



**TC06980**

5

**Appeal number: TC/2018/00910**

10

*VALUE ADDED TAX – Appeal against default surcharges. Value Added Tax Act 1994 Sections 59, 70 and 71 – whether a reasonable excuse – no - Appeal dismissed*

15

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE RED SKY AT NIGHT GROUP LIMITED                      Appellant**

**- and -**

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

20

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS  
MEMBER IAN MALCOLM**

25

**Sitting in public at Edinburgh 6 February 2019**

30

**The Appellant was not represented nor present but made written submissions  
Nikki Griffin, Officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal by The Red Sky at Night Group Limited ('RS') against a decision by HM Revenue & Customs ["HMRC"] to charge a VAT default surcharge for the period 09/17 of £763.67. The Tribunal had before it a bundle of documents which included the Notice of Appeal.
2. The issue before the Tribunal was whether HMRC's decision to impose the surcharge was correct in accordance with the legislation and whether or not RS had established a reasonable excuse for the default which had occurred.
3. Section 59(7)(b) of the Value Added Tax Act 1994 (VATA) provides that a surcharge does not arise in relation to a failure to submit a return and/or payment by the due date if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and that they put right the failure without unreasonable delay after the excuse had ended.

### Legislation

4. Sections 59, 70, and 71 Value Added Tax Act 1994 (VATA)

### Cases referred to

*Revenue and Customs Commissioners v Trinity Mirror plc* [2016] STC 352

- 20 *The Clean Car Company Limited v The Commissioners of Customs & Excise* [1991] VATTR 234

### The Facts

5. RS has been registered for VAT since 1 October 2015 under the VAT registration number 229 8415 83 and it carries on the business of a licensed premises.
- 25 6. In the VAT period 06/16 the amount due to be paid, of £7,101.05, by the due date of 7 August 2016 was paid late and a surcharge issued at a nil amount as this was the first default in the penalty regime. Although this did not result in a monetary surcharge, it had a consequential effect on all later defaults. RS requested a Time to Pay (TTP) arrangement for this period on 1 September 2016 but as this was requested after the due date, no relief was given under section 108 of the Finance Act 2009 (FA 30 2009 s.108) and the surcharge remained. The first payment of this liability was made on 1 September 2016 and then by a further nine instalments of £500.
- 35 7. In the VAT period 09/16, the amount of £7,957.36 due to be paid on 7 November 2016 was paid late on 16 November 2016. As this was the second default, a charge of 2% was applied to the tax which was paid late and resulted in a surcharge of £159.14. As this figure was below the £400 *de minimus* limit for the 2% and 5% penalties, no actual surcharge was issued, however, the regime period was extended. Consequently, on 11 November 2016, a surcharge liability extension notice

5 was issued indicating that the regime had been extended and that any further default within the regime would result in a 5% penalty. RS requested a TTP on 5 December 2016 and although as in 06/16 this was requested after the due date, no relief was given under section 108 of the Finance Act 2009 (FA 2009 s.108) and the surcharge remained.

10 8. In the VAT period 12/16 the amount due to be paid, by the due date of 7 February 2017, was partially paid late and resulted in a surcharge being issued of £222.75. As the surcharge was below the *de minimus* limit of £400 for the 2% and 5% penalties no surcharge was issued but the penalty regime period was again extended. Consequently, RS were informed of this by a surcharge liability extension notice that any further default within the regime would result in a 10% penalty.

15 9. In the VAT period 03/17 the amount of £4,347.78, due by 7 May 2017, was paid late, on 12 May 2017, and resulted in a surcharge of £434.78 being issued. This was paid by RS who were informed by HMRC by a surcharge liability extension notice that the penalty regime would be extended and that any further default within the regime would result in a 15% penalty.

20 10. In the VAT period of 09/17, the tax due by 7 November 2018 was paid on 8 November 2017 in two instalments. As the payment was received late and this was the fifth default of penalty, 15% was applied resulting in a surcharge of £763.67. As before RS received a surcharge liability extension notice advising that the regime would be extended and that any further default within the regime would result in a 15% penalty.

### **RS's Written Submissions**

25 11. RS say that being a new business particularly in the tied pub trade it was hard to get the business off the ground and running; that it is paying its taxes and contributing to the local community and economy.

30 12. RS say they have never been late with a VAT payment since 09/17 and that it is a business that abides by its responsibilities; that it has endured a two-year onslaught from HMRC, in regard to a payment that was 24 to 48 hours late, which it believes is unnecessary and that the whole case taking over two years is a waste of public money.

13. RS say that the size of the fine of over £700 for being 24 to 48 hours late is excessive, is an abuse of power and nothing short of bullying, and that HMRC have not mentioned once about its payments which have actually been on time or in advance of payment dates.

### **35 HMRC's Submissions**

14. HMRC say that the onus of proof, on the balance of probabilities, rests with them to demonstrate that the penalties are due and that once that is established, the onus is on RS to demonstrate that there is a reasonable excuse for late payment.

15. The law specifies two situations which are not a reasonable excuse: an insufficiency of funds, although the circumstances which led to the insufficiency may provide a reasonable excuse, and reliance on another person to do anything unless the person took reasonable care to avoid the failure.

5 16. HMRC say there is no statutory definition of “reasonable excuse” and that it is a matter of fact that RS has a history of defaults, none of which it has appealed previously. RS is, therefore, fully aware of the default surcharge regime process and the potential financial consequences attached to the risk of further default.

17. RS is also aware of the TTP arrangements that could have been put in place.

10 18. HMRC say that the date a payment is made is largely a question of fact and once it is established that a payment is late a surcharge accrues. The length of the delay is immaterial. The surcharge applies even if the payment is one day late, or 365 days late. HMRC say the legislation is very clear and that the payment must be received by the due date and the length of delay is irrelevant.

15 19. HMRC refer to the Upper Tribunal decision of *Revenue and Customs Commissioners v Trinity Mirror* [2016] STC 352 which confirms that the default surcharge regime is not disproportionate and that therefore, the rate of surcharge is set in the legislation and neither HMRC nor the Tribunal have the power to mitigate the surcharge irrespective of the value.

20 20. HMRC refer to the action a reasonable person/business person would take in a similar situation in determining what constitutes a reasonable excuse and refer to *The Clean Car Company Limited v The Commissioners of Customs & Excise* [1991] VATTR 234 case. HMRC say that RS has not acted with reasonable prudence and diligence in dealing with its tax affairs. As a VAT registered business it is the responsibility of the Director to monitor their VAT accounts and ensure that they understand the implications involved in dealing with VAT returns and the consequence of failing to make payments to HMRC by the due date.

25 21. HMRC submit that a reasonable person would have ensured that payment was arranged with the bank prior to the banking deadlines to ensure payments reach  
30 HMRC on time.

22. HMRC say that RS has accepted that the payment was made late within its Notice of Appeal but has not offered any reasonable excuse as to why the payment of the VAT was made late.

### **Decision**

35 23. As there was no representation for or on behalf of RS, the Tribunal considered carefully its reasons given in the Notice of Appeal and its written submissions.

24. The Tribunal noted RS’s view that the surcharge was harsh and unfair and that the penalty which was the subject of the appeal came about as a result of payment being made late by one day. The Tribunal has no discretion in relation to the fairness or the

time limits for the reasons set out in HMRC's submissions and can only consider whether or not there has been a reasonable excuse for the default.

25. The Tribunal were satisfied that HMRC had demonstrated that the payments had been made late and the penalties were due and had been correctly calculated.

5 26. The Tribunal then considered whether there was a reasonable excuse and given the legislative exemptions from what constitutes a reasonable excuse, no evidence could be found on which to constitute such a reasonable excuse.

10 27. Consequently, the Tribunal accepts the submissions put forward by HMRC and does not consider that RS has provided evidence to establish a reasonable excuse in terms of the relevant case law and statutory provisions. Accordingly, the appeal is dismissed.

15 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.

20

**W RUTHVEN GEMMELL WS  
TRIBUNAL JUDGE**

**RELEASE DATE: 13 FEBRUARY 2019**