

[2020] UKFTT 466 (TC)



**TC07941**

**Appeal number: TC/2020/00556**

*VAT default surcharge - payment made by FPS on day before payment was due - not received by HMRC until three days later - bank did not transfer money by Faster Payment Scheme as amount exceeded appellant's daily FPS limit - whether reasonable excuse - no - whether penalty disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**DOUGS MAINTENANCE SERVICES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 10 June 2020 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 3 February 2020 and HMRC's Statement of Case received by the Tribunal on 11 March 2020.**

## DECISION

### **The Appeal**

1. Dougs Maintenance Services Limited (“the appellant”) appeals against a default surcharge of £1,597.13 imposed by HMRC on 13 December 2019, in respect of the VAT period ended 31 October 2019 for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 2% of the VAT due of £79,856.89.
2. The point at issue is whether or not the appellant has a reasonable excuse for making late payment.

### **Background**

3. The appellant, company registration No 06759392, operates a property maintenance and general repair business in Folkestone, Kent. The company was incorporated on 26 November 2008 and has been registered for the purpose of VAT with effect from that date. Its directors are Douglas Lindsay Senior and Fiona Lesley Senior. The company’s VAT Registration Number is 944 8011 25.
4. All VAT registered businesses are required by law to send to HMRC both their return and payment of the VAT by the due date, which is normally one calendar month after the end of the accounting period covered by the return.
5. The company was on a quarterly basis for VAT, and therefore its VAT returns and the related payment was due on or before the end of the month following each calendar quarter. Reg. 25(1) and Reg 40(1) VAT Regulations 1995.
6. The appellant has been mandated under VAT Regulations 1995, SI 1995/2518, regulation 25A (Folio 91), to submit VAT returns electronically.
7. 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 filing and payment.
8. The history of VAT return filings and payments relevant to the appellant’s appeal is as follows:
  - The period 07/19 had a due date of 7 September 2019 for submission and payment. The return was received on 2 September 2019 and payment was received on 9 September 2019.
  - The period 10/19 had a due date of 7 December 2019 for submission and payment. The return was received on 6 December 2019 and payment was received on 9 December 2019.
9. Under s 59(1) VATA 1994 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 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 a non-financial Surcharge Liability Notice is issued. After that, the specified percentage is 2%, 5%, 10% and 15% of the VAT payable for the second, third, fourth and fifth defaults.

10. The appellant entered the VAT default surcharge regime in period 07/19 when a non-financial Surcharge Liability Notice was issued.

11. A VAT default surcharge was issued in respect of the default for period 10/19 in the sum of £1,597.13 calculated at 2% of the VAT due of £79,856.89.

12. The Default surcharge was upheld on review and appealed to the Tribunal on 3 February 2020.

13. Section 71 (1) VATA, 1994 - Reasonable Excuse provides:

(1) For the purpose of any provision of sections 59-70 which refers to a reasonable excuse for any conduct:-

(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 any task, neither the fact of that reliance, nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

### **Burden and standard of proof**

14. The Onus of Proof rest with HMRC to demonstrate that a penalty is due. Once so established, the burden then shifts to the appellant to demonstrate there is a reasonable excuse for late payment.

15. The standard of proof is the ordinary Civil Standard, which is the balance of probabilities.

### **Appellant's Contentions**

16. The appellant does not dispute that its VAT payment for the period 10/19, due on 7 December 2019, was late. It is agreed that the payment was due on Saturday, 7 December 2019 but did not reach HMRC until Monday 9 December 2019.

17. The appellant says that payment of its VAT liability was made electronically on Friday 6 December 2019 using the Faster Payment Scheme and that payment (normally guaranteed processing within two hours) should have been received by HMRC on Saturday 7 December, but the payment was not processed until Monday 9 December 2019.

18. Ms Fiona Senior on behalf of the appellant says in the Notice of Appeal:

“I believe that it is absolutely clear that it was the case, the company made a same day payment from their bank on Friday 7 December 2019, the due date of the payment, they categorically had every expectation that the payment would reach HMRC on time. The payment was in fact received by HMRC on Monday 9 December.

The company always submits its VAT returns on time and always pay on time, other than when this happened. Unfortunately the same thing happened in the previous quarter but it had never happened before. The company is not a company that simply delay paying its VAT bill, they have just been caught out by bank timings on the last two transactions.

It would be unfair to change the company over £1500 when it has always submitted and paid its VAT on time.”

19. In an email dated 9 March 2020, the appellant identifies why the payment did not go out the same day:

“The payment request was made at 16.05pm.... The bank have now advised that the reason that the payment did not go out on the Friday is because, whilst the company have a £99, 999 daily payment limit there is also a faster payment limit of £24,999. No-one at the company was aware of this limit within the overall limit, which is why the company fully expected that the payment would reach HMRC on the day it was made.”

20. The bank’s website states that there is a daily limit on the amount that can be transferred by faster payment. These are £25,000 if the request is made online or £100,000 if the request is made in a branch.

21. The penalty imposed is unfair and disproportionate to the nominal delay in HMRC receiving payment.

### **HMRC’s Contentions**

22. The Period 10/19 had a due date of 7 December 2019 for electronic VAT Payments and Returns. The VAT Return was received electronically by HMRC on time. As the payment of the VAT was received after the due date of 7 December 2019, the Surcharge was correctly imposed.

23. The payment from the appellant was received on 09 December 2019. It had been making electronic payments for some considerable time and therefore it is expected that the proprietors would have familiarised themselves with the time taken to process to payments.

24. The appellant acknowledges in their contentions that they made the same mistake with their previous 07/19 period. The payment for the appellant’s previous quarter, the 07/19 period, was for £50,491.48. The payment was received by HMRC on Monday 9 September 2019.

25. HMRC's website advises traders when making their payment to "check your banks' transaction limits and processing times before making a payment".

26. The appellant had been advised of the default surcharge regime previously and therefore must have been aware of the consequences of not paying its VAT by the due date.

27. In order for the appeal to succeed, the taxable person must demonstrate that the appellant held a reasonable belief the payment would be received. Based on the evidence held, the appellant's belief was not reasonable.

28. The requirements for submitting timely electronic payments can be found:

- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

29. The Surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4) payment having been received by HMRC after the due date for the Period 10/19.

30. The first default was recorded for Period 07/19 and the company entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default should have been known to the appellant from this point on given the information printed on the Surcharge Liability Notice.

31. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

*"Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000."*

32. The reverse of each notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

33. Genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses for surcharge purposes. The fact that the proprietors of the company intended to make payment in time is not a reasonable excuse.

34. The Directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon. The appellant has not provided any evidence that the bank was at fault in the late payment.

35. Each surcharge liability notice warns that should the trader default again they may become liable to a surcharge and the percentage rate is given. It clearly warns of the consequences of further defaults and details how the surcharge will increase. Each SLN or SLNE is issued with the same or similar guidance.

36. The appellant argues that there was a reasonable excuse for the delay.

37. In *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) the Upper Tribunal set out an approach that the First-tier Tribunal can take in considering a “reasonable excuse” defence (para 81).

“When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayers own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

Second, decide which of those facts are proven.

Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

38. Applying these four tests to the present circumstances:

- i. The taxpayer believed that a faster payment initiated on Friday 6 December 2019 would be transferred to HMRC’s bank account immediately.
- ii. The appellant has not provided evidence to prove that their belief was soundly based.
- iii. In the absence of any evidence that proves the payment was made so that it would be received on or before 7 December 2019, no reasonable expectation or excuse has been provided.

- iv. The taxpayer did not remedy the failure. It is a fact that due to the day that payment was initiated it was received late, on 9 December 2019.

39. In relation to the argument that the Default Surcharge is unfair and disproportionate, the Upper Tribunal in *The Commissioners for Her Majesty's Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 421 (TCC) ('Trinity Mirror') held that:

- 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) ('Total Technology')) (paragraph 65);
- 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);
- it did not endorse the suggestion that exceptional circumstances that might give rise to a disproportionate penalty could include cases such as *Energys* [2010] UKFTT 20 (TC) where there had been what was described as a 'spike' in profits for a particular VAT period for which the surcharge had been imposed, even if the consequent liability for VAT was of a different order of magnitude than was normal for the trader concerned (paragraph 67);
- it accepted that the scheme of the Default Surcharge regime is to impose a penalty for failing to pay VAT on time, and not to penalise further for any subsequent delay in payment (paragraph 68), in line with the decision of the Upper Tribunal in *Total Technology* (in particular paragraph 88);
- 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).

## **Conclusion**

40. Apart from the two defaults, the appellant has a good compliance history. However, the proprietors would have been aware of the deadline for payment and the consequences of late payment. The proprietors cannot suggest they are blameless for the delay that occurred.

41. I accept that a penalty of £1,597.13 may seem harsh for a two day delay, but as the appellant acknowledges, the same mistake occurred in the previous quarter. No penalty was levied on that occasion, but a non-financial Surcharge Liability Notice was issued and the proprietors should therefore have investigated the reason for that delay in order to ensure that it did not happen again.

42. The penalty may also seem disproportionate and unfair but I am bound by the precedent set in the case of *Trinity Mirror*. Legislation lays down the surcharges to be applied in the event of VAT being paid late. The surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period. This was a second default and so the penalty was 2% of the VAT due. I have no jurisdiction to reduce the penalty.

43. The burden of proof is on the appellant to show that it has a reasonable excuse for the late payment of VAT for the period 10/19. In my view, that burden has not been discharged and I concur entirely with HMRC's assertions as set out in paragraphs 22 - 40 above.

44. The appellant has not shown a reasonable excuse for the late payment.

45. The appeal is dismissed and the surcharge upheld.

46. 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.

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 13 NOVEMBER 2020**