- 15 4. The appellant has been in the VAT default surcharge regime from period 11/16 when a non-financial Surcharge Liability Notice was issued. Prior to the default under appeal there had been four previous defaults.
5. No financial penalty is issued on the first default and no penalty was issued on the second and third defaults because the penalty at fell below the £400 de minimis level.
20 A penalty levied at 10% of VAT paid late was levied in respect of the fourth default. The penalty under appeal is the appellant's fifth default.
6. The appellant was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations
25 1995.]
7. 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
30 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%.
35 The percentage ascends to 5%, 10% and 15% for the second, third, fourth and subsequent defaults.
8. 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 electronic
40 filing and payment.

9. The appellant's preferred method of payment was via the Faster Payment Service.

10. The appealed Default Surcharge is for period 08/18. The due date for electronic returns and payments was 7 October 2018. In the absence of a return an Assessment of Penalty and Surcharge Liability Notice Extension at 15%, being £1,216.05, was issued on 12 October 2018.

11. The return was then submitted and VAT paid on 15 October 2018, being 8 days after the due date. As a result of the filing of the return the Notice of Surcharge was cancelled and replaced. The 15% surcharge was increased to £1,431.60 and notified as per the Schedule of Defaults.

12. 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 1994 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.'

13. 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 reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

14. The appellant's grounds of appeal as stated in its Notice of Appeal are:

"Further to my first appeal I would like to expand on it.

Our member of staff in question had upped and left us after we discovered she was making mistakes that had cost us many thousands of pounds, the late filing being just one of them, this is causing a financial unbalance at present which we are currently working hard to rectify. Whilst I understand that as a Director I am ultimately responsible for filing, the financial situation we find ourselves in is grave.

The amount you are requesting seems unfair, we are just a small company of 4 employees and the bottom line is I do not have the funds to pay it without causing risk to our future trading.

I accept we were seven days late filing but when it was discovered we filed and paid on the same day.

I would be grateful if this amount could be reduced or put on to payment plan.”

HMRC’s contentions

5 19. The first default was for period 11/16, when the appellant entered the default regime. The potential financial consequences attached to the risk of any further default would have been known to the appellant from this point onward, given the information printed on the Surcharge Liability Notice.

10 20. Liability to VAT surcharge is governed by VAT Act (VATA 1994) s 59 and on the reverse of each notice issued up to and including period 08/18, detailed how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with s 59(5) VATA 1994.

21. Included within the notes on the reverse of Surcharge Liability Notices(s), issued for the periods 04/15 onwards, are the following, standard paragraphs:

15 “How to avoid surcharges

- Submit your return and pay your VAT on time.
- For information on how to complete and submit your return go to vwww.gov.uk and search for VAT return.”

“Think ahead

20 If the person who normally does your VAT return will be absent, make alternative arrangements. If you can’t pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge.”

25 22. The requirements for submitting timely electronic payments can be found -

- On the HMRC website www.gov.uk/hmrc
- E-VAT return acknowledgement.
- HMRC’s VAT payment deadline calculator

30 23. In accordance with VATA 1994 s 59 and VAT regulations 1995 s 40, section 21.2.2 of Notice 700 The VAT Guide (from August 2017) states:

35 “You’re required by law to submit a VAT Return and to make sure that payment of the VAT due has cleared to HMRC’s bank account by the due date. If you fail to do so, you will be in default and you may have to pay a surcharge. A surcharge is an additional amount you may have to pay if you don’t pay your return on time. For more information see VAT Notice 700/50: default surcharge.”

24. In a letter dated 15 January 2019 the appellant states: “We filed and paid on 15th October so the actual VAT payment was not late.”
25. HMRC's records show that the 08/18 return and payment were both received on 15 October 2019, being 8 days late. The surcharge has been correctly issued in accordance with s 59(4) of VATA 1994, payment having been received by HMRC after the due date.
26. The fact that up until period 05/18 the previous default surcharge notices did not contain a financial element may be relevant. The appellant may not have realised they were default surcharge notices because of this, whereas they immediately recognised the notice for period 08/18 as it included a financial element.
27. The appellant has been in the default surcharge regime since period 11/16 and the appropriate notices were issued to them at the address on file and therefore the appellant should have been aware of the defaults and had procedures in place to ensure that their tax obligations were met.
28. The appellant states that the 08/18 return was filed late as they were “let down by a member of staff and was not aware it had happened” and further maintain that the same employee was “making mistakes that cost us thousands of pounds, the late filing being just one of them”.
29. While the appellant has delegated the task of VAT calculation and completion to a third party, reliance on a third party is not a reasonable excuse for late payment as specified in s 71 (1) (b) of VATA 1994. It is the responsibility of the director to ensure the timely submission of the VAT return and any tax due thereon.
30. In the Queen’s Bench ruling in the case of *Profile Security Services Ltd v Customs and Excise Commissioners* His Honour MacPherson of Cluny held that:
- “The words ‘any other person’ in s 33(2)(b) bore their ordinary wide meaning. Reliance on ‘any other person’ did not restrict that reliance to outside advisors but included reliance on a trusted employee. Indeed, it would be just as desirable, if not more so, to exclude reliance on a person in a position such as N as it would be to exclude reliance on an outside accountant who delayed in similar circumstances. The company should have had more control over its own servant than an outside accountant. In the instant case the tribunal had found, correctly, that the reason for each late return was dilatoriness or inaccuracy on the part of N and not dishonesty. It found that his failure to put in the respective claims timeously was because of his culpable or inexcusable delay caused by his lack of appreciation of the effect of non-compliance with the giro scheme. There was no finding that dishonesty was the cause of his conduct otherwise than after each event. It followed that PSS was caught by the strict provisions of s 33(2)(b) as those findings of fact could not be disturbed as being illogical or unreasonable.
- In all the circumstances the tribunal’s conclusions were correct and the appeal would therefore be dismissed.”
31. It is incumbent upon the taxable person to ensure that provisions are in place to enable them to comply with their statutory obligations.

32. In *Profile Security* His Honour MacPherson of Cluny made the point that an employer is better placed to exert control when the person upon whom a responsibility has been placed is an employee.

5 33. The appellant failed take sufficient care in relation to their financial and statutory obligations. A prudent person exercising reasonable foresight and due diligence having proper regard for their tax responsibilities would have checks and controls in place in respect of employees' actions to ensure the timely submission and payment of VAT returns. The appellant has provided no evidence of having such procedures in place.

10 34. Having considered the decision released by the Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) HMRC consider that whether a person has a reasonable excuse depends on the particular circumstances in which the failure occurred as well as the particular circumstances and abilities of the person concerned who failed in this obligation. The test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and
15 decide if the actions of the person met that standard.

35. The appellant has not met that standard in its obligation to ensure payment of the VAT due for the Period 08/18 was made on time.

20 36. The appellant has referred, in the grounds for appeal, to an inability to pay the surcharge amount. This would neither retrospectively, be a reasonable excuse for the original default under the provisions of s 59(7) of VATA 1994, nor for the withdrawal of the surcharge itself.

25 37. In relation to the argument that the default surcharge is “unfair”, HMRC refer to the Upper Tribunal decision in *The Commissioners for Her Majesty's Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 421 (TCC) (*Trinity Mirror*). That decision creates a binding precedent on appeals before the First-tier Tribunal considering issues of proportionality.

38. In *Trinity Mirror* the Upper Tribunal stated that:

- 30 • the default surcharge regime, viewed as a whole, is a rational scheme (In agreement with the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) (paragraph 65);
- 35 • using the amount unpaid as the objective factor by which the amount of surcharge varies is not a flaw in the system; to the contrary, it is appropriate as the achievement of the aim of fiscal neutrality according to EU law depends on the timely payment of the amount due (paragraph 65);
- whilst it could not absolutely rule out the possibility that a default surcharge might be disproportionate, given the structure of the regime, this is likely to occur only in a wholly exceptional case (paragraph 66);

- it could not readily identify characteristics of a case where a challenge to a default surcharge (on grounds that the surcharge is disproportionate) would be likely to succeed (paragraph 66);
- the surcharge of £70,906.44 incurred by Trinity Mirror PLC could not be regarded as disproportionate by reference to EU law or the European Convention on Human Rights (paragraphs 71 and 72).

39. The Upper Tribunal judgement in *Trinity Mirror* supports the position that the default surcharge in respect of the late payment of VAT for the accounting period 08/18 is not disproportionate and therefore complies with EU law [and the European Convention on Human Rights].

40. The default surcharge of £1,431.60 for the 08/18 period is less than 1.3% of the appellant's total sales net of VAT of £114,936.

41. The level of the default surcharge is specified in s 59 of VATA 1994 and as such HMRC have no discretion as to the amounts to be levied.

42. VAT Act 1994 does not provide for mitigation of default surcharges and as such neither HMRC nor the Tribunal have any mitigation powers in that context.

Conclusion

43. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any Surcharge Liability Period.

44. The burden of proof is on the appellant to show that it has a reasonable excuse for the late payment of VAT for the default periods.

45. The Surcharge Liability Notice V160 issued on the first default advises a trader how surcharges are calculated and the percentages used. Subsequent Surcharge Notices also advise the trader of the percentage used to calculate the surcharge, if one has been issued, and the percentage which will be used in calculating the surcharge for any subsequent default.

46. Value Added Tax Regulations 1995, at Regulation 40, state that "any person required to make a return shall pay to HMRC such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return." There is therefore a statutory obligation on a person required to make a return to pay the VAT to HMRC.

47. The rates of surcharge are laid down in law and neither the Commissioners, nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

48. The first default was recorded for period 11/16 and the appellant entered the default regime. The potential financial consequences attached to the risk of further default would have been known to the appellant from this point onward, given the information

printed on the initial Surcharge Liability Notice. The company proprietors must take responsibility for any defaults caused by the inadvertence or negligence of employees, as set out in s 71(1)(b) VATA 1994.

5 49. As HMRC say, in relation to any argument that the penalties are unfair or disproportionate, the Upper Tribunal decision in *Trinity Mirror* creates a binding precedent on appeals before the First-tier Tribunal considering issues of proportionality.

10 50. The surcharges have been correctly issued in accordance with s 59(4) of VATA 1994, payment having been received by HMRC after the due date and the appellant has failed to show that it had a reasonable excuse for the late payment.

51. The appeal is therefore dismissed and the default surcharge of £1,431.60 in respect of period 08/18 is upheld.

15 52. 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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 26 NOVEMBER 2019

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