



**TC03593**

**Appeal number: TC/2013/06261**

*VAT default surcharge - payment made two days late - insufficiency of funds - whether reasonable excuse – no - whether penalty disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TREVOR STARKES**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL S CONNELL  
                  MR JOHN COLES**

**Sitting in public at 45 Bedford Square, London WC1B 3DN on 20 February 2014**

**The Appellant did not attend and was not represented**

**Mr Bruce Robinson, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

5 1. Trevor Starkes (“the Appellant”) appeals against a default surcharge of £798.16 imposed by HMRC on 17 May 2013, in respect of the VAT period ended 30 March 2013, for his failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £5,321.10.

10 2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

15 3. The Appellant did not attend the hearing and was not represented. The Tribunal was satisfied that the Appellant had been notified of the date, time and venue of the hearing and that it was in the interests of justice to proceed.

### Background

4. The Appellant has been in the VAT default surcharge regime from period 06/11.

20 5. The Appellant paid VAT on a quarterly basis. 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 6. 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. As payment was made electronically, the due date for the 03/13 period was 7 May 2013. The return was received on 30 April 2013 and the  
30 VAT payment on 9 May 2013. The payment was therefore two days late.

35 7. 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 –

40 (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

5 (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 .

8. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

10 (1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -  
(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.'

Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

15 9. 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.

20 Appellant's contentions

10. The Appellant does not dispute that his VAT payment for the period 03/13, was late. It is agreed that the payment, if made electronically, was due no later than 7 May 2013, but did not reach HMRC until 9 May 2013.

11. The Appellant's grounds of appeal are:

25 (i) He had cash flow problems. He is a truck driver based in the Dutch office of an English company, and draws his diesel in Holland. The company, which provides him with fuel, take payment from him by direct debit from his bank account. The company had started to apply the direct debit earlier than they had previously done and this resulted in the money due to the company being taken from the Appellant's account at the same time as the VAT was due to be paid. The Appellant's wife monitors his business account while he is away and paid in £2,000 from borrowings in order to ensure that there were sufficient funds to pay both the amount due for diesel and the VAT. Unfortunately there was a two day delay before the monies were credited to his account.

30 (ii) He was out of the country when the VAT was due and therefore unable to make contact with HMRC to explain the difficulty. He says that in any event HMRC would not have discussed the matter with his wife. He was unaware that he may have been able to agree a time to pay arrangement.

40 (iii)The penalty is disproportionate, given that the payment was only two days late.

5 (iv) Hardship. The Appellant says that he is sixty-five years of age, does not have a private pension and is unable to retire due to financial business commitments. It will take three years to clear his debts, assuming he stays in good health and there is available work. He says that the Dutch office where he worked was closed in October 2013. He says that he has had one holiday in four years. A penalty of £798.16 would only cause an additional financial burden.

#### HMRC's contentions

10 12. The period 03/13 had a due date of 7 May 2013 for electronic VAT Payments and Returns. The VAT return was received on time. The Appellant paid his VAT electronically and payment was received by HMRC on 9 May 2013, two days late. As the payment was received late the surcharge was correctly imposed.

15 13. The Appellant defaulted in period 06/11 and entered the Default Surcharge Regime. He then defaulted in periods 09/11, 03/12, 06/12 and again in period 03/13, which is under appeal.

20 14. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 06/11 Surcharge Liability Notice.

25 15. 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".*

30 16. 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).

35 17. The requirements for submitting timely electronic payments can in any event 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.

40 18. 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.

19. With regard to the Appellant's grounds of appeal, it is specifically stated in s 71(1) VATA 1994 that any insufficiency of funds to pay any VAT is not reasonable excuse.

5 20. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellant made no contact with HMRC prior to the due date of 7 May 2013 and did not make any request for a time to pay arrangement

10 21. The Appellant says that the surcharge is entirely disproportionate to the delay which has occurred. The case of *Total Technology (Engineering) Limited v HMRC* was heard in the Upper Tribunal when it was held that:

15 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.

2) The Tribunal found that the DS penalty does not breach EU law on the principle of proportionality.

20 3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:

(a) The number of days of the default

(b) The absolute amount of the penalty

(c) The 'inexact correlation of turnover and penalty'

25 (d) The 'absence of any power to mitigate'

4) The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality

### 30 Conclusion

22. The Appellant was clearly aware of the due date for payments of his VAT and the potential consequences of late payment.

35 23. The Appellant's first ground of appeal is that he was suffering cash flow shortages at the time of the default.

40 24. In *Customs & Excise Commissioners –v- Steptoe* [1992] STC 757 the tax-payer argued that although the proximate cause of his default was insufficiency of funds, the underlying cause of that insufficiency, namely the unexpected failure by a major customer to pay him on time, amounted to a reasonable excuse. The Court determined on a majority that the statutory exclusion of insufficiency of funds as an excuse did not preclude consideration of the underlying cause of insufficiency and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test had to be applied strictly.

25. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether  
5 notwithstanding that person's exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

10 26. The Tribunal accepts that the underlying cause of the default may have been cash flow shortage. However, the Appellant has not provided any information to show that the cash flow shortage was entirely unforeseeable, outside the normal hazards of trading or due to events beyond his control

15 27. The Appellant could have requested time to pay but did not do so.

28. The Appellant says that he will suffer hardship as a result of the imposition of the surcharge. Whilst the Tribunal accepts that the surcharge may impose a financial burden on the Appellant, this does not constitute a reasonable excuse or grounds of  
20 appeal. 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.

29. The burden of proof is on the Appellant to show that he has a reasonable excuse  
25 for the late payment of VAT for the 03/13 period. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

30. The appeal is accordingly dismissed and the surcharge upheld.

30 31. 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  
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

40 **MICHAEL S CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 May 2014**

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