



**TC06863**

**Appeal number: TC/2018/05072**

*Value Added Tax – default surcharges – appellant believed payments would be received by due dates – bank evidence in support – HMRC evidence inconsistent – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DADS TYRES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ALASTAIR J RANKIN  
MRS SHAMEEM AKHTAR**

**Sitting in public at Court 15, Centre City Tower, 5-7 Hill Street, Birmingham, B5  
4UU**

**Mr Rob Freeman, managing director with Mr Michael Emerson for the Appellant**

**Ms Christina Warmington, Presenting Officer with Mr Ridley for the  
Respondents**

## DECISION

1. The Tribunal decided to allow the appeal.

### 5 **Background**

2. This is an appeal by Dads Tyres Limited (the Company) against two VAT default surcharges for the periods 07/11 and 10/11. The 07/11 surcharge was originally for £3,005.36 being 15% of the VAT liability but was subsequently reduced to £2,003.57 being 10% of the VAT liability for the 07/11 quarter. The 10/11 surcharge was for 10 £2,594.98 being 15% of the VAT liability for the 10/11 quarter.

3. The Company had been registered for VAT from May 2007 until July 2015 but has not traded since 2013. It had been in the VAT Surcharge regime since the 04/10 quarter. The total of the two surcharges under appeal is now £4,598.55.

### **Evidence from the Company**

15 4. The Company maintains the payments were made on 7 September 2011 and 6 December 2011 and produced copies of bank statements showing £20,035.74 had been debited on 7 September 2011 and £17,299.90 had been debited on 6 December 2011. The due dates for these payments to be received by HMRC were 7 September 2011 and 7 December 2011.

20 5. Mr Freeman produced an email dated 11 October 2017 from an Associate Director at Barclays Bank, the Company's bankers, which stated

"Bill Payments = BBP so they should credit same day. Although please note depending on the time sent it could be the next day."

25 6. This statement was supported by another email from the Company's relationship manager with Barclays also dated 11 October 2017. Mr Freeman maintained that these emails had been sent to HMRC at the time. He also claimed that he had asked HMRC on several occasions for copies of their bank statements showing when the two payments were received but HMRC had failed to produce them.

30 7. Mr Freeman informed the Tribunal that it was the Company's practice to carry out its banking first thing each morning.

### **Evidence from HMRC**

8. Ms Warmington in her written submissions to the Tribunal stated that while the VAT return for the 07/11 quarter was received before the due date the payment was not received until 9 September 2011, two days after the due date of 7 September 2011. 35 HMRC advised the Company by letter dated 19 November 2018 that the surcharge for the 07/11 period was being reduced from £3,005.36 or 15% of the VAT liability to £2,003.57 or 10% of the VAT liability due to the fact that the liability for the 04/11

quarter was in fact a credit which resulted in no surcharge for that period instead of a 10% surcharge.

9. Ms Warmington's written submission further stated that the return for the 10/11 quarter was received before the due date but the payment was not received until 8  
5 December 2011, one day after the due date of 7 December 2011.

10. Ms Warmington maintained that payments for the periods 07/11 and 10/11 could not have been made on the same day whilst using the Faster Payment Service as HMRC's bank account at that time did not accept payments using this service. Payments were in fact made using the banks automated clearing system – BACs. BACs  
10 could take up to three working days to reach the recipient's bank account though they will show on the payer's account (the written statement incorrectly states: payee's account) as having left on the day the payment request was initiated.

11. The rates of surcharge are laid down in law and neither HMRC nor this Tribunal have the power to reduce them because of mitigating circumstances.

15 12. HMRC believes the actions of the Company should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the tax acts. The decision depends upon the particular circumstances in which the failure occurred and the particular  
20 circumstances and abilities of the Company failing to make payment on time. The test is what a reasonable trader, in the position of the Company, would have done in those circumstances and by reference to that test to determine whether the conduct of the Company can be regarded as conforming to that standard.

13. Ms Warmington referred to the Upper Tribunal decision in *Her Majesty's Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 421 (TCC) and summarised  
25 the decision as follows:

- a) the default surcharge regime, viewed as a whole, is a rational scheme ... (paragraph 65)
- b) using the amount unpaid as the objective factor by which the amount of surcharge varies is not a flaw in the system; to the contrary, it is proportionate as  
30 the achievement of the aim of fiscal neutrality according to EU law depends on the timely payment of the amount due (paragraph 65);
- c) whilst it could not absolutely rule out the possibility that a default surcharge might be disproportionate, given the structure of the regime, this is likely to occur in a wholly exceptional case (paragraph 66);
- d) it could not readily identify characteristics of a case where a challenge to a  
35 default surcharge (on grounds that the surcharge is disproportionate) would be likely to succeed (paragraph 66).

14. Finally Ms Warmington requested the Tribunal to find that the default surcharges had been charged correctly in accordance with the appropriate legislation and that there  
40 were no special circumstances which would allow them to be reduced.

## The legislation

15. The default surcharge regime is detailed in section 59 of the Value added Tax Act 1994 (VAT Act 1994). The relevant portions of section 59 are as follows:

5 (1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

(a) the Commissioners have not received that return, or

10 (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

15 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(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

20 (b) there is a reasonable excuse for the return or VAT not having been so despatched,

25 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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

16. Section 71 of the VAT Act 1994 provides

30 (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

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

35 (b) where reliance is placed on any other 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.

## Decision

17. As Ms Warmington reminded the Tribunal in HMRC's Statement of Case, the onus of proof rests with HMRC to demonstrate that a penalty is due. HMRC has not succeeded to so demonstrate.

40 18. The Tribunal decided that it prefers the evidence of Mr Freeman and Barclays Bank to that of HMRC. The email from Barclays states that the payments made by the Company on 7 September 2011 and 6 December 2011 should have been received by HMRC on the same day and we accept Mr Freeman's statement that all banking transactions are carried out first thing each morning.

19. The information provided by HMRC was inconsistent in that in their Statement of Case and in their written Submissions presented at the hearing they stated that the first payment was received on 9 September 2011, whereas the Historical Ledger Printout shows the payment was received on 12 September 2011. Likewise the  
5 Statement of Case and the written Submissions state the second payment was received on 8 December 2011 while the Historical Ledger Printout shows the payment was received on 9 December 2011.

20. At the hearing HMRC was unable to contradict the information supplied by Barclays nor did it produce bank statements to show when the payments were actually  
10 received. Mr Freeman had informed the Tribunal that he believed that when the two payments were made they would have been received by HMRC by the due dates. The bank statements provided by Mr Freeman showed that there was sufficient cash in the bank account to have made the payments earlier if he thought this had been necessary. The Tribunal therefore finds that in accordance with the provision of section 59(7)(a)  
15 of the VAT Act 1994 each payment 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”.

21. While preparing for the Tribunal hearing HMRC wrote to the Company on 19 November 2018 to advise that the default surcharge for the 04/12 period was being  
20 removed as HMRC accepted that

“whilst the incorrect Direct Debit system was used to initiate payment, it was your intention to make payment by the due date for payments by Direct Debit.”

22. HMRC was willing to accept that the Company had an intention to pay the 04/12 VAT liability by the due date but used the wrong payment method. It was clear from  
25 the evidence given by Mr Freeman that his intention was to ensure the VAT liability for the 07/11 and 10/11 quarters was received by HMRC by the due dates. In order to be consistent HMRC should have accepted that the two payments were made on time and removed the two surcharges.

23. For the above reasons the two surcharges are removed and the appeal is allowed.

30 24. 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  
35 accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**Alastair J Rankin**  
**TRIBUNAL JUDGE**

40 **RELEASE DATE: 13 DECEMBER 2018**