



**TC05472**

**Appeal number: TC/2016/03897**

*VAT – default surcharge penalty – VAT paid late – yes – challenge on the basis of lack of awareness that the appellant was in the surcharge regime – not accepted – whether there was a reasonable excuse – no - quantum of penalty and challenge to proportionality of penalty – held not disproportionate – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRITEAIR SYSTEMS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT**

**The Tribunal determined the appeal on 7 October 2016 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 19 July 2016 (with enclosures), and HMRC's Statement of Case [(with enclosures)] acknowledged by the Tribunal on 23 August 2016.**

## DECISION

### Background and Introduction

1. This was an appeal in respect of the penalty levied in terms of Section 59 Value Added Tax Act 1994 (“VATA”) for the late payment of VAT for the period 03/16. That penalty was quantified in the sum of £1,244.84 being 10% of the tax concerned.
2. It is a matter of agreement that the payment for period 03/16 was late.

### The Legislation

3. Section 59 VATA sets out the provisions in relation to the default surcharge regime. Under Section 59(1) a taxable person is regarded as being in default if he fails to pay by the due date the amount of VAT shown on the return as payable in respect of that period.

4. Section 59(4) provides that:-

“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,

he shall be liable to a surcharge equal to whichever is the greater for the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.”

5. The legislation provides that HMRC may serve a surcharge liability notice on the defaulting taxable person, which brings him within the default regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. Section 59(5) sets out those percentage rates. A new default, made within the surcharge liability period, gives rise to a default surcharge being charged. The first surcharge thereafter is at 2%, increases to 5% for a second default within the period, 10% for a third and 15% for all subsequent defaults within the specified period.

6. Section 59A VATA provides that 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.

7. Section 98 VATA deals with service of notices and reads as follows:-

“Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative”.

8. Section 7 of the Interpretation Act 1978 reads as follows:-

5 “Where an Act authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effective by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

### **The background**

10 9. The appellant registered for VAT in October 2009 and was mandated to submit VAT returns and payments electronically from period 02/10 onwards and has continued to do so.

10. The appellant’s preferred method of payment has consistently been Bill Payment and was used for the periods 03/14, 12/14, 03/15 and 03/16.

15 11. Period 03/14 had a due date of 7 May 2014 for electronic VAT returns and payments. The VAT return was received before the due date of 30 April 2014. However, the VAT payment was received late on 8 May 2014. A Surcharge Liability Notice (“SLN”) was issued on 8 July 2014.

12. Period 12/14 had a due date of 7 February 2015 and the VAT return was received before that due date. The payment was received late on 9 February 2015 and an SLN extension (“SLNE”) was issued on 13 February 2015.

20 13. Period 03/15 had a due date of 7 May 2015 and that return was received timeously but the payment was received late on 8 May 2015. The SLNE was issued on 15 May 2015.

25 14. In respect of the period 12/15 a SLNE was issued showing the penalty at 10% and Mr Orme for the appellant had telephoned HMRC on 29 February 2016 explaining why the payment had been incorrect. The appellant was found to have a reasonable excuse for the late payment and on 14 March 2016 that penalty was withdrawn.

15. Period 03/16 had a due date of 7 May 2016 and the return was received timeously on 22 April 2016 but payment was received late on 23 May 2016.

30 16. SLNs and SLNEs are computer generated by an automated process and state that the taxpayer has been sent the notice because it is in default. The percentage rates of surcharge are identified and advice is given on how to avoid defaults. All SLNs and SLNEs were issued to the appellant’s principal place of business in accordance with Section 98 VATA and therefore in terms of Section 7 Interpretation Act 1978 they are deemed to have been delivered unless the contrary is proven.

### **HMRC’s case**

17. HMRC argue that the requirements for submitting timely electronic payments can be found not only on the HMRC website and the E-VAT return acknowledgement but also in Notice 700 “The VAT Guide” which sets out at paragraph 21 HMRC’s

understanding of the position in regard to late, incomplete or incorrect returns and payments. It also makes it clear that a taxpayer will not have to pay a surcharge the first time that there is a default within any 12 month period but if there is a default within any 12 months period but if there is a further default the taxpayer might have to pay a surcharge and the surcharge period would be extended each time there is a default. It goes on to explain the calculation of the surcharge and to make it explicit that a surcharge at the rates of 2% or 5% will not be charged if the surcharge is for less than £400.

18. Accordingly, since the first default was recorded for period 03/14 and there were subsequent defaults, the appellant was within the default surcharge regime and should have been aware of the financial consequences attached to the risk of further default.

### **The appellant's case**

19. The appellant conceded that the 03/16 payment was late and the reason was that it was "simply one of an oversight purely down to the chaos and heavy workload we are going through ... it just simply got forgotten". It was argued that 10% was an "extreme amount of money for our small company" and that the director was not aware that they had received previous surcharge notices.

### **Discussion and decision**

20. As indicated above there are four relevant defaults in this period. The appellant entered the default surcharge regime in respect of the period 03/14 and because that was the first default there was no monetary penalty levied. The relevant percentage for the period 12/14 was 2% and for 03/15 was 5% and in neither case was the monetary penalty levied since in both instances the penalty was below the *de minimis* level of £400.

21. It is quite clear that in regard to the period 12/15, where the percentage was 10%, the appellant contacted HMRC to appeal the penalty and did so successfully. He telephoned on 29 February 2016 but more pertinently wrote to HMRC that day heading the letter "Late Payment Surcharge" and referred to HMRC's letter of 18 February 2016 which is the SLNE. In querying the penalty Mr Orme did not take issue with the quantum. He simply explained how the problem arisen because he had transposed figures. That penalty notice should have alerted the appellant to the scale of the problem that would be faced if there was a further default. It should have alerted the appellant to the fact that any penalty arising thereafter would be levied at the same rate.

22. I do not accept the appellant's argument that nothing had been received from HMRC to suggest that the appellant was within the Default Surcharge Penalty regime. It is self-evident from the waiver of the penalty for period 12/15 that the appellant had received the SLNEs. In any event I agree with HMRC's argument that looking to the provisions of Section 98 VATA and Section 7 of the Interpretation Act the various notices would be deemed to have been delivered unless the contrary is proved. The

onus of proof in that regard lies with the appellant and the appellant's assertion that no paperwork from HMRC can be found does not suffice, particularly when considered in the context of the previous successful appeal.

5 23. The fact that the previous defaults had triggered no monetary liability for the penalty does not change the fact that the appropriate percentage is 10% because it is the fourth relevant default.

10 24. I do not consider that the appellant has established a reasonable excuse for the delay. I agree with Judge Tildesley in *Schola UK Limited v HMRC*,<sup>1</sup> which although not looking at VAT, indicates that in considering a reasonable excuse the Tribunal must consider the actions of the appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence whilst also having proper regard for his responsibility under the Tax Acts.

15 25. The return had been completed, the appellant knew the amount of tax that was due but simply prioritised other matters. That does not amount to a reasonable excuse.

20 26. Like many other taxpayers the appellant has argued that the Default Surcharge Regime is unfair and a burden on business. However, the Upper Tribunal in *HMRC v Trinity Mirror plc*<sup>2</sup> made it explicit that because the amount unpaid is the objective factor by which the amount of surcharge varies there is not a flaw in the system. In this case the penalty amounts to less than 1% of the total value of sales net of VAT. It is within the bounds of proportionality.

25 27. For all these reasons I find that the payment was late and there was no reasonable excuse for that late payment. The penalty has been correctly calculated in accordance with the relevant legislation and I therefore confirm the penalty in the sum of £1,244.84. The appeal is dismissed.

30 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.

35 **ANNE SCOTT**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 20 OCTOBER 2016**