



TC06890

Appeal number: TC/2018/03198

*VAT default surcharge - payment made one day late by electronic transfer -
accounting software problems - whether reasonable excuse - no - whether
penalty disproportionate - no - appeal dismissed*

FIRST-TIER TRIBUNAL

TAX

COLDSTAR (UK) LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 26 October 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 15 May 2018 and HMRC's Statement of Case received by the Tribunal on 9 August 2018 with enclosures. The Tribunal wrote to the Appellant on 9 August 2018 stating that if the Appellant wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

DECISION

The Appeal

- 5 1. Cold Star (UK) Limited ('the Appellant') appeals against a default surcharge of £540.98 imposed by HMRC, in respect of the VAT period ended 30 April 2017, for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 2% of the VAT due.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

10 **Background**

- 15 3. The Appellant's business is that of the installation of plumbing, heating and air-conditioning. The business was incorporated on 6 August 2002 and is based in Staple Hill, Bristol. The Appellant has been registered for VAT with effect from 6 April 1998. The sole director is Mr Lee Bryant.
4. The Appellant has been in the VAT default surcharge regime from period 10/16, when a non-financial Surcharge Liability Notice was issued. Prior to the defaults under appeal there had been one previous default.
- 20 5. No financial penalty was issued on the first default but a Surcharge Liability Notice was issued. The penalty under appeal is the Appellant's second 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 1995].
- 25 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 person, which brings him within the default surcharge regime so that any
- 30 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%
- 35 for the second, third and fourth default.
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 filing and payment.

9. If payment is by direct debit, HMRC will automatically collect payment from the businesses bank account three bank working days after the extra seven calendar days, following the standard due date. The Appellant paid its VAT electronically. No direct debit was set up.

5 10. The Period under appeal, 04/17, had a due date of 7 June 2017 for electronic payments and electronic VAT submission. The return was received on 28 June 2017, being 21 days later than the due date and payment was received on 8 June 2017, being 1 day later than the due date.

10 11. 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 : -

15 ‘(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 –

20 (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

25 (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.’

12. Section 108 Finance Act 2009, specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange Time to Pay, and this is agreed by HMRC.

30 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.

Appellant’s contentions

14. The Appellant’s grounds of appeal are that:

35 “As a small business we are already finding cash flow difficult and being charged huge surcharges like this just puts the company under more pressure. We have already seen a massive decline in getting money out of customers and them going bust owing us loads of money and the suppliers are just tightening down everyone’s credit term as it is.”

15. In earlier correspondence with HMRC, the Appellant said that they had:

“made the VAT payment [for 04/17] on time, but due to a bug in our Sage, the paper work got held up and we sorted it out as soon as we were aware.”

HMRC’s contentions

- 5 16. The first default was recorded for Period 10/16 and the Appellant entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default would have been known to the Appellant from that point onward, given the information printed on the Surcharge Liability Notice issued.
17. The requirements for submitting timely electronic payments can be found -
- 10
- In Notice 700 ‘The VAT Guide’ para 21.3.1(the notice represents HMRC’s policy and understanding of the relevant legislation)
 - On the HMRC website www.gov.uk/hmrc
 - E-VAT return acknowledgement.
18. Included within the notes on the reverse of Surcharge Liability Notices(s), issued for the periods 01/13 onwards, are the following, standard paragraphs:
- 15 *“Submit your return on time*
Make a note of when your return is due.”
“Pay your VAT on time
Don’t rely on HMRC to remind you — go to www.hmrc.gov.uk/payinghmrc/vat.htm”
“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 on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether.”
- 25 19. The Surcharge Liability Notice V160 advises a trader how the surcharges are calculated and the percentages used. Subsequent Surcharge Notices advise the trader of the percentage used to calculate the current surcharge, if one has been issued, and/or the percentage which will be used in calculating the surcharge for any subsequent default.
- 30 20. Each notice issued details on the reverse how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA s 59(5).

21. The 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 a statutory obligation on a person required to make a return to pay the VAT to HMRC.
22. The Default Surcharge system seeks to ensure businesses that fail to pay VAT on time, do not gain a commercial advantage (by way of an interest free loan) over the majority that do. The system therefore imposes a financial penalty on traders who are persistently late paying their VAT.
23. HMRC has a statutory responsibility to ensure that tax due is not retained and used as working capital after the date when it is due to be paid.
24. Section 108 of the Finance Act 2009 specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange a payment deferment and this is agreed by HMRC.
25. HMRC consider that a person exercising reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates, would have put measures in place to ensure payment was made on time or contacted HMRC to request a deferment of payment.
26. HMRC’s website details what actions to take if a trader cannot pay their VAT on time and warns of surcharges. This web page can be found at the following addresses:
<https://www.gov.uk/Nat-returns/surcharges-and-penalties>
<https://www.gov.uk/difficulties-paying-hmrc>
27. By submitting payment of their liability after the due date that the Appellant is not complying with the VAT Act and Regulations.
28. In accordance with VATA 1994 s 59 (4) a surcharge was correctly issued in each instance where payment was received after the due date.
29. 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, VATA 1994 s 70 not applying to surcharges issued under s 59 of said Act.
30. Liability to VAT surcharge is governed by VAT Act 1994 (VATA 1994) s 59 and the reverse of each notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the s 59(5) of the said Act.
31. As the surcharge notices are computer generated by an automated process it is not possible to provide copies of the actual notices issued to the Appellant, but examples of the notices are included within the bundle of documents.

32. The fact that the previous default surcharge notice did not contain a financial element may also be relevant. The Appellant may not have realised they were default surcharge notices because of this, whereas they immediately recognised the notice for period 04/17 as it included a financial element.
- 5 33. Whilst HMRC accept the Appellant had problems with submission of their return for the period under appeal, the financial surcharge issued is as a result of late payment for that period, as evidence within the Schedule of Defaults.
34. The Appellant maintains that they made payment of the liability for the period 04/17 on time and that it was only the “paperwork” that was late. In addition, having
10 checked their bank the money left their account and should have shown up in HMRC’s account, even though it did not appear until the following day.
35. HMRC invited the Appellant, in their telephone call of 3 July 2018, to supply further information that may affect the decision to uphold the surcharge, such as evidence of payment transactions or reasons as to delays at the bank. As of the date of
15 this Statement of Case no additional information or evidence has been received.
36. When information, such as dates of receipt of payments are input by HMRC, they are credited with the actual date of receipt. The surcharge for the period 04/17 was issued correctly as the date of receipt was one day after the due date.
37. The potential effect that the payment of the surcharge may have on the
20 Appellant’s finances would not be considered a reasonable excuse for removal of the surcharge for the period 04/17.
38. The treatment which the Appellant has received in relation to the requirements to account for VAT is the same as any other person who is registered for VAT. HMRC contend that whilst it is accepted that a business has other expenses, VAT must be
25 given priority. As a VAT registered company the Appellant charged VAT to their customers and are required by law to pay this with the appropriate return by the due date.
39. In relation to any argument that the fines are unjustified and thereby disproportionate, the Upper Tribunal released its 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
30 First-tier Tribunal considering issues of proportionality.
40. In *Trinity Mirror* the Upper Tribunal stated that:
- The default surcharge regime, viewed as a whole, is a rational scheme (in
35 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);

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- 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);

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- 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);

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- 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);

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- 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).

41. 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 04/17 is not disproportionate and therefore complies with EU law [and the European Convention on Human Rights].

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42. The surcharges have been correctly issued in accordance with s 59(4) of the VAT Act 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.

Conclusion

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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.

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44. The burden of proof is on the Appellant to show that he has a reasonable excuse for the late payment of VAT for the default periods. There is no definition of “reasonable excuse”.

45. The level of the Default Surcharge is specified in s 59 VATA 1994, and as such HMRC have no discretion as to the amounts to be levied. The level of the default surcharge is commensurate with the number of defaults and the amount paid late.

46. Whilst the Tribunal has sympathy for the Appellant, particularly given that this was its first financial penalty and the VAT payment was only one day late, there is a statutory obligation on a person required to make a return to pay the VAT to HMRC in such time and manner as determined by or under Regulations. The Value Added
5 Tax Regulations 1995, 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”. Software issues or bank transfer problems, unless entirely unforeseeable and unavoidable, despite the taxpayer acting in good faith, are not
10 acceptable as reasonable excuses for surcharge purposes. The Directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

47. Regulation 40 (2) of the VAT Regulations 1995, stipulate that VAT must be paid no later than the due date of the return.

48. In all the circumstances I conclude that the Appellant has not shown a reasonable
15 excuse for the late payment of VAT due in period 04/17.

49. The appeal is accordingly dismissed.

50. 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
20 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**

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RELEASE DATE: 20 DECEMBER 2018

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