[2019] UKFTT 178 (TC)

TC07028

Appeal number: TC/2017/05663

VAT – default surcharge – reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PORTER & COMPANY **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS ELIZABETH BRIDGE

Sitting in public at Taylor House, Rosebery Avenue, London on 15 January 2019

The Appellant did not attend and was not represented

Mr Oladapo Sanusi of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. Porter & Co ("the Appellant") is a firm of solicitors. The Appellant appealed against two VAT default surcharges: for £503.26 in relation to period 05/13 and for £1,507.75 in relation to period 11/13. The Tribunal decided to dismiss the Appellant's appeal and issued a summary decision confirmed the surcharges.

2. On 12 February 2019, Mr Peter Long, a partner of the Appellant, emailed the Tribunal asking that the decision be set aside. This application was treated as including an application for a full decision; this is that full decision. A separate decision refusing the set aside application has been issued at the same time as this decision.

The failure to attend

3. On 5 November 2018, the Tribunals Service sent an email to the Appellant, using the firm's email address, attaching the listing direction. By that direction, the parties were informed that the hearing was listed to begin at 10.30am, and told to arrive half an hour before the beginning of the hearing. They were also informed that "if you do not attend, the Tribunal may decide the matter in your absence".

4. HMRC's litigator, Mr Sanusi, arrived in good time for the hearing, but by 10.30 am there was no representative for the Appellant. The Tribunal directed that the clerk call the Appellant's offices, but when he did so, the phone was not answered. We took time to consider whether to continue with the hearing.

The relevant legal considerations

5. Rules 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 reads as follows:

> **"Hearings in a party's absence**
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

6. It was clear that the Appellant had been notified of the hearing. We considered whether it was in the interests of justice to proceed. Rule 2(2) says:

> "Dealing with a case fairly and justly includes--
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

7. The relevant factors here are (a), (c) and (e).

(1) In relation to (a), the appeal concerns a straightforward VAT default surcharge. HMRC had sent Mr Sanusi to the hearing, and if the appeal was not heard, his time and the related costs would be wasted.

(2) In relation to (c), the lack of a representative means that the Appellant cannot put forward oral submissions. But we have letters from the Appellant explaining its reasons why it believes the appeal should be allowed, as well as its grounds of appeal.

(3) In relation to (e), postponing the appeal would inevitably cause delay. The Tribunal had been provided with a comprehensive Bundle, which contains the Appellant's VAT returns for six quarters; a schedule of the Appellant's defaults; a ledger print showing the VAT payments made by the Appellant; the parties' correspondence; the legislation; the Appellant's grounds of appeal; HMRC's Statement of Case and various extracts from HMRC guidance. In our judgment, we had sufficient information properly to consider the issues.

8. Furthermore, relisting would be likely to cause a delay to another court user. As Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

9. Finally, the appeal concerns defaults which occurred in 2013, over five years previously, for which the Appellant has been given permission to appeal late (see *Porter & Co v HMRC* [2018] UKFTT 264 (TC), a decision of Judge Beare and Ms Shillaker). Although we would have come to the same decision without reference to this factor, it is clearly in the interests of justice for the resolution of this long-running dispute not to be further delayed.

10. Taking all relevant matters into account, we were satisfied that it was in the interests of justice to proceed.

The evidence

11. As set out above, the Bundle provided for the hearing included the correspondence between the parties and between the parties and the Tribunal, and also contained:

(1) the Appellant's VAT returns for six quarters;

(2) a schedule of the Appellant's defaults;

(3) a ledger print showing the VAT payments made by the Appellant; and

(4) various extracts from HMRC guidance.

12. On the basis of that evidence, the Tribunal finds the facts set out below.

The facts

13. A part-time employee, Mr Fuggle, had the task of filing the Appellant's VAT returns.

14. The Appellant was issued with default surcharges in 05/10 and 08/10. On 19 October 2010 HMRC refused the Appellant's appeal against those surcharges, saying that "the accounts department working part-time" was not a reasonable excuse.

15. The Appellant re-entered the default surcharge regime in period 08/12, when it paid its VAT several days late. HMRC issued the Appellant with a Surcharge Liability Notice, which informed the Appellant that it was entering a new default surcharge period, and that defaults within that period would trigger surcharge.

16. In the following period the Appellant was not only late paying the VAT, but also late in filing its VAT return. It was liable to a 2% surcharge, but as the amount was below HMRC's threshold for collecting liabilities, no surcharge was imposed.

Period 05/13

17. For period 05/13 the Appellant filed its VAT return on the due date of 7 July 2013. The VAT due was £10,065.30. HMRC received £5,000 on 8 July 2013, one day after the due date; the balance was received on 4 October 2013, 89 days after the due date. HMRC issued a surcharge of £503.26, charged at 5% of the VAT paid late.

18. The Appellant says that the delay was caused because:

(1) there were problems with the Appellant's bank, so that "the full payment could not be made in one transaction" and "the second part of the payment did not reach [HMRC] in time because of the delay in the bill pay service"; and

(2) the proprietor of the business was on holiday and could not be contacted.

19. In relation to the first reason, there is no evidence as to the nature of the problem, or why it stopped only part of the payment going through. We note that that balance was not paid the following day, as might be expected if there were some issue with the processing of a single transaction; there was a further delay of around three further months. It is not credible that any "delay in the bill pay service" would have continued to operate for such a long period.

20. We find as a fact that there were no relevant problems with the Appellant's bank which prevented the payment being made in full by the due date. We accept that the proprietor of the business was on holiday and could not be contacted.

Period 08/13

21. For period 08/13 the Appellant filed its VAT return on 6 October 2013, one day before the due date. The VAT due for payment was £10,971.31. HMRC received £6,000 on 8 October 2013, one day after the due date; the balance was received on 14 October 2013, 7 days after the due date. HMRC issued a surcharge of £1,097.13, charged at 10% of the VAT paid late.

22. In his letter of 10 February 2014, Mr Fuggle said that the filing and payment of this return was late because "of an unforeseen absence from my office of my accountant" who "did not leave instructions as to how to do the filing or make the payment". As the Appellant had previously informed HMRC that it was Mr Fuggle himself who was responsible for the VAT returns, we have inferred that Mr Fuggle was saying that the failure was his fault. But even if that is not the case, we accept that the reason the return was late was because the accountant (who was probably Mr Fuggle himself) was away at the relevant time and had not left instructions for someone else to do the return and make the payment.

Other facts

23. In period 11/13, the Appellant's VAT return was filed on 15 January 2014, over a week late. It showed that the VAT due was £10,051.71. HMRC received £9,370 on 28 April 2014; the balance of £681.71 remained outstanding as at the date of this hearing.

24. The Appellant paid its VAT for all the above periods via "Bill Pay", other than that for 11/13, which was paid via the telephone.

25. The Appellant appealed to HMRC on 10 February 2014. On 4 March 2014, HMRC wrote a detailed letter explaining why they were refusing the appeal.

The law

26. The relevant provisions are set out in an Appendix to this decision. For ease of reference, Value Added Taxes Act 1994 ("VATA"), s 59(7) reads:

> "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 or in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or
>
> (b) there is a reasonable excuse for the return or VAT not having been so despatched,
>
> 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)."

27. VATA s 71(1) reads:

> "For the purposes 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 reasonable excuse; and
>
> (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."

28. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?...
>
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

29. That this is the correct test has recently been confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81] of that judgment, the UT also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default….In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the

relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

30. The fourth stage of the process recommended by the Upper Tribunal is not relevant, because the statutory provisions being considered in *Perrin* contain an extra requirement which does not apply to default surcharges.

Appeal against the surcharge for period 05/13

The Appellant's case

31. On 10 February 2014, Mr Fuggle wrote to HMRC on behalf of the Appellant, saying:

(1) the majority of the VAT due was paid on time;

(2) the balance could not be paid in one transaction because of "problems with my bank"; and

(3) the proprietor of the business was on holiday and could not be contacted.

32. On 31 July 2017, the Appellant wrote to the Tribunal, asking that "in addition to the grounds already submitted" the following further grounds be accepted:

(1) the amount of the surcharge is "substantial in relation to the delay";

(2) if the appeal is not allowed, it will cause the Appellant "great financial hardship" especially as one of the consultants working with the Appellant had cost that firm a lot of money, causing its indemnity insurance to be increased fourfold, and therefore all reserve funds have been utilised to pay that increased premium so as to allow the Appellant to continue trading.

The Appellant's case

33. On behalf of HMRC, Mr Sanusi submitted that the Appellant:

(1) had not provided any evidence of the alleged banking problem;

(2) had paid by Bill Pay on previous occasions, and so was familiar with the process;

(3) could have paid the VAT by a different method – for instance, the Appellant paid the 11/13 VAT by telephone;

(4) should have made alternative arrangements for the holiday of the relevant partner;

(5) in relation to proportionality, the amount of the default surcharge is fixed by Parliament. The Upper Tribunal has found that the default surcharge regime is not disproportionate, see *HMRC v Trinity Mirror* [2018] UKUT 421 (TCC) ("*Trinity Mirror*") and *HMRC v Total Technology* [2012] UKUT 418 (TCC) ("*Total*"); and

(6) the Appellant has been in the default surcharge regime for some time and so is familiar with how it operates; it was aware that if the deadline was missed, it would be liable to a surcharge.

Discussion and decision on reasonable excuse

34. The Tribunal will set aside the surcharge if the Appellant satisfies it that either of the conditions in VATA s 59(7)(a) or (b).

35. We first considered whether subsection (a) was satisfied, namely whether, the VAT was "despatched at such a time or in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit". There were no relevant problems with the Appellant's bank, and so the subsection was not satisfied.

36. In considering subsection (b), we turned to *Perrin.* The first of the steps there set out is to establish the facts which the Appellant asserts give rise to a reasonable excuse. These are that:

(1) the majority of the VAT was paid on time;

(2) there were problems with the Appellant's bank;

(3) the proprietor of the business was on holiday and could not be contacted.

37. The second step is to establish which of the above are proven:

(1) the VAT due was £10,065.30. HMRC received £5,000, less than half of the amount due, on 8 July 2013, one day after the due date, and the balance 89 days after the due date. Thus, all of the VAT was paid late, and the majority was paid around three months late;

(2) we have found as a fact that there were no relevant problems with the Appellant's bank; but

(3) we have found as a fact that the proprietor of the business was on holiday and could not be contacted.

38. Thus, only the third of the three reasons is a proven fact.

39. The third step is to decide whether viewed objectively, that proven fact amounts to an objectively reasonable excuse for the default. We agree with Mr Sanusi that it does not. The Appellant has a statutory obligation to pay its VAT when due. A partner who goes on holiday has to ensure that he has made arrangements for the relevant payment to be made in his absence. This would be true of any business, and it is certainly the case with a firm of solicitors.

40. Thus, the Appellant does not have a reasonable excuse for the 05/13 default

Discussion and decision on proportionality

41. In *Total Technology* at [83]-[98] the Upper Tribunal carried out a detailed analysis of the default surcharge regime, and then continued:

> "99. 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. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's Convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to Convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged).
>
> 100. Our conclusion, therefore, is that with the possible omission of an upper limit on the penalty which may be imposed, the regime viewed as a whole does not suffer from any flaw which renders it non-compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

42. In *Trinity Mirror* the Upper Tribunal said:

> "65. We agree with the tribunal in *Total Technology* that the default surcharge regime, viewed as a whole, is a rational scheme. The penalties are financial penalties, calculated by reference to the amount of tax unpaid at the due date. Although penalties may vary with the liability of the taxable person for the relevant VAT period, and increase commensurately with an increase in such liability (and, consequently, such default), the penalties are not entirely open-ended. The maximum liability for a fifth or subsequent period of default is 15% of the amount unpaid. In common with the Upper Tribunal in *Total Technology*, we consider that the use of the amount unpaid as the objective factor by which the amount of the surcharge varies is not a flaw in the system; to the contrary, the achievement of the aim of fiscal neutrality depends on the timely payment of the amount due, and that criterion is therefore an appropriate, if not the most appropriate, factor.
>
> 66. However, we accept that, applying the tests we have described, the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgment, given the structure of the default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances. Although the absence of a maximum penalty means that the possibility of a proper challenge on the basis of proportionality cannot be ruled out, we cannot ourselves readily identify common characteristics of a case where such a challenge to a default surcharge would be likely to succeed."

43. The default surcharge provisions were therefore found to be proportionate by the Upper Tribunal in *Total Technology* and *Trinity Mirror,* and both those decisions are binding on us.

44. We noted that in *Trinity Mirror* the Upper Tribunal said that there might be a "wholly exceptional case" where the imposition of the surcharge was disproportionate, but this is not such a case. The Appellant had been subject to default surcharges in the past, was familiar with the rules, and had not put forward anything unusual about its facts, so as to bring it within such an exception.

Shortage of funds?

45. The Appellant did not submit that shortage of funds was a reason why the VAT was paid late, but as a reason why it cannot pay the penalty. The Tribunal only has jurisdiction to decide whether the surcharge was properly levied, and in that context, a later shortage of funds is irrelevant.

46. The Appellant has not claimed that there was a shortage of funds in 2013, but had that been the position, the statute provides that it would not have provided it with a reasonable excuse, see VATA s 71(1)(b) set out earlier in this decision.

Decision on the 05/13 appeal

47. The Tribunal therefore confirms the 05/13 surcharge and refuses the Appellant's appeal.

Appeal against the surcharge for period 11/13

Submissions

48. As noted above, Mr Fuggle said that the filing and payment of this return was late because "of an unforeseen absence from my office of my accountant" who "did not leave instructions as to how to do the filing or make the payment".

49. Mr Sanusi submitted that the reasonable taxpayer in the position of the Appellant would have been aware that it had to file and pay VAT, and if the accountant was away, would have made other arrangements.

50. The parties repeated their submissions about proportionality and insufficiency of funds.

Discussion and decision

51. We considered whether the Appellant had a reasonable excuse. Applying the three steps in *Perrin,* we have found as a fact that the accountant was absent from the office without leaving instructions as to how to do the filing or make the payment. However, we agree with Mr Sanusi that, viewed objectively, that proven fact does not amount to an objectively reasonable excuse for the default, for the reasons he gives.

52. The position on proportionality and insufficiency of funds is the same as in relation to the earlier surcharge.

53. The Tribunal therefore confirms the 11/13 surcharge and refuses the Appellant's appeal.

Overall decision and appeal rights

54. For the reasons set out above, the Appellant's appeal is dismissed.

55. This document contains full findings of fact and reasons for the decision. If the Appellant is dissatisfied with this decision, it 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 06 MARCH 2019

THE LEGISLATION

VATA s 59 Default Surcharge

(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

(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.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that

period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(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

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

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).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

VATA s 71 Construction of sections 59 to 70

(1) For the purposes 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 reasonable excuse; and

(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.

(2) …..