



TC04348

Appeal number: TC/2014/05686

*VALUE ADDED TAX – surcharge – Section 59 Value Added Tax Act 1994
– whether there was a reasonable excuse for the default – no – whether the
penalty was disproportionate – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NUNEATON ROOF TRUSS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 9 March 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 15 October 2014 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 4 December 2014 and the Appellant's further Notice of Appeal dated 2 December 2014.

DECISION

1. This is an appeal against the decision of HMRC dated 1 September 2014, to
5 confirm the imposition of a default surcharge in the amount of £788.02 for the
Appellant's delay in paying VAT of £39,401.00 shown as due under its VAT return
for the quarter ending 31 May 2014.

Application to appeal out of time

2. The first issue to be determined is whether this appeal, which had been filed
10 with the Tribunal late, should be admitted. Under Section 83G Value Added Tax Act
1994 ("VATA 1994") an appeal to the Tribunal against the imposition of a surcharge
under Section 59 VATA 1994 shall be made before the end of 30 days beginning with
the date of the decision appealed against. As the decision in this case is dated 1
September, an appeal should have been filed by 5 p.m. on 30 September 2014. The
15 Appellant's notice of appeal was received by the Tribunal on 15 October 2014.

3. The Appellant's explanation for the delay is that the original notice of appeal
was posted by the Appellant's agent on 26 September 2014. This was returned to the
Appellant for it to authorise its agent to file an appeal on its behalf. A notice of
appeal dated 15 October 2014 was filed with the appropriate authorisation. The
20 Appellant also filed a third notice of appeal on 4 December 2014 with substantially
the same grounds.

4. HMRC do not oppose the application for permission to appeal out of time.

5. In considering whether the Appellant should be given permission to appeal out
of time the Tribunal should have regard to the length of the delay, the Appellant's
25 reasons for the delay, the consequences for the parties if permission to appeal out of
time is not granted, and the consequences for the parties if permission to appeal out of
time is granted. The Tribunal should also bear in mind the need for litigation to be
conducted efficiently and the overriding objective in the Tribunal Rules to deal with
cases fairly and justly.

30 6. Having in mind the over-riding objective to deal with cases fairly and justly, I
grant the Appellant permission to appeal out of time, and admit this appeal.

Chronology and relevant facts

7. On the basis of the papers submitted with the Appellant's Notice of Appeal and
with HMRC's Statement of Case, I find the following facts:

35 8. The Appellant's VAT return for the quarter ended 31 May 2013 was filed on 25
June 2013. The deadline for payment of the VAT shown as due under that return was
7 July 2013 if the VAT due was paid electronically. The Appellant paid the VAT
due, by electronic means, on 11 July 2013.

9. On 12 July 2013 HMRC served a surcharge liability notice on the Appellant specifying a surcharge period which extended until 31 May 2014.

10. The Appellant's VAT return for the quarter ended 31 May 2014 was filed on 24 June 2014. The deadline for payment of the VAT of £39,401 shown as due under that return was 7 July 2014 if the VAT due was paid electronically. The Appellant paid the VAT due, by electronic means, on 8 July 2013.

11. On 11 July 2014 HMRC issued the Appellant with a default surcharge calculated at 2% of the VAT which was outstanding. This amounted to £788.02.

12. On 24 July 2014 the Appellant's agent wrote to HMRC seeking reconsideration of the decision to impose a surcharge. The Appellant explained that the two main reasons for late payment were that:

- a) The Appellant had delayed payment to allow remittances to clear, and
- b) The Appellant misjudged the timing of his payment once he was confident he had sufficient funds.

13. On 1 September 2014 HMRC informed the Appellant that the surcharge would be upheld as insufficiency of funds did not constitute reasonable excuse. The Appellant appealed to this Tribunal challenging the meaning of "reasonable" and suggesting that the surcharge imposed was disproportionate.

14. On 10 November, once it had been notified of the Appellant's appeal, HMRC wrote to the Appellant's agent, seeking further information as to the Appellant's lack of funds at the time the payment of VAT was due. By letter dated 24 November 2014 the Appellant's agent accepted that the Appellant had sufficient funds to pay on time the VAT due for the quarter ended 31 May 2015.

Appellant's submissions

15. The Appellant's sole ground of appeal to this Tribunal, as clarified in its more recent Notice of Appeal and letter dated 24 November 2014 to HMRC, is that the surcharge imposed is disproportionate to the default. The Appellant argues that its payment of VAT was late by only one day and a surcharge of £788.02 is disproportionate to that short delay.

16. The Appellant cites *Trinity Mirror plc v Revenue and Customs Commissioners* [2014] UKFTT 355 (TC) ("*Trinity Mirror*") in support of its submissions.

Respondents' submissions

17. In response to the Appellant's submission, HMRC submit that the surcharge imposed is not disproportionate. HMRC cite in support *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT 418 ("*Total Technology*"). HMRC submit that *Total Technology* is binding upon this Tribunal.

Burden and standard of proof

18. The burden of proof lies first upon HMRC to establish that the Appellant was in a default period and that, while in this default period, the Appellant filed its return late or made late payment of the amount of VAT shown in the return as having been due.

5 19. Once the surcharge has, on the face of it, been established, the burden of proof in establishing that there was a reasonable excuse for late submission lies upon the Appellant. The Appellant also bears the burden of establishing that the surcharge imposed was disproportionate to the default.

20. The standard of proof is the civil standard of the balance of probabilities.

10 **The legislation relevant to this appeal**

21. Section 59(1) of VATA 1994 provides that if a person has not provided a VAT return, or paid the amount of VAT shown on that return as due, by the last date on which a VAT return for a particular accounting period is required, then that person is to be regarded as being in default. Where a person is in default under Section 59(1)
15 then Section 59(2) enables HMRC to serve a surcharge liability notice on that person, specifying a surcharge period.

22. Section 59(4) provides that while in the default period, a person who is in default in respect of an accounting period within the default period (either by filing a VAT return late or by late payment of the VAT shown on a return as due) shall be
20 liable to a surcharge. The surcharge is the greater of a prescribed percentage of the outstanding VAT for the relevant period, and £30.

23. Section 59(5) provides that in relation to the first default while in the surcharge period, the prescribed percentage is 2%.

24. However, under Section 59(7), a person who would otherwise be liable to a
25 surcharge is not liable if either the return or payment of VAT was despatched at a time and in a way that it was reasonable to expect that it would be received by the Commissioners within time, or there is a reasonable excuse for the VAT being paid late. Section 71 VATA 1994 qualifies Section 59(7) by specifically excluding from the categories of reasonable excuse: an insufficiency of funds to pay any VAT due,
30 and reliance on any other person to perform a task.

Decision

25. On the basis of the facts found as set out above, I conclude that HMRC has established that the Appellant was in a default period and also that while in this default period the Appellant made late payment of VAT of £39,401 being VAT
35 shown in the Appellant's return as having been due.

26. The Appellant has withdrawn its earlier ground of appeal that it had a reasonable excuse for making late payment. If the Appellant had pursued an argument that it had a reasonable excuse I would have held that neither of the reasons

put forward by the Appellant (waiting for customer remittances to clear and mistiming the payment to HMRC) constitute reasonable excuse in this case.

27. The remaining issue is whether a surcharge of £788.02 is disproportionate to the Appellant's default.

5 28. The Appellant referred to *Trinity Mirror*. In that case the taxpayer had been issued with a surcharge of £70,906.44 for a one day delay in making payment. The First-tier Tribunal (Dr Khan) held that this was disproportionate as went beyond what was strictly necessary to achieve the objectives of the legislation. In his decision Dr
10 Dr Khan referred to the earlier decision of the First-tier Tribunal in *Enersys Holdings UK Limited v Revenue and Customs Commissioners* [2010] UKFTT 20 (TC) ("*Enersys*") where a surcharge of £131,881 for a one day delay in making payment was held to be disproportionate. In *Enersys* there had been a spike in trading which result in an unusually large VAT payment being due, and thus the surcharge was far higher than would have resulted if the delayed payment had occurred in any other quarter.

15 29. In *Total Technology* the Upper Tribunal considered the default surcharge regime at length. After extensive review of case-law of both the ECJ and the ECHR, the Upper Tribunal held that the architecture of the default surcharge regime as a whole did not offend the principle of proportionality but that it was appropriate to consider cases on an individual level. At that individual level, it was possible that
20 some surcharges would be disproportionate to the default.

30. In *Total Technology* the Upper Tribunal held that the question to be asked, at the individual level, is whether the surcharge is disproportionate in all of the circumstances of the case bearing in mind the intention of the legislation and the effect of the legislation on the specific taxpayer. It was legitimate for the surcharge
25 imposed to be of a substantial rather than nominal amount. However, there must be an upper limit and the surcharge could not be plainly unfair. The surcharge imposed in *Total Technology* was £4,260, which the Upper Tribunal held (at paragraph 93) was "comfortably ... below any possible upper limit" and not disproportionate.

31. Looking at the circumstances of this case, I bear in mind that the intention of
30 Section 59 VATA 1994 is to deter late payment but it does so without distinguishing between degrees of lateness. The Appellant's VAT payment was one day late and this default was the Appellant's first default since being issued with a surcharge liability notice almost a year earlier. I note there is no evidence that there was a spike in trading so that the surcharge was higher than the Appellant would have incurred
35 had the default occurred in respect of another quarter in the year. The effect of applying Section 59 VATA 1994 to the Appellant's case is that a surcharge of £788.02 has been imposed on the Appellant for a first default. That surcharge is smaller than that imposed on the taxpayer in *Total Technology*, and of a completely different scale to the surcharges imposed in either *Enersys* or *Trinity Mirror*.

40 32. In all the circumstances of the case I do not consider a surcharge of £788.02 to be plainly unfair to the Appellant or to go beyond what is necessary to achieve the

aim of the legislation. In my opinion a surcharge of £788.02 is not disproportionate to the Appellant's default.

Conclusion

33. This appeal is dismissed and the surcharge of £788.02 is confirmed.

5 34. 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
10 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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JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 7 April 2015