



TC06843

Appeal number: TC/2017/07793

VALUE ADDED TAX –Appeal against default surcharges- payments consistently paid late- HMRC kept fully informed throughout the default period – choices made to use funds for costs other than tax payments- whether a reasonable excuse- no – Value Added Tax Act 1994 sections 59 and 59A - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

H& R GRAY HAULAGE LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS
MEMBER CHARLOTTE BARBOUR, CA, CTA
(Fellow)**

Sitting in public at Edinburgh 13 November 2018

The Appellant was represented by Robert (Robin) Gray

Elizabeth McIntyre, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by H & R Gray Haulage Ltd ('GH') against decisions by HM Revenue & Customs ["HMRC"] to charge VAT default surcharges for the periods 09/16, 12/16, 03/17, 09/17 and 12/17 for a total amount, amended at the tribunal hearing, of £32,443.88. 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 surcharges was correct in accordance with the legislation and whether or not GH had established a reasonable excuse for the defaults 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.
4. Robin Gray (Mr Gray) is the sole director of H & R Gray Haulage.

Legislation

Value Added Tax Act 1994, sections 59, 70 and 71

Value Added Tax Regulations Act 1994, regulations 25, 25A and 40

Finance Act 2009, section 108

Cases referred to

Revenue and Customs Commissioners v Trinity Mirror plc [2015]UKUT 421 (TCC)

Norman Emerson Group Limited v. The Commissioners for a HM Revenue & Customs [2018] UKFTT 30 (TC)

ETB (2014) Limited v Revenue and Customs Commissioners [2016] UKUT 424

The Facts

5. GH has been registered for VAT under the VAT registration number 717 347625 since August 1998 and its business is described as general haulage.
6. In October 2016, a major customer, a manufacturing company with multiple sites nationwide, moved production away from its Scottish base to another of its sites in England which meant that the amount of transported loads available to GH was

drastically reduced, “almost overnight”. This led to a review by GH’s bank and subsequently a reduction in their banking facility.

5 7. That time of year was normally GH’s busiest time of year and this decision, which was out of GH’s control, had a major effect on cash flow. In addition, fuel had to be paid by direct debit and was essential to a haulage business and GH wished to avoid lying off some of their 81 members of staff.

10 8. In the VAT period 06/16, the amount due to be paid, by the due date of 07 August 2016 for electronic payment, of £106,153.35 was paid late and a surcharge liability notice issued for a first default on 12 August 2016. The return was received on 15 July 2016 and payment was received in seven parts. GH had requested a Time to Pay (TTP) arrangement for this period, which had to be made before payment is due and which required HMRC’s agreement. This request was refused. Mr Gray stated that he had issues with the bank in raising funds and that cash flow issues at the time were due to the costs involved in expanding the business. HMRC said that these costs should have been included in GH’s cash flow forecast. Reasons for the refusal also included an issue over PAYE arrears and because a TTP had been given for the last four VAT quarters. Consequently, no relief was given under section 108 of the Finance Act 2009 (FA 2009 s.108).

20 9. In the VAT period 09/16, the amount of £111,151.40 due on 7 November 2016, for electronic payment, was paid late and on 11 November 2016 a surcharge of £2,223.02 was issued. The return was received on 14 October 2016 and payment was received in seven instalments. GH contacted HMRC on 8 November 2016 to advise that the payment would be late but hoped to clear the amount due within six weeks when GH was paid by customers. Payment was not received as indicated by GH and a TTP arrangement was subsequently agreed on 6 December 2016 for the balance outstanding on GH’s account at that time, which included the 09/16 period. As this was after the due date for the 09/16 period, GH was again not entitled to relief under FA 2009 s. 108.

30 10. In the VAT period 12/16, the amount due to be paid by the due date of 7 February 2017, for electronic payment, was partially paid late with £30,000 paid by the due date and £65,432.88 paid late. Mr Gray had telephoned HMRC on 8 February 2017 stating that he would pay £25,000 of the amount due and the balance on 17 February 2017, when he was paid by his customers. On 16 February 2017 Mr Gray telephoned HMRC to say that he would not be able to make payment for the next quarter. This resulted in a surcharge being issued of £4,771.64 (subsequently reduced at the hearing to £3271.64). The return was submitted on 12 January 2017 and payment was received in five parts. There being no TTP agreement in place GH was again not entitled to relief under FA 2009 s.108.

40 11. In the VAT period 03/17, the amount due to be paid by the due date of 7 May 2017, for electronic payment, was partially paid late, with £30,000 paid by the due date and £69,549.73 paid late. Mr Gray wrote on 28 April 2017 outlining reasons for his cash flow issues and advised that his company was in the process of moving from the Clydesdale Bank which should have allowed cash currently held by the bank (“in

their IF side”) to be released. Mr Gray stated that the agreement with the bank should be concluded within 6 weeks.

12. On 22 May 2017 HMRC’s note stated that “the trader seems to have an unofficial TTP for 12/16 period and unofficial TTP for the 09/16 return.”

5 13. On 23 May 2017 Mr Gray telephoned to say that GH would be paying as much as they could when they could but there had been a delay in obtaining the funds previously thought to be available. HMRC advised Mr Gray to pay as much as GH could, as quickly as they could, and that the matter would be passed to HMRC officers to use their discretion as to “whether anything can be agreed if the debt is
10 reduced”.

14. This resulted in a surcharge of £9,954.97 being issued (which was reduced at the hearing to £6954.97). The return was submitted on 21 April 2017 and payment was received in three parts. As no TTP arrangement had been agreed in respect of the 03/17 period, GH was not entitled to relief under FA 2009 s.108.

15 15. In the VAT period 09/17, the amount due to be paid by the due date of 7 November 2017, was partially paid late resulting in a default surcharge of £12,271.26. On 7 November 2017, HMRC returned Mr Gray’s call, when he advised that GH wanted a short time TTP for the 09/17 period. He proposed to pay £50,000 on 7
20 November 2017, another amount the next day and the balance of £80,000 by 14 November 2017. HMRC advised that they could not consider another TTP proposal as GH recently had two TTP arrangements and a PAYE balance that almost went to liquidation.

16. There then followed a discussion as to the fairness of the situation. The HMRC official’s decision was to formally refuse the TTP. The note stated “Mr Gray was
25 keen to avoid a default surcharge but I confirmed that the only way of avoiding it was to pay today. I then explained that the default surcharge would only be raised on the outstanding balance after the due date”. As no TTP arrangement had been agreed in respect of the 09/17 period, GH was not entitled to relief under FA 2009 s.108.

17. In the VAT period 12/17 the amount due to be paid by the due date of 7 February
30 2018 was partially paid late resulting in a default surcharge of £7,722.99.

18. GH say they had a lot of difficult decisions to make both personally and for the good of the business and to retain all staff whilst growing their business. They turned their business round and managed to pay all HMRC arrears. They did not, having taken accountants advice, decide to go into administration or liquidation but instead
35 paid all the tax due and have, in fact, paid this.

19. GH’s problems were exacerbated when they felt they had to switch banks from RBS to Clydesdale Bank and when they fell behind with their PAYE obligations. GH, the haulage company, was one of three businesses including a farm which held security for the other companies’ indebtedness.

20. As the period of the defaults progressed, the cash flow problems were compounded as GH was in the process of moving from Clydesdale Bank which, when completed, would have allowed them to “free up” cash. This move was expected to be resolved within six weeks of April 2017 but was still not in place and concluded at the time of the Tribunal hearing.

21. In addition to a major customer moving their business away from Scotland, GH suffered a £94,000 loss or bad debt which caused an adverse reaction from their bankers.

22. GH did not disagree that payments were late and accepted the amounts of default surcharge, as amended at the Tribunal hearing. The total default surcharges amounted to £32,443.88.

23. In order to establish the extent to which GH’s cash flow was affected during the period, HMRC requested additional information, including copies of the management accounts for the period 1 April 2016 to 30 September 2016, the figures for the later periods having already been submitted with a letter sent by GH on 28 April 2017.

24. Based on this information HMRC calculated that GH would have had sufficient funds to enable it to pay the VAT due and by the due dates. They estimated that, rather than turnover falling by 15%, it in fact fell by 3%.

25. HMRC also ascertained that GH used invoice financing and consequently received 85% of all invoices issued on forwarding copies to the finance company. As such, it received the following sums based on the submitted figures of total sales: - period 06/16, £1,441,905.60; period 09/16, £1,539,666.72; period 12/16, £1,515,090.88 and period 03/17, £1,549,599.36.

26. Mr Gray of GH stated that he would often receive conflicting or confusing advice from HMRC’s telephone response service depending on whom he spoke to. There was also reference within an HMRC telephone note to “an unofficial TTP”. On requesting further information from HMRC they explained to the Tribunal that this was not in fact a TTP as it was not agreed by HMRC but appeared to be some form of hybrid arrangement, and a loose term, whereby GH as the taxpayer was told to pay as much as he can but was then also subject to a default surcharge for those amounts not paid on time.

GH’s submissions

27. GH say that over the period under appeal they had arrears with HMRC in excess of £250,000 which were paid off, as well as any interest charged.

28. GH says that their cash flow was very tender and paying an additional amount would have had an adverse effect on their cash flow coming at the busiest time of the year. They did not want to go backwards with HMRC or for the business to suffer again.

29. GH feels that the surcharges have been levied unfairly as at all times over the period of repayment of arrears, all departments of HMRC were informed of the situation and yet these excessive charges were still applied to their account.

5 30. GH stated that the imposition of “hefty surcharge” penalties made their cash flow concerns even greater but that they were very keen to ensure that they did not jeopardise future payments of tax and to make payment of those that were due as soon as possible.

10 31. GH say that when speaking to the different HMRC officers that would receive different guidance or permissions in relation to being allowed flexibility to make payments late. On some occasions this was given but on others not and there was a disparity in approach amongst those they spoke to on the telephone at HMRC.

32. GH in the last year paid approximately £1,200,000 in tax but because of their position with the bank, cash flows issues remained and all that could be done, to pay the outstanding amounts, was done.

15 **HMRC’s submissions**

33. 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 has been established, if the penalties are to be removed, the onus is on GH to demonstrate that there is a reasonable excuse for late payment.

20 34. 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 something unless the person took reasonable care to avoid the failure.

25 35. HMRC say there is no statutory definition of “reasonable excuse” and whether or not a person has a reasonable excuse is an objective test and is “a matter to be considered in light of all the circumstances of the particular case” (*Rowland v HMRC* (2006) STC 536 at paragraph 18).

30 36. The actions of GH should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard to the responsibility under the Taxes Act. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to the standard.

35 37. To the extent that GH may have a reasonable excuse it must exist throughout the period of the default.

38. GH use invoice financing and received 85% of all invoices. Even if GH did experience a 15% reduction in its income in September 2016, as stated in their email of 6 November 2017, this would not be considered sufficient to prevent payment

being made by the due dates. In HMRC's assessment, the reduction in monies received during the period 09/16 and 12/16 was 3%.

5 39. GH should have taken into account the costs of the expansion of their business within their cash flow forecasts. Such an expansion to a business carries inherent risks and it is expected that a reasonable business person would take steps to mitigate these risks. If it failed to do so, this would not provide a reasonable excuse for late payment.

40. HMRC accept that GH kept them informed of its circumstances throughout the timeline of the default surcharge cycle, and earlier had granted the relief under the relevant TTP agreements for periods 12/15 and 03/16.

10 41. A TTP agreement is given to a trader as a short-term solution to financial/cash flow difficulties to allow them to put measures in place to ensure that future liabilities can be paid on time; it is not a long term solution. HMRC say that whilst a business has other expenses, VAT must be given priority for payment and as GH charge VAT to their customers they are required by law to pay this and produce the appropriate return by the due dates.

42. The potential effect of payment of the surcharges on GH's finances would not be considered a reasonable excuse for their removal and they had in fact been paid, albeit late.

20 43. The rates of surcharge are laid down by law and neither HMRC nor the Tribunal have the power to reduce the amounts because of mitigating circumstances as a consequence of section 70 VATA 1994 not applying to section 59 VATA 1994.

25 44. HMRC say that in terms of the Upper Tribunal judgement in *The Commissioners of HMRC v Trinity Mirror PLC* [2015] UKUT 421 (TCC) the default charges in respect of the late payment of VAT for the accounting periods 06/16, 09/16, 12/16 and 03/17 are not disproportionate and comply with EU law.

Decision

45. The Tribunal had considerable sympathy with GH in relation to the cycle in which they found themselves, triggered by the move of a major customer elsewhere and then by a substantial bad debt.

30 46. It was clear that when the cash flow problems began to exist they would take some time to resolve and it seemed that GH's interpretation of the TTP arrangements as being available for a longer period of time were at odds with HMRC's view that they should be for short-term difficulties only.

35 47. The Tribunal also understood the frustration that might be caused by receiving different responses on different occasions and this was put to HMRC at the hearing who stated that any individual decision will depend on the circumstances but that there was some discretion with HMRC officers as to what decision should be made.

48. The Tribunal also felt that the term used by HMRC “unofficial TTP” could only have added to GH’s confusion as to their position as regards payment and liability to penalties

5 49. GH’s position is that the surcharges are incorrect and excessive. On the evidence before it, the Tribunal was satisfied that the revised surcharges were correctly calculated. The revision was due to a late reallocation of payments against the debts by HMRC, which was more beneficial to the taxpayer. The Tribunal was also unable to either reduce the amounts of the charges or consider them disproportionate, as stated in the submissions made by HMRC.

10 50. As an insufficiency of funds is by statute not allowed as a reasonable excuse, the Tribunal could only consider whether the circumstances which led to that insufficiency did amount to a reasonable excuse. In assessing this the Tribunal considered the obligations on HMRC to collect taxes on the due dates and to implement the default surcharge regime where this does not take place, as well as the
15 difficulties of very many businesses in managing their cash flow in difficult trading conditions, which in themselves, are not unnatural events for any trading business.

51. GH’s attitude towards ensuring that it paid some tax and continued to trade to ensure that all its taxes were paid, was within in the spirit of the taxation legislation. Their particular actions, however, which led to the imposition of the default
20 surcharges were a risk that GH took when making difficult choices, in terms of the continuance and expansion of their business and ensuring employment of their staff, when HMRC say they should have paid their tax liabilities as a priority.

52. HMRC’s evidence was, that based on their calculations, the company would have had sufficient funds to pay the tax liabilities if they had chosen to do so. The Tribunal
25 noted that this may have meant that other payments could not be made and which were made for other reasons but there was no evidence produced at the hearing or in the bundle to rebut HMRC’s evidence and assertion and in relation to this matter, the onus of proof was on GH.

53. The Tribunal, for these reasons, accept the submissions put forward by HMRC
30 that the penalties were due and correctly assessed. Although sympathetic to GH’s predicament the Tribunal does not consider that GH has provided sufficient evidence to establish a reasonable excuse in terms of the relevant case law and statutory provisions.

54. Accordingly, the appeal is dismissed.

35 55. 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.

5

**W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE**

RELEASE DATE: 27 NOVEMBER 2018