



TC03847

Appeal number: TC/2014/01012

*VAT- Default surcharge – SECTION 59 Value Added Tax Act 1994 –
Reasonable excuse – Proportionality – appeal dismissed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

YORKSHIRE DALES ICE CREAM LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER G. NOEL BARRETT LLB
MR ALBAN HOLDEN**

Sitting in public at The Parsonage Manchester on 16th June 2014.

Mr G Rodgers, Director, for the Appellant.

Mr B Sellers of HM Revenue and Customs, for the Respondents.

DECISION

5 Introduction

1. This is an appeal by Yorkshire Dales Ice Cream Limited (“the Appellant”) against an assessment to default surcharge at the rate of 15% amounting to £9,503.68 for late payment of VAT by the due date for the quarter ending 30th April 2013. The
10 default surcharge assessment was issued on 14th June 2013.

2. The assessment resulted from the Appellant’s fifth default in accounting for its liability to VAT and followed a Surcharge Liability Notice (“SLN”) issued to the Appellant on 14th June 2012.
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3. The Appellant appeals against this default surcharge, (but has not appealed against the earlier default surcharges), firstly on the basis that it has a reasonable excuse for late payment; and secondly on the basis that the amount of the surcharge is disproportionate to its default.
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The Law

4. By section 59(1)(a) and (b) of the Value Added Tax Act 1994 (VATA) a person shall be regarded as being in default for that period:
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“if by the last day on which a taxable person is required to furnish a return HMRC have not received that return, or have received that return but have not received the amount of VAT shown on the return”.

5. Under Regulations 25(1) and 40(1) VAT Regulations 1995, if the tax payer is on a quarterly basis for returns, they and their related tax payments are due on or before the end of the month next following each calendar quarter. Where however the taxpayer files its return or pays tax electronically HMRC allow a further seven days from the end of the month next following each calendar quarter for such electronic filing and payment.
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6. On a first default occurring, HMRC serve a Surcharge Liability Notice (SLN) on the taxable person. On subsequent defaults HMRC serve a Surcharge Liability Notice Extension (SLNE). Although no surcharge is imposed on the SLN, if any
40 further defaults are made by the taxable person before the expiry of the first anniversary of the last day of the period referred to in the SLN, then the taxable person becomes liable to a surcharge being the greater of the specified percentage or £30.

7. With each SLN and subsequent SLNEs, HMRC provide the taxable person with notes explaining what amounts to a default and the consequences which will flow
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from further defaults. Those notes also advise the taxable person to contact HMRC's local Debt Management Unit if they expect to have difficulty paying VAT on time.

5 8. The specified surcharge percentages are set out in Section 59(5) VAT as follows:

(a) in relation to the first prescribed period the specified percentage is 2%.

10 (b) in relation to the second such period the specified percentage is 5%.

(c) in relation to the third such period the specified percentage is 10%.

(d) in relation to such period after the third the specified percentage is 15%.

15 9. HMRC do not however issue a surcharge at the rate of 2% or 5% if it calculates it to be less than £400.

20 10. Section 59(7) VATA provides that a taxable person shall not be liable to the surcharge and shall not be treated as having been in default, if he satisfies the Tribunal there is reasonable excuse for the return of the VAT not having been so despatched.

11. Section 71(1) VATA provides that:

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

(b) where reliance is placed on any 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".

30 12. Section 108 Finance Act 2009 specifies that there is no liability to a default surcharge for a period where contact is made with HMRC by the Tax Payer prior to the due date in order to arrange Time to Pay and that Time to Pay is agreed by HMRC.

35 13. References to "taxable person" and "Tax Payer" within the legislation include companies as corporate personalities as well as individuals.

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The Evidence and our Findings of Fact

45 14. From the documentary evidence and the oral evidence of Mr Rogers, Director of the Appellant and Mr Sellers of HMRC, we make the following findings of fact.

15. Mr Sellers explained and we accepted the following facts in relation to the Appellant's previous defaults:

Default 1 - The quarter ending 04/12 had a due date, (if filed and paid electronically) of 7th June, and the Appellant filed late on 11th June and its payments arrived late in HMRC's account on the 14th and 19th June. This late filing and late payments resulted in the SLN being issued.

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Default 2 – The quarter ending 07/12 had a due date, (if filed and paid electronically) of 7th September and whilst the Appellant filed on time on 6th September, payment did not reach HMRC's account until 17th September. This late payment resulted in the first SLNE being issued and resulted in a penalty at the subsequently adjusted rate of 2%, being imposed.

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Default 3 – The quarter ending 10/12 had a due date, (if filed and paid electronically) of 7th December and whilst the Appellant filed on time on 6th December, its payments arrived late in HMRC's account in several instalments over the period 20th December to 30th April 2013. Whilst the Appellant did apply for a Time to Pay it did not do so until 20th December after the due date for payment as such the surcharge is unaffected. This late payment resulted in the second SLNE being issued and resulted in a penalty at the rate of 5%, being imposed.

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Default 4 – The quarter ending 01/13 had a due date, (if filed and paid electronically) of 7th March and whilst the Appellant filed on time on 7th March, its payment arrived late in HMRC's account on 20th March. This late payment resulted in the third SLNE being issued and resulted in a penalty at the rate of 10%, being imposed.

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Default 5 – The quarter ending 04/13, (being the subject of this appeal) had a due date, (if filed and paid electronically) of 7th June and whilst the Appellant filed on time on 6th June, its payment arrived late in HMRC's account on 10th June and 15th July. These late payments resulted in the fourth SLNE being issued and resulted in a penalty at the rate of 15%, being imposed.

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16. We accept that the SLN and the subsequent SLNE's and assessments to surcharge were properly served, the Appellant has not appealed against either the SLN or the three subsequent SLNEs or surcharge assessments, apart from the fourth SLNE and surcharge which is the subject of this appeal .

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17. Mr Rogers confirmed that he did not dispute the facts of the defaults themselves, which we again accept.

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18. We also accept Mr Rogers explanation, that whilst the Appellant was fully aware of its obligations, it had struggled to pay its VAT on time because "the last few years of trading" had been extremely difficult not only because of the financial recession, also but because of the poor summer weather between 2008 and 2012, which meant that a large number of agricultural shows, from which the company derived considerable income, were either cancelled at short notice, or were "wash

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outs”, resulting in the company losing the concession fees it had paid and not selling its ice cream in the quantities it had expected to.

5 19. Mr Sellers submitted and we accept; that the Appellant had requested a review of the default surcharge under Appeal and that that review upheld the default surcharge. Subsequently, which we note and accept, the default surcharge was reviewed again, at the request of the Appellants MP, and again was confirmed. Finally, which we note and accept the default surcharge under appeal, together with a later default surcharge arising from the quarter ending 07/13 were reviewed on the receipt of this appeal and the default surcharge under appeal was again upheld, but that from 07/13 was removed.

15 20. Mr Rogers explained that he thought that the Appellant had a direct debit set up with HMRC at the time of the default which should have enabled HMRC to take the required amount of funds on time. Mr Sellers submitted that that whilst the Appellant had previously set up direct debit arrangements on three separate occasions that the last of these direct debit arrangements had been cancelled on 6th December 2011. He further submitted that the Appellant would on each instance of cancellation have received electronic notification from its Bank that the arrangement had been cancelled and that in addition HMRC had written to the Appellant confirming the cancellations. Copies of those letters from HMRC to the Appellant were exhibited in HMRC’s bundle of documents at pages 42, 44 and 47.

25 21. Furthermore Mr Sellers submitted that the Appellant must have realised that its direct debit instruction had been cancelled because it made payments by other means between 6th December 2011 and 15th July 2013. We accept Mr Sellers submissions over the direct debit cancellations but do not accept that the Appellant could have genuinely and reasonably believed that its payments for the quarter under appeal could have been paid/taken by HMRC by direct debit.

30 22. We note that Mr Rogers did concede that the Appellant “was not as organised as it should have been” and had had a “tough time” up to the time of the 04/13 quarter.

35 23. Mr Rogers confirmed that general economic recession and the poor weather had created havoc with the Appellant’s finances and with his mind in trying to plan the business. That said, given that VAT is a tax on turnover and that this was largely a cash business, he was unable to provide evidence of any specific unforeseeable or inescapable events which prevented the Appellant from paying over to HMRC the VAT it had collected over the previous three months.

40 24. In so far as the Appellants cash flow is concerned we note Mr Rogers evidence that he also ran a successful Ice Cream Parlour business alongside the Appellant Company and accept his evidence that that business could have loaned cash to the Appellant to enable it to pay its VAT liabilities.

45 25. Finally Mr Rogers submitted that the amount of the penalty “for being just a few days late” in payment was disproportionate. He further submitted that the damage

the surcharge did was not realised and that he as a Director of the Appellant was devastated by the amount of the surcharge.

5 26. We did not accept Mr Roger's submissions on proportionality for the reasons set out below.

10 **Reasonable Excuse**

27. The burden of establishing a reasonable excuse falls upon the Appellant.

28. In our judgment, the Appellant has failed to establish that it had a reasonable excuse for the late payment of VAT for the quarter ending 04/13.

15 29. Its reasons for the late payment i.e. its mistaken belief that it had a direct debit instruction with HMRC; the general economic recession and the poor summer weather are insufficient in our view to amount to a reasonable excuse.

20 30. Whether taken collectively or individually the reasons for late payment of VAT by the Appellant were neither unforeseeable nor inescapable, they were not based on the Appellant suffering a sudden or inescapable shortage of funds or some other sudden and unforeseeable event. In part they were grounded on a mistaken belief by the Appellant that it had a direct debit arrangement with HMRC. Whilst the
25 Appellant's mistaken understanding of whether or not it had a valid direct debit instruction with HMRC might have been a genuine oversight, in our view it falls short of amounting to a reasonable excuse, particularly given the number of previous defaults by the Appellant and the fact that the Appellant should in our judgment have been even more vigilant on this occasion to ensure that it did pay its VAT on time.

30 31. We do not accept either that the general economic recession over a period of years amounts to a reasonable excuse for late payment of VAT. Many businesses have managed to plan their cash flows to enable them to pay their VAT on time, despite the economic recession and in our view the Appellant should have done likewise.

35 32. Whilst poor summer weather, may be difficult to predict, it is an almost inescapable fact in the United Kingdom. VAT is effectively a tax on turnover. Given that the Appellants VAT liabilities would have fallen as its sales and turnover fell and that the Appellant ran a cash business, it should, in our view have been able to meet
40 its reducing VAT liabilities on time, as those liabilities would have fallen proportionately as turnover fell.

45 33. In any event the evidence provided by Mr Rogers establishes that monies could have been loaned to the Appellant had it been suffering from a shortage of funds.

Proportionality

34. Mr Rogers also submitted that the amount of the surcharge imposed was disproportionate to the Appellant's mistake.

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35. The question of whether or not this Tribunal has the power to determine whether or not a particular penalty, (as decided upon by Parliament), is or is not proportionate to the particular "default" was examined recently in great detail by the Upper Tribunal in the case of *HMRC –v- Total Technology (Engineering) Limited [2012] UKUT 418 (TC)* (Total).

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36. The decision in that Upper Tribunal case is binding on this Tribunal.

37. In that case the payment was only one day late; previous defaults had been due to innocent errors; the taxpayer had an excellent compliance record prior to the first of the defaults; the amount of the penalty was £4,260.26 and the tax payers profits were around £50,000 per year.

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38. Mr Justice Warren and Judge Bishopp said at page 26 para 81:

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"..... the VAT default surcharge regime penalises only the failure to deliver a return and to make payment of the tax owed by the due date It is to be noted that the penalty does not increase as time goes by; the penalty is for failure to do something by a due date, not a penalty for continuing failure to put right the original default"

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39. At page 31 para 99 they concluded;

"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".

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Decision

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40. In our judgment for the reasons we have provided, the Appellant does not have a reasonable excuse for the default, nor was there a Time to Pay arrangement in place at the time of the default. There was on the Appellants own evidence no effective shortage of funds. Neither the Appellant's mistaken belief that there was a direct debit instruction in place; the general economic recession; or the poor weather during the summertime, are in our judgment sufficient to provide a reasonable excuse in this case..

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41. Nor do we find, again for the reasons we have provided, following the Upper Tribunal decision in Total, that the amount of the default surcharge was disproportionate either in the context of the number of defaults by the Appellant, or as to the amount of the default surcharge in proportion to the Appellant's sales, net of VAT, which amounted to £366,911, (as such the default surcharge imposed on the Appellant amounts to less than 2.75% of its net sales).

42. We therefore dismiss the appeal and confirm the penalty in the sum of £9,503.68.

43. 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.

G NOEL BARRETT
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 29 July 2014