



**TC06310**

**Appeal number: TC/2017/07562**

*VAT - Default Surcharge - Late payment - Section 59 VATA - Was there a reasonable excuse? - No - Was the penalty disproportionate? - No - Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**NORMAN EMERSON GROUP LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL  
MR DEREK ROBERTSON JP**

**Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice,  
Chichester Street, Belfast BT1 3JF on Monday 8 January 2018**

**Mr George Emerson, a Director, appeared the Appellant**

**Ms Mary Hendrick, an Officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal against a VAT default surcharge of £9,573.57 imposed on 14 July 2017 in relation to the late payment of VAT for the period 05/17.

5 2. The following facts are not in dispute:

(1) The appellant limited company had been in the VAT default surcharge regime (for which see section 59 of the *Value Added Tax Act 1994*) since the period 11/15;

10 (2) Since 11/15, there had not been four complete successive periods without default;

(3) There was a default in 08/16 in paying VAT on time, attracting a surcharge at the rate of 2%;

(4) The defaults in 11/15 and 08/16 together meant that any further default would attract a surcharge at the specified rate of 5%.

15 3. It was not in dispute that the VAT payment for 05/17 had been made late. VAT of £191,471.42 was due by 30 June 2017, but extended to seven days after the statutory due date: namely, extended to Friday 7 July 2017.

4. On Monday 10 July 2017, the appellant made two electronic payments, both using the Faster Payments Scheme: one of £100,000, and one of £91,471.42.

20 5. Those payments, which came to the precise sum of VAT due, were three days late (counting the intervening weekend) but on the next working day after the extended due date.

6. In summary, the Appellant's case as to why the VAT was had not been paid in time was (i) that the Appellant was suffering very difficult financial circumstances, and  
25 (ii) that it was unreasonable and excessive to impose a default surcharge in relation to a payment which had been made one day late.

7. The Grounds of Appeal put it in this way:

30 "...I would contend that of course we had a reasonable expectation that HMRC would receive payment by the due date - this would be our hope at all times, but of course business does not always run smoothly, and sometimes even the highest and most noble of expectations veer off course ... the 'reasonable excuse' for payment being late is more than a mere excuse - it is cold, hard fact that at the time payment fell due, cashflow was compromised, and we simply did not have the money  
35 available to make the payment in a timely fashion"

8. The appellant is an old-established family company, founded in 1945, and in the business of supplying ready mixed concrete. It had experienced financial difficulties which led in 2010 to its entry into a Creditors' Voluntary Arrangement (CVA). It had slashed its workforce from about 200 to about 50 in order to survive. It had still been  
40 subject to the CVA during the VAT period 05/17.

9. It had parted company with its bankers, Ulster Bank, in March 2016. This had caused extremely difficult times, and the Appellant had entered into a commercial relationship with Close Finance, an invoice factoring business.

5 10. The Appellant invoiced on a weekly basis, and believed it would be in funds and able to pay on the extended due date. It received £30,000 from Close Finance at about 3.20pm on Friday afternoon, but as at the close of business that day it only had £40,627 in its bank account. As Mr Emerson put it, he (on behalf of the appellant company) had gone out with the begging bowl but had been unable to raise the rest of the money on the Friday.

10 11. The appellant had not put its factored sales down on the Wednesday or Thursday, but had waited until the Friday, because it would not have been able to pay earlier.

12. The Appellant had been in a similar (but not identical) position in 2014, when it had successfully appealed a 10% VAT default surcharge of £12,105.10 which had been imposed for the period 05/13. We were shown the Tribunal's decision: TC/2013/07383.  
15 The Appellant contended that we should approach the matter similarly on this occasion.

13. Section 59(7)(b) of the Value Added Tax Act 1994 provides that a person shall not be liable to a surcharge if *'there is a reasonable excuse for the VAT not having been despatched'*.

14. Section 70 of the Value Added Tax Act 1994 provides that the Tribunal may  
20 reduce the penalty to such amount (including zero) as we think proper. However, we are not allowed to take into account *'the insufficiency of the funds available to any person for paying any VAT due or for paying the amount of the penalty'* or *'the fact that the person liable to the penalty has acted in good faith'*: section 70(4)(a) and 70(4)(c).

15. In *Customs and Excise Commissioners v Steptoe [1992] STC 757* the majority of  
25 the Court of Appeal (Lord Donaldson MR and Nolan LJ) said (at p770):

30 "Scott LJ ... is of the opinion that the underlying cause of the insufficiency of funds must be an 'unforeseeable or inescapable event'. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) it treats foreseeability as relevant in its own right, whereas I think that 'foreseeability' or as I would say 'reasonable foreseeability' is only relevant in the context of whether the cash flow problem was 'inescapable' or, as I would say, 'reasonably avoidable'. It is more difficult to escape from the unforeseeable than from the foreseeable."

35 16. This means that although a lack of funds - in and of itself - cannot be treated as a reasonable excuse, the underlying reason for the relevant delay (even if that reason also gave rise to the lack of funds) may itself constitute a reasonable excuse where reasonable foresight and due diligence, and a proper regard for the need to pay the tax on time, would not have prevented the delay in the circumstances: see the decision of  
40 the Tribunal (Judge Hellier and Mr Marsh) in *Axxent Voice and Data Limited [2006]* Lexis Citation 573 at Para [16]

17. We agree with that analysis.

18. In our view, reasonable foresight and due diligence, coupled with a proper regard for the need to pay the tax on time, would have prevented the delay in this case.

19. Put another way, the appellant failed to pay the tax on time due to a combination  
5 of lack of reasonable foresight and due diligence.

20. We do not say that the appellant has acted dishonestly, or with any lack of good faith. HMRC did not make any such suggestion, and we make no such findings.

21. Whilst the fact that the appellant had been in the default surcharge regime on a previous occasion is not, strictly speaking, relevant to the present appeal, it is not an  
10 unfair point that the appellant, having been in the default surcharge regime previously, and having appealed a penalty to the Tribunal on a previous occasion, must reasonably be taken to have known the jeopardy which it would face if failing to pay the VAT on time on a subsequent occasion.

22. In this appeal, the appellant knew when the tax was due. In our view, the situation,  
15 even though tough, was wholly foreseeable. The appellant could see it coming, and should have taken steps earlier in the week to make sure that it would be in a position on the Friday to pay the tax. It failed to do so. The situation was getting more and more pressing every day, and the appellant just left it too late. The gravity of the situation was plain. It was not reasonable to simply believe that the money would appear,  
20 especially since the appellant, which had received £20,000 to £30,000 'up front' from Close Finance in the past, had never asked for £150,000 before.

23. It was hoping that it would have the money on the Friday, but it did too little, too late. The appellant took a conscious, but commercial, decision not to invoice earlier, and before the Friday, on the basis that, if it had put its factored sales down on  
25 Wednesday or Thursday, it would not have been able to pay.

24. In a nutshell, the appellant was simply sailing too close to the wind. It knowingly ran a real risk of not having the money in time, and that risk came to pass.

25. It seems to us that the appellant may also have come to place too much reliance  
30 on the fact that the Tribunal had, on a previous occasion, allowed an appeal against a VAT default surcharge. But the decision on that occasion was influenced by the combination of particular facts and circumstances, outlined by the Tribunal in 2014. Those were not entirely the same as here. But we are not bound by that earlier decision. Nor did that earlier decision set down any binding precedent for the future.

26. HMRC had granted the appellant time to pay its VAT in the past. But in our view  
35 it was not reasonable to expect that HMRC would grant it time to pay on this occasion. HMRC was simply not bound to do so.

27. The appellant argued that the penalty is disproportionate to the gravity of the infringement, bearing in mind that the VAT was paid in full on the first working day after it was due.

28. In relation to this question, we are bound by the decision of the Upper Tribunal (Rose J and Judge Berner) in *The Commissioners for HMRC v Trinity Mirror plc* [2015] UKUT 0421 (TCC). In that case, and in the course of a careful and thorough review, the Upper Tribunal held that it was possible, at least in theory, for an individual case to result in a penalty that might be considered disproportionate. However, this was *likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances*: see Paragraph 66 of the judgment. The Upper Tribunal held that the surcharge, based on a modest percentage of the amount of VAT on paid by the due date, was proportionate within the objectives of the default surcharge regime.

29. A wide discretion is conferred on Parliament in devising a suitable scheme for penalties and therefore a high degree of deference is due by courts and tribunals when determining the legality of penalties. The state has a wide margin of appreciation and was, as the Tribunal, must be astute not to substitute our own view of what is fair for the penalty which Parliament has imposed. There is nothing in the default surcharge regime as whole which leads to the conclusion that its architecture is fatally flawed. The fact that a late payment is made only one day after its due date is not sufficient to render an otherwise proportionate penalty disproportionate.

30. On the facts, we do not consider that any feature of this present case is *wholly exceptional* so as to have resulted in a penalty that might be considered disproportionate.

31. So, and whilst the penalty seems harsh to the appellant, it cannot in our view be regarded as disproportionate.

32. The appeal is dismissed and the VAT surcharge is upheld in its entirety.

33. This document contains full findings of fact and reasons for the decision.

34. Any party has the right to apply for permission to appeal against this decision 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.

**DR CHRISTOPHER McNALL  
TRIBUNAL JUDGE**

**RELEASE DATE: 26 JANUARY 2018**