



**TC04116**

**Appeal number: TC/2014/03732**

*VAT – Whether reasonable excuse for late payment of VAT for the period ending 30 September 2013. No*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CARREK LTD**

**Appellant**

**- and -**

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

**TRIBUNAL    PRESIDING MEMBER    PETER R SHEPPARD FCIS FCIB CTA AIIT  
MR WILLIAM HAARER**

**Sitting in public at Vintry House, Wine Street, Bristol on 12 September 2014**

**Keith A Hoskins, Commercial Director and Richard M Thompson, Director for  
the Appellant**

**Jane Ashworth, Officer of HMRC, for the Respondents.**

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## DECISION

### Introduction

5 1. Carrek Ltd is a small business involved in historic building renovation and conservation. They were set up in 2010. They have worked on such notable buildings as The Tower of London and Cardiff Castle.

2. This considers an appeal dated 4 July 2014 against a review decision from HMRC dated 1 May 2014 upholding an initial review letter from HMRC dated  
10 24 January 2014 which confirmed a Notice dated 15 November 2013 levying a surcharge of £3,419.41 for value added tax paid late for the period ending 30 September 2013. The surcharges were imposed under Section 59 of the VAT Act 1994.

### Statutory Framework

15 3. The VAT Regulations 1995 Regulation 25(1) contains provisions for the making of returns and requiring them to be made not later than the last day of the month following the end of the period to which it relates. It also permits HMRC to vary that period, which they do in certain circumstances eg by allowing a further seven days for those paying electronically.

20 4. Regulation 25A(3) requires the provision of returns using an electronic system.

5. Section 59 of the VAT Act 1994 sets out the provisions whereby a Default Surcharge may be levied where HMRC have not received a VAT return for a prescribed accounting period by the due date, or have received the return but have not  
25 received by the due date the amount of VAT shown on the return as payable.

6. A succinct description of the scheme is given by Judge Bishopp in paragraphs 20 and 21 of his decision in *Energys Holdings UK Ltd* **Error! Hyperlink reference not valid.** UKFTT 20 (TC) TC 0335 which are set out below.

30 20 “... The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next,  
35 again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence.

40 21. There is no fixed maximum penalty; the amount levied is simply the prescribed percentage of the net tax due. The Commissioners do not collect some small penalties; this concession has no statutory basis but is the product of a (published) exercise of the Commissioners’ discretion, conferred on them by the permissive nature of s 76(1)

of the 1994 Act, providing that they “may” impose a penalty, and their general care and management powers. Even though the penalty is not collected, the default counts for the purpose of the regime (unless, exceptionally, the Commissioners exercise the power conferred on them by s 59(10) of the Act to direct otherwise). Similarly, where  
5 the monetary penalty is nil, because no tax is due or the trader is entitled to a repayment (.....) the default nevertheless counts for the purposes of the regime, subject again to a s 59(10) direction to the contrary.”

7. Section 59(7) VAT ACT 1994 covers the concept of a person having reasonable excuse for failing to submit a VAT return or payment thereof on time.

10 8. Section 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

9. **Case law**

*HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC)

15 *Energys Holdings UK Ltd* **Error! Hyperlink reference not valid.** UKFTT 20 (TC) TC 0335

*J B Steptoe CA*, July 1992, [1992] STC 757

*Trinity Mirror PLC v HMRC* [2014] UKFTT 355 (TC)

**The appellant’s submissions**

20 10. Mr Hoskins explained that the appellant had a struggle getting paid in accordance with their payment terms. The terms are payment within 14 days of the issue of an Architects certificate. He said that about 75% of the appellant’s clients pay late, some pay two to three months late. He said that many of their clients were  
25 government departments or were large organisations run by committees. He said that the appellant’s business was heavily labour orientated so wages had to be paid. Two of the three directors are working directors.

30 11. Mr Hoskins said that the money was available for the return for the period ended 30 September 2013 but he had difficulty getting the necessary computer connection in North Devon. He accepted that this was not an uncommon problem and he should have not left attempting to make payment so late.

35 12. Mr Hoskins said the appellant’s main argument was that the surcharge was not proportionate. He said a surcharge calculated as a percentage of the tax due was not a correct basis to calculate a surcharge. In his business materials, plant and scaffolding were expensive and had to be charged on to customers. He said that he and his staff work long hours for low pay. He produced unaudited accounts which showed that the company’s annual profit for the period 27 August 2010 to 31 August 2011 was £4,601; for the year to 31 August 2012 it was £12,260; and for the year to 31 August 2013 it was £2,093. Thus the surcharge would wipe out the last year’s profit and some of the previous year’s.

13. Mr. Hoskins pointed out that the amount of the surcharge was not related to the length of delay. The penalty which was levied for a delay of about eight hours would have been the same if the delay had been for a much longer period.

### **HMRC's submissions**

5 14. HMRC had included in the bundle a schedule of defaults which showed that the  
appellant had a history of defaults. In the seven quarters between 1 January 2011 and  
30 September 2012 there had been four defaults. Thus any further default would result  
in a surcharge at the maximum rate of 15%. There had then been three periods when  
returns and payment were made on time. Had the appellant made the return and  
10 payment for the period to 30 September 2013 on time he would have been removed  
from the default surcharge system. Unfortunately the appellant failed by a few hours.

15. HMRC say that the penalty is 15% of the tax paid after the due date which was  
£22,796.12. 15% of that amount is £3,419.41.

15 16. HMRC stated that they were aware that the appellant had had computer  
connection problems and had asked for further information but it appears that the  
appellant did not receive their letter. In the absence of further detail HMRC have not  
been able to consider whether or not this could constitute a reasonable excuse for a  
late payment of VAT.

20 17. HMRC said that they appreciated the steps the appellant had taken to improve  
its compliance record but there was no provision which would allow the suspension of  
a surcharge on the basis of future compliance. They said that the potential hardship  
resulting from a surcharge is not a reasonable excuse for late payment.

18. HMRC made no comment on proportionality,

25 19. HMRC state they considered that the appellant had not discharged the onus of  
proof that he had reasonable excuse for the late payment of value added tax for the  
period ended 30 September 2013 and requested the appeal be dismissed.

### **The Tribunal's observations**

30 20. The Tribunal queried whether the appellant had a reasonable excuse for the  
surcharges levied for earlier periods. The appellant was unaware of the decision of the  
Court of Appeal in the case of *Steptoe*. When this was explained the appellant said  
that it could well have applied in some of the earlier periods but not for the period  
ending 30 September 2013. If there is reasonable excuse for the failure in earlier  
periods then this would affect the percentage used to calculate subsequent surcharges.  
The appellant did not have the detailed information to hand to advance any  
35 submissions in this regard so it was left for the matter to be taken up with HMRC  
separately with recourse to the Tribunal in the event of any further dispute.

21. The appellant was also unaware of the time to pay arrangements offered by  
HMRC.

22. The level of the penalties and whether or not they are disproportionate is discussed at length in the Upper Tribunal's decision in *HMRC v Total Technology (Engineering) Ltd*. The decision also discusses the fact that there is no power of mitigation available to the Tribunal. The only power in this respect is that if the
- 5 Tribunal considers the amount of the penalty is wholly disproportionate to the gravity of the offence, if it is not merely harsh, but plainly unfair, then the penalty can be discharged. For example in *Energys Holdings Ltd* the Tribunal discharged a potential penalty of £130,000 for the submission and payment of a return submitted one day late.
- 10 23. The level of the penalties has been laid down by parliament and unless the surcharges have not been issued in accordance with legislation or have been calculated inaccurately the Tribunal has no power to discharge or adjust it other than for the reason outlined in paragraph 20 below.
- 15 24. Mr Hoskins relied on the argument that a penalty of £3,419.41 was disproportionate for a company that made an annual profit of £2,093 in the year ending 31 August 2013.
- 25 25. Whilst the Tribunal had some sympathy with the appellant in that the payment was made only a few hours late there have been a number of cases where similar fines have been levied on appellants in similar circumstances. The case of *Total Technology (Engineering) Ltd* is just one example where a fine of £4,260.26 was
- 20 levied for a VAT payment made one day late. In the current case whilst the appellants annual profits shown in the unaudited accounts was £2,093 this profit figure was arrived at after deduction of administration expenses of £60,000 being a payment of £30,000 paid to each of two of the directors. The Tribunal also considered the
- 25 decision of the First-tier Tribunal in *Trinity Mirror PLC v HMRC* which gives some views on what is disproportionate.
26. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by Section 59(7) VAT Act 1994.
- 30 27. The Appellant accepted that the payment had been made late and could offer no reasonable excuse for the delay. They accepted that the money was in the bank account ready to be sent.
- 35 28. The Tribunal considers that in these circumstances the surcharge is not wholly disproportionate to the gravity of the offence, nor is it unfair. The appellant accepted that there was no reasonable excuse for the late return. Therefore the appeal against the surcharge for the period ending 30 September 2013 is dismissed.
29. Whether the appellant had reasonable excuse for late payments made in earlier periods, and whether the principles outlined in the decision in the case of *Steptoe* applies to those periods is a matter for the appellant to take up with HMRC.
- 40 30. 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.

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**PETER R SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

**RELEASE DATE: 10 November 2014**