



TC06246

Appeal number: TC/2017/05292

*VAT – default surcharge – allocation of payments – time to pay
arrangements – reasonable excuse*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RECIPROCAL LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR
 CATHERINE FARQUHARSON**

Sitting in public at Ashford Hearing Centre, Ashford, Kent on 3 October 2017

Andrew James, Director, for the Appellant

**Victor Olamide, HM Revenue and Customs presenting officer, for the
Respondents**

DECISION

Introduction

1. This is an appeal by Reciprocal Limited (“**RL**”) against a VAT default
5 surcharge of £3,768 in relation to the period 03/17.

Background facts

2. The following facts relevant to this appeal were not in dispute:
- (1) RL’s VAT return and payment of VAT for the period ended 31 March 2017 (period 03/17) were due on 7 May 2017;
 - 10 (2) The return, stating a liability of £75,366.98 was received on 8 May 2017, i.e. one day late;
 - (3) HMRC issued a surcharge liability notice on 12 May 2017 based on a 10% surcharge rate, amounting to a surcharge of £7,536.69;
 - 15 (4) The first payment made by RL in respect of that VAT period was £43,817.19 paid on 22 May 2017;
 - (5) RL requested a review of the default surcharge on 23 May 2017;
 - (6) In the review response, dated 13 June 2017, HMRC reduced the default surcharge percentage to 5%, i.e. to £3,768, on the basis that one of the earlier defaults within the liability period had been treated as a default in error because
20 the return had been late but there had been no VAT liability;
 - (7) RL appealed to the Tribunal on 4 July 2017.

Parties arguments

Appellant’s submissions

3. Mr James, on behalf of RL, made the following submissions:
- 25 4. The full £75,366.98 was not really due on 7 May because £31,549 of it had already been dealt with by a time to pay arrangement (“**TTP**”) with HMRC; in particular, HMRC had incorrectly allocated £31,549 of the VAT repayment due in relation to the VAT period 12/16 to satisfying debts that had been dealt with under the TTP when RL had been expecting HMRC to repay that amount in cash to RL; if
30 HMRC had repaid it in cash in March 2017, RL would have had the funds to pay the full VAT amount in May 2017.
5. His co-director, Ms Lellow (who was not present at the hearing) had called HMRC to find out what was going on with regards to the £31,549 and was promised a phone call back, which did not happen for several weeks, until 19 May when Ms
35 Lellow phoned back. Ms Lellow’s statement (submitted with the Notice of Appeal) was that:

- (1) the person on the phone agreed to put the £31,549 back into the TTP;

(2) she explained that she wasn't able to arrange the payment for the remainder of the VAT because she was travelling, but would do so on Monday 22 May; and

(3) the person on the phone had agreed that that was acceptable.

5 6. RL had been unable to make a partial payment of VAT prior to 22 May 2017 because it did not know how much it owed, while it waited for the phone call back from HMRC.

HMRC's submissions

10 7. HMRC argued that the default surcharge had been validly issued in accordance with section 59(4) of the Value Added Tax Act 1994 because the VAT amount had been paid late.

8. In relation to the £31,549, HMRC submitted that:

15 (1) RL's agent had been advised on 14 March 2017 of what had happened, i.e. the amount had been used to eliminate the outstanding VAT debt and therefore RL could have contacted HMRC prior to 7 May 2017 in order to discuss a further time to pay arrangement in relation to the 03/17 period;

(2) HMRC has the power, under section 80(2A) of VATA 1994, to set off any amount standing to a taxpayer's credit against sums otherwise due under VATA 1994;

20 (3) The FTT, following the decision in *Noor v HMRC* [2013] UKUT 071 (TCC) has no jurisdiction over HMRC's decisions on lawful allocation of payments; and

25 (4) The TTP would have included terms and conditions that explained that HMRC would set off any repayments due against the earliest debts in accordance with its practice.

9. HMRC submitted that RL did not make contact with HMRC concerning the debt due on 7 May 2017 until after that date, with the first phone call occurring on 12 May 2017 and therefore there can have been no time to pay arrangement in place in respect of the 03/17 period.

30 **Facts**

10. While noting the frustration that, despite the importance of the TTP to the case, neither party submitted any documentary evidence of the TTP, nor were there witnesses present at the hearing who might have given evidence as to its contents and the way it was set up, based on the limited evidence in the bundle presented to the
35 tribunal and oral evidence of Mr James, we find the following facts in relation to the TTP:

(1) It had been set up in relation to debts over the course of 2015 and 2016 in respect of both VAT and National Insurance contributions ("NICs");

(2) It required approximately £11,000 a month to be paid by direct debit;

(3) The VAT period 12/16 (which was not one of the periods dealt with by the TTP) gave rise to a VAT repayment of £41,557.14;

(4) HMRC paid £10,007.35 to RL, who queried why they had not received the remaining funds on 14 March 2017;

5 (5) RL's agent, Mr William Wood, contacted HMRC on 14 March 2017 to discuss this issue and learnt that the £31,549 had been used by HMRC to clear the remaining VAT debt on RL's account and that the direct debit for the TTP would now be adjusted so that the only payments continuing to be due under it were for the outstanding NICs debt;

10 (6) Mr Wood made another phone call to HMRC on 12 May at 12:44, broadly asking for confirmation of the same point, that the £31,549 had been applied to the amount under the TTP rather than repaid to RL, which he received again from the HMRC representative on the telephone;

15 (7) Ms Lellow then made a phone call to HMRC, also on 12 May 2017, at 14:35, asking HMRC to undo that offsetting, effectively requesting that the VAT debt under the TTP be restored back up to its full debt amount; the £31,549 be repaid to RL (or more likely set off against the VAT due in relation to the 03/17 period). The adviser at HMRC was unable to resolve the issue on the phone but said that someone would phone Ms Lellow back.

20 11. There was one other factual issue in dispute and this was the point at which RL had made contact with HMRC regarding their inability to pay the VAT liability due on 7 May 2017. Mr James contended that Ms Lellow had called HMRC 'several weeks' before the phone call that Mr James contended she made on 19 May 2017, whereas HMRC, relying on the transcripts of recorded calls in its systems, stated that
25 the first phone call was not made until 12 May 2017 and that they have no record of any calls before 7 May or indeed on 19 May 2017.

12. Again, it was unfortunate for RL that Ms Lellow was not present at the hearing to give evidence or be cross-examined on the statement included in the Notice of Appeal about the phone call on 19 May 2017, nor on whether she had made attempts
30 to discuss the issue earlier than 12 May 2017. We can therefore put little weight on her statement in the Notice of Appeal.

13. In the absence of any further evidence and based on the facts that Ms Lellow's call on 12 May occurred a couple of hours after the call from RL's agent Mr Wood and that in the transcript of the 12 May 2017 telephone call, Ms Lellow does not refer
35 back to an earlier call she had made, we find that the first telephone call to HMRC regarding RL's difficulties with paying their VAT bill due on 7 May 2017 took place on 12 May 2017.

Discussion

14. We considered two questions in relation to this VAT default surcharge amount:
- 40 (1) Was the default surcharge validly issued?
- (2) Did RL have a reasonable excuse for the late payment?

Was the default surcharge validly issued?

15. RL accepted that VAT was due on 7 May 2017 and that the first payment was not made until 22 May 2017.

5 16. HMRC showed us the detail from their systems showing the date the surcharge notice was issued (12 May 2017), which was again not disputed by RL.

17. Save for the adjustment for the earlier default surcharge notice having been incorrectly issued in relation to a late credit return, RL did not dispute the earlier defaults and therefore the fact that it was in the default surcharge regime and on its 3rd default.

10 18. We therefore conclude that the default surcharge was validly issued and that the rate of 5% for the 3rd default within the default surcharge period was the appropriate rate to apply.

15 19. As an aside, we suggest that the fact that HMRC's system does not appear to have any provision for cancelling surcharge notices that have been issued because a return is late but turn out not to have been necessary because it was a credit return, unless and until the taxpayer either notices or requests a review of a subsequent surcharge, is unsatisfactory. In this appeal the mistake had been resolved by HMRC and therefore it does not give rise to an issue to be resolved, but that will not universally be the case.

20 *Did RL have a reasonable excuse for the late payment?*

20. The essential question here is whether the confusion in RL about the allocation of a prior VAT repayment to the earlier debts, covered by the TTP, is sufficient to constitute a reasonable excuse for the late payment.

25 21. We agree with HMRC's submission that this Tribunal has no general supervisory jurisdiction over HMRC's decisions, as concluded in *Noor*. The decision of the Upper Tribunal in *Swanfield Limited v HMRC* [2017] UKUT 088 (TCC) supports this conclusion in the specific context of the allocation of funds by HMRC to the earliest debt due from the taxpayer.

22. The decision in *Swanfield*, also indicates that:

30 (1) RL would have been entitled to demand that the VAT repayment due in respect of the 12/16 period was set off against the later debt (including the one not yet due at that time) rather than the earlier debt; and

35 (2) If the taxpayer has made no such request, HMRC is free to make such allocation as it sees fit and is not obliged to consider what allocation will give the best outcome for the taxpayer.

40 23. As noted above, neither party included evidence of the terms and conditions of the TTP arrangement. If, as HMRC suggested, there are standard terms that state that HMRC can allocate to debts as it sees fit, the terms and conditions perhaps ought to make it clear, following *Swanfield*, that the taxpayer has the option to make a request as to how a payment should be allocated.

24. There was no suggestion here that RL had requested, prior to submitting its VAT repayment return for the 12/16 period, that the repayment should not be allocated against its VAT debt under the TTP, but rather repaid to RL (or retained as a credit against future VAT payments). While that may have been because RL were not aware of that option, the fact remains that, in the absence of that request, HMRC has the right to allocate the credit against VAT due to it at that time.

25. However, the matter that determines the appeal in this case is that RL made no payments at all in respect of the 7 May 2017 debt until 22 May 2017 and had not contacted HMRC prior to 7 May 2017 to discuss its difficulties in paying.

26. We find that RL's submission that it could not, prior to 22 May 2017, make a partial payment because it did not know how much it owed because Ms Lellow waiting for a phone call back from HMRC is not a reflection of the reality of the situation.

27. Regardless of whether RL and HMRC could have come to other arrangements regarding the £31,549, in all circumstances RL owed at least £43,817.19 on 7 May 2017 and could, quite easily, have determined that payment amount. If it had done so, the amount of the default surcharge would have been substantially reduced. However, RL did not attempt to make any payment at all until 22 May.

Decision

28. For the reasons set out above, we dismiss RL's appeal. Therefore the VAT default surcharge stands.

29. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

RELEASE DATE: 30 NOVEMBER 2017