



TC04034

Appeal number: TC/2014/02079

*VAT- Default surcharge – SECTION 59 Value Added Tax Act 1994 –
Reasonable excuse – Proportionality – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COLIN ROBINSON T/A CARAN D'ACHE

Appellant

- and -

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

Respondents

**TRIBUNAL: G. NOEL BARRETT LLB
(Presiding Member)**

**DEREK ROBERTSON MA (Econ)
(Member)**

Sitting in public at The Parsonage Manchester on 29th August 2014.

Appellant not in attendance

Mr A O'Grady of HM Revenue and Customs, for the Respondents.

DECISION

5 Introduction

1. This is an appeal by Mr Colin Robinson trading as Caran D'Ache ("the Appellant") against several assessments for default surcharges for late payment of VAT as follows:-

10

Quarter	VAT	Due Date	Rate of Surcharge	Amount of Surcharge
08/11	£ 9,787.27	7.10.11	5%	£ 489.36
02/12	£18,283.62	7.4.11	10%	£1,828.36
05/12	£ 7,907.12	7.7.12	15%	£1,186.06

15

2. The assessments resulted from the Appellant's third fourth and fifth defaults in accounting for his liability to VAT. They followed a Surcharge Liability Notice ("SLN") which was issued to the Appellant on 15th April 2011, after his first default for late payment of his VAT for the quarter 02/11, by virtue of which the Appellant entered into the default surcharge regime and a second default for late payment of VAT in the sum of £9,043.11 for the quarter 05/11 when a penalty at the rate of 2% was imposed. As however the penalty at the 2% rate amounted to less than £400, no penalty was actually imposed for this second default.

20

25 3. The Appellant appeals against these default surcharges, firstly on the basis that it has a reasonable excuse for late payment; and secondly on the basis that the amount of the surcharge is disproportionate to his default.

30 4. The Appellant did not attend the hearing. When telephoned by the Clerk he confirmed that he did not wish to attend and that he wished the matter to be determined by the Tribunal in his absence. The Appellant asked for his letter of the 28th August to Mr A J O'Grady, Tax Inspector, to be taken into consideration by the Tribunal.

35 5. In view of that which the Appellant had told the Clerk we decided it was in the interests of justice to proceed with the hearing in the Appellants absence.

6. Whilst Mr Robinson submitted his appeal late, as HMRC made no objection to the late appeal we give permission for the appeal to proceed out of time

40

The Law

7. By section 59(1)(a) and (b) of the Value Added Tax Act 1994 (VATA) a person shall be regarded as being in default for that period:

45

“if by the last day on which a taxable person is required to furnish a return HMRC have not received that return, or have received that return but have not received the amount of VAT shown on the return”.

5 8. Under Regulations 25(1) and 40(1) VAT Regulations 1995, if the tax payer is on a quarterly basis for returns, they and their related tax payments are due on or before the end of the month next following each calendar quarter. Where however the taxpayer files his return or pays tax electronically HMRC allow a further seven days from the end of the month next following each calendar quarter for such electronic
10 filing and payment.

9. On a first default occurring, HMRC serve a Surcharge Liability Notice (SLN) on the taxable person. On subsequent defaults HMRC serve a Surcharge Liability Notice Extension (SLNE). Although no surcharge is imposed on the SLN, if any
15 further defaults are made by the taxable person before the expiry of the first anniversary of the last day of the period referred to in the SLN, then the taxable person becomes liable to a surcharge being the greater of the specified percentage or £30.

20 10. With each SLN and subsequent SLNEs, HMRC provide the taxable person with notes explaining what amounts to a default and the consequences which will flow from further defaults. Those notes also advise the taxable person to contact HMRC’s local Debt Management Unit if they expect to have difficulty paying VAT on time.

25 11. The specified surcharge percentages are set out in Section 59(5) VAT as follows:

(a) in relation to the first prescribed period the specified percentage is 2%.

30 (b) in relation to the second such period the specified percentage is 5%.

(c) in relation to the third such period the specified percentage is 10%.

(d) in relation to such period after the third the specified percentage is 15%.

35 12. HMRC do not however issue a surcharge at the rate of 2% or 5% if it calculates it to be less than £400.

40 13. Section 59(7) VATA provides that a taxable person shall not be liable to the surcharge and shall not be treated as having been in default, if he satisfies the Tribunal there is reasonable excuse for the return of the VAT not having been so despatched.

14. Section 71(1) VATA provides that:

45 “(a) an insufficiency of funds to pay any VAT is not a reasonable excuse; and

(b) where reliance is placed on any 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”.

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

10 16. References to “taxable person” and “Tax Payer” within the legislation include companies as corporate personalities as well as individuals.

15

The Evidence and our Findings of Fact

17. From the documentary evidence within the bundle of documents prepared by HMRC, The Appellant’s letter of the 28th August and the oral evidence of Mr x of HMRC, we make the following findings of fact.

18. Mr O’Grady explained and we accepted the following facts in relation to the Appellant’s previous defaults:

25 Default 1 - The quarter ending 02/11 had a due date, (if filed and paid electronically) of 7th April 2011. The Appellant filed his return on time, but his payments arrived late in HMRC’s account on the 14th April and 2nd August 2011. These late payments resulted in the SLN being issued.

30 Default 2 – The quarter ending 05/11 had a due date, (if filed and paid electronically) of 7th July 2011. Whilst the Appellant filed his return on time, payment in the sum of £9,043.11 did not reach HMRC’s account until 20th July 2011. This late payment resulted in the first SLNE being issued and resulted in a penalty surcharge at the rate of 2%, being calculated. However as the amount of the surcharge was less than £400, no surcharge was imposed

35 Default 3 – The quarter ending 08/11 had a due date, (if filed and paid electronically) of 7th October 2011. Whilst the Appellant filed his return on time his payments in the total sum of £9,787.27 all arrived late in HMRC’s account in several instalments over the period 15th November to 6th December 2011. This late payment resulted in the second SLNE being issued and resulted in a penalty at the rate of 5%, in the sum of £489.36 being imposed.

40 Default 4 – The quarter ending 02/12 had a due date, (if filed and paid electronically) of 7th April 2012. Whilst the Appellant filed his return on time his payments in the total sum of £18,283.62 made by way of ten faster payments during the period 12th April to 20th June 2012 all arrived late. These late

payments resulted in the third SLNE being issued and resulted in a penalty at the rate of 10%, in the sum of £1,828.36 being imposed.

5 Default 5 – The quarter ending 05/12 had a due date, (if filed and paid electronically) of 7th July 2012. Whilst the Appellant filed on time and paid £2,100 of the total VAT due by the due date he paid the remaining VAT in the sum of £7,907.12 after the due date. These late payments resulted in the fourth SLNE being issued and resulted in a penalty at the rate of 15%, in the sum (as adjusted) of £1,186.06 being imposed.

10

19. The Appellant did not dispute the facts of the defaults themselves and we accept that the SLN and the subsequent SLNE's and assessments to surcharge were properly served. In the Appellants view however he had a reasonable excuse to the late payments, which for the reasons set out below we are unable to accept.

15

20. We accept that whilst the Appellant was fully aware of his obligations, he had struggled to pay his VAT on time, because his business was experiencing a difficult time and was struggling.

20

21. Unfortunately the Appellant did not provide any evidence of any sudden specific unforeseen or inescapable events which his business had suffered, citing only the general economic recession for his defaults.

25

22. Whilst we accept that the Appellant was confused to some extent and thought that two payments of VAT which he had made in the sums of £929 and £2,795 should have been credited to his account. We also accept HMRC's explanation that these two sums were paid by Mr Robinson to discharge VAT owed by his limited company, which was an entirely separate entity to the Appellant and that as such those payments have no relevance to this appeal.

30

23. We also accept HMRC's submissions that Appellant's business, as a clothing retailer, was largely a cash business and that as such, any VAT would be collected at the point of sale and therefore prior to the due date for payment.

35

24. HMRC also submitted and we also accept that the cash collected for VAT was available to the Appellant to meet his VAT obligations and that if the Appellant chose to use the VAT for other business expenses and then found he could not pay over the required VAT by the due date, then that could not amount to a reasonable excuse for none payment.

40

25. We note that there was no Time To Pay Agreement in place at the time of the defaults the subject matter of this appeal.

45

26. Finally the Appellant submitted that the amount of the penalties were disproportionate. We did not however accept the Appellant's submissions on proportionality for the reasons set out below.

Reasonable Excuse

5 27. The burden of establishing a reasonable excuse falls upon the Appellant.

28. In our judgment, the Appellant has failed to establish that he had a reasonable excuse for the late payment of VAT for the three quarters under appeal

10 29. We do not accept that the general economic recession can in itself amount to a reasonable excuse for late payment of VAT. Many businesses manage to plan their cash flows to enable them to pay their VAT on time, despite the economic recession and in our view the Appellant should have done likewise.

15 30. Given that the Appellants ran a cash business, he should, in our view have been able to meet his VAT liabilities on time. The fact that he apparently chose to “borrow” the VAT he had collected and then use it to defray other business expenses and then found himself unable to meet his VAT payment obligations by the due date, cannot in our view amount to a reasonable excuse.

20 31. The Appellant did not provide evidence as to any specific unforeseen or inescapable events which befell his business and which then directly resulted in his inability to pay his VAT on time.

25

Proportionality

30

32. The question of whether or not this Tribunal has the power to determine whether or not a particular penalty, (as decided upon by Parliament), is or is not proportionate to the particular “default” was examined in great detail by the Upper Tribunal in the case of *HMRC –v- Total Technology (Engineering) Limited [2012] UKUT 418 (TC)* (Total).

35

36. The decision in that Upper Tribunal case is binding on this Tribunal.

37. In that case the payment was only one day late; previous defaults had been due to innocent errors; the taxpayer had an excellent compliance record prior to the first of the defaults; the amount of the penalty was £4,260.26 and the tax payers profits were around £50,000 per year.

40

38. Mr Justice Warren and Judge Bishopp said at page 26 para 81:

45

“..... the VAT default surcharge regime penalises only the failure to deliver a return and to make payment of the tax owed by the due date It is to be noted

that the penalty does not increase as time goes by; the penalty is for failure to do something by a due date, not a penalty for continuing failure to put right the original default

5 39. At page 31 para 99 they concluded;

10 “In our judgment there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are however some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the Tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed”.

15

Decision

40. In our judgment for the reasons we have provided, the Appellant does not have a reasonable excuse for the defaults.

20

41. Nor do we find, again for the reasons we have provided, following the Upper Tribunal decision in Total, that the amount of the default surcharges were disproportionate either in the context of the number of defaults by the Appellant, or as to the amount of the default surcharge in proportion to the Appellant’s sales, net of VAT.

25

42. We therefore dismiss the appeal and confirm the penalties in the sums of £489.36, £1,828.36 and £1,186.06 respectively

30 43. 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

**G NOEL BARRETT
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 29 September 2014