

[2015] UKFTT 0344 (TC)



TC04528

Appeal number: TC/2014/04492

VAT default surcharge – appeal against five default surcharges - whether Appellant had a reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MABO CONSULTING LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN HEWETT**

Sitting in public at Fox Court, Grays Inn Road, London on 10 March 2015

The Appellant did not attend and was not represented

Mrs Lynn Ratnett, Officer of HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal by Mabo Consulting Limited (“the Appellant”) against five VAT Default Surcharges, imposed in respect of the Appellant’s late payment of VAT in the following periods:

- 04/13 - a surcharge of £975.66
- 07/13 - a surcharge of £1,941.66
- 10/13 - a surcharge of £1,680.84
- 01/13 - a surcharge of £2,245.95
- 04/13 - a surcharge of £30.00

The total late payment surcharges is calculated as £6,874.11.

2. The Appellant did not attend the hearing, however the Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

3. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

20 **Background**

4. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires a VAT return and payment of VAT due on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].

5. The Appellant has been in the default surcharge regime from period 07/12 onwards. Prior to this the Appellant had made a late payment in respect of the 04/12 period, but as the Company’s turnover was less than £150,000, HMRC issued a Help Letter offering advice and support.

6. Prior to the period subject to this appeal, three earlier Surcharge Liability Notices had been issued.

7. The first relevant default was in respect of period 07/12 when VAT of £6,965.32 had been paid by Bill Pay on 13 December 2012, the return having been submitted on 6 September 2012. The due date of 31 August 2012 was extended by seven days for electronic payment. Although the payment was not made on or before 7 September 2012, it did not attract a surcharge as it was the “first default”.

8. The next relevant default was for period 10/12. The amount of £3,946.00 was paid by Bill Pay on 19 February 2013, the return being received on 4 February 2013. The due date of 30 November 2012 was extended by seven days for electronic payment. As the payment was not made on or before 7 December 2012, the default attracted a surcharge calculated at 2% of the amount paid after the due date. Because

the amount was less than £400, by concession the surcharge has not been sought by HMRC.

5 9. The next relevant default was for period 01/13. The amount of £6,154.80 was paid by Bill Pay on 23 April 2013, the return being received on 15 April 2013. The due date of 28 February 2013 was extended by seven days for electronic payment. Although the payment was not made on or before 7 March 2013, because the amount was less than £400, by concession it was not sought by HMRC.

10 10. The next relevant default was for period 04/13, when the relevant VAT of £9,756.60 was paid by Faster Payment Service (FPS) on 22 June 2013. The due date of 31 May 2013 was extended by seven days for electronic payment. Because the payment was not made on or before 7 June 2013, the default attracted a surcharge calculated at 10% of the amount paid after the due date, in the sum of £975.66

15 11. The next relevant default was for period 07/13, when VAT of £12,944.40 was paid by Faster Payment Service (FPS) on 14 September 2013. The due date of 31 August 2013 was extended by seven days for electronic payment. Because the payment was not made on or before 7 September 2013, the default attracted a surcharge calculated at 15% of the amount paid after the due date, in the sum of £1,941.66.

20 12. The next relevant default was for period 10/13, when VAT of £11,205.60 was paid by Faster Payment Service (FPS) on 10 May 2014. The due date of 30 November 2013 was extended by seven days for electronic payment. Because the payment was not made on or before 7 December 2013, the default attracted a surcharge calculated at 15% of the amount paid after the due date, in the sum of £1,680.84.

25 13. The next relevant default was for period 01/14, when an amount of £12,055.68 on account of a total VAT liability of £14,973.00 was paid by Faster Payment Service (FPS) on 10 May 2014. The due date of 28 February 2014 was extended by seven days for electronic payment. Because the payment was not made on or before 7 March 2014, the default attracted a surcharge calculated at 15% of the amount paid after the due date, in the sum of £2,245.95.

30 14. The next relevant default was for period 04/14, when an amount of £9,609.81 on account of a total VAT liability of £9,644.00 was paid by Faster Payment Service (FPS) on 7 June 2014. The due date of 31 May 2014 was extended by seven days for electronic payment. Because the full payment was not made on or before 7 June 2014 and because under s 59(4) Value Added Tax Act 1994 (“VATA”) the surcharge is the greater of specified percentage of the outstanding VAT and £30, the amount charged was £30.

Relevant legislation

40 15. Section 59 of VATA sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return

by that due date but does not pay by that due date the amount of VAT shown on the return. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates.

16. The specified percentage rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default after the issue of a VAT Surcharge Liability Notice, the specified percentage is 2% and the percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

17. A taxable person who is otherwise liable to a default surcharge, may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge.

Section 59 (7) VATA 1994 sets out the relevant provisions: -

“(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (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 then 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 ..”

18. Section 59(7) is subject to the limitation set out in Section 71(1) VATA 1994 which sets out that any insufficiency of funds to pay any VAT is not a reasonable excuse. Although an insufficiency of funds is not a reasonable excuse the underlying cause may constitute a reasonable excuse.

19. The underlying cause of the insufficiency of funds is not restricted to unforeseeable or inescapable events. If the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the taxpayers default, then the taxpayer may have a reasonable excuse for non-payment, but that excuse would be exhausted by the date on which such foresight diligence and regard would have overcome the insufficiency of funds. [*Customs and Excise Commissioners v Steptoe* 1992 STC 757].

20. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

Appellant's case

5 21. The Appellant's accountant's Messrs Goodman Lawrence & Co said in a letter dated 3 June 2014, that the Appellant was late in making VAT payments for the following reasons, which they asked be regarded as a reasonable excuse:

- 1) The Appellant's director, Mark Friedman, works at different locations and does not always have access to the internet to make online payments.
- 10 2) Most recently confidential information has been hacked by fraudsters. As a result the Appellant has been reluctant to make on line payments.
- 3) The Appellant's customers do not always make payments on time and as such the Appellant often encounters cash flow problems.

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22. The Appellant reiterated the above as its grounds of appeal in its Notice of Appeal to the Tribunal. The Appellant also referred to the case of *Trinity Mirror PLC v HMRC* [2011 TC 09490], where the First-tier Tribunal found a penalty of £70,909.44, in respect of a delay in payment of VAT by one day, to be disproportionate and allowed the appeal.

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HMRC's case

23. The Appellant defaulted in period 07/12 when it entered the surcharge regime resulting in the issue of a Surcharge Liability Notice. The potential financial consequences attached to the risk of further default would therefore have been known to the Appellant, given the information printed on the Surcharge Liability Notice issued.

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24. Included within the notes on the reverse of the Surcharge Liability Notices issued for periods up to and including the 12/12 period, was the following, standard paragraph:

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“Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.”

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25. Included within the notes on the reverse of Surcharge Liability Notices issued for periods 01/13 onwards, are the following, standard paragraphs:

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“Submit your return on time. Make a note of when your return is due.
Pay your VAT on time. Don't rely on HMRC to remind you - go to www.hmrcgov.uk/dpaysinghndvat.htm
Problems paying your VAT?
If you can't pay the full amount on time, pay as much as you can and before the payment is due, contact the Business Payment Support Service.”

26. The reverse of each notice issued up to and including the 12/12 period, detailed how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA s 59(5).
- 5 27. With effect from the period 01/13 the Surcharge Liability Notice VAT160 advises a trader how the surcharges are calculated and the percentages used. Subsequent Surcharge Notices advise the trader of the percentage used to calculate the current surcharge, if one has been issued, and/or the percentage which will be used in calculating the surcharge for any subsequent default.
- 10 28. As the Appellant has not made reference to non-receipt of the earlier surcharge notices, HMRC conclude that these were received by the Appellant. This being the case HMRC maintains that the surcharges have been correctly issued in accordance with VATA s 59(4).
- 15 29. The fact that the previous default surcharge notices did not contain a financial element may also be relevant. Because of this the Appellant may not have realised they were default surcharge notices. However the notices issued for period 04/13 onwards included a financial element and HMRC contends that the Appellant would have been aware that they were in the surcharge regime from that point onward.
- 20 30. The Appellant states that access to the internet is not always possible because of working at different locations. HMRC contends that working at different locations was a foreseeable event and alternative provision should have been made both for the filing of VAT returns and the making of payments.
- 25 31. Making payments online is not the only method of payment. HMRC's website sets out how to pay VAT using alternative methods such as direct debit, Bank Giro and BACS. The due date is given on electronic returns and the online acknowledgement confirms when and how payment is to be made. HMRC says that the Appellant would have been aware of the due dates for the return and payment.
- 30 32. It is the directors' responsibility to ensure the timely submission of the VAT return and any tax due thereon. Records show that there are two directors for the business and where it was known that there were difficulties with internet access and/or payment, a reasonable business would have made arrangements to ensure timely compliance with its obligations to file returns and make payments on or before the due date.
- 35 33. As the history of defaults shows, the Appellant entered the Default Surcharge regime from period 07/12. HMRC say that the potential financial consequences attached to the risk of further default would have been known to the Appellant from this point onward.
34. The Appellant cites that customers do not always make payments on time, however under Section 71(1) (a) VATA 1994 it is set out that an insufficiency of funds to pay any VAT due is not a reasonable excuse.

5 35. HMRC contends that traders can use the Cash Accounting Scheme whereby those with a VAT taxable turnover of less than £1.35 million can pay VAT on sales when paid by customers and reclaim VAT on purchases upon payment to suppliers. HMRC records do not show that any application was made by the Appellant in respect of this scheme.

36. HMRC records indicate that the Appellant did not contact the National Advice Service or the Business Payment Support Service prior to the due dates to discuss late payment.

10 37. The Appellant suggests that the surcharges are excessive. HMRC submits that the amounts charged are in accordance with the legislation set out in s 59 VATA 1994 and are not excessive. The Appellant having received surcharges notices would have been aware of the percentages and amounts.

15 38. The Upper Tribunal reviewed the UK Default Surcharge regime in general in the case of *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC). In that case the Appellant had received a surcharge of £4,260.26, calculated at 5% of the tax paid late. The tax was paid one day late. The First-tier Tribunal found in favour of the Appellant. HMRC appealed and HMRC's appeal was upheld.

39. The judgment, as it is an Upper Tribunal decision, is binding on the First-tier Tribunal. Mr Justice Warren stated:

20 "In our judgement, there is nothing in the VAT default surcharge regime 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." (Paragraph 99)

25 40. In the next paragraph the Judge states:

30 "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..."

41. In reaching its decision, the Upper Tribunal identified a number of factors in the legislation:

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- i. The number of days of the default.
 - ii. The absolute amount of the penalty.
 - iii. The "inexact correlation of turnover and penalty".
 - iv. The "absence of any power to mitigate".

40 which it decided had to lead to the conclusion that the Default Surcharge regime did not infringe the principle of proportionality.

42. Applying those factors, HMRC submits that the penalties in the current appeal are not disproportionate, for the following reasons:

- The company filed the returns for the periods under appeal between 15 days and 5 months late.
- None of the surcharges are disproportionately large.
- The surcharges are not high when compared with the Appellant's turnover, being between 1.6 % and 2.5% of the sales (excluding VAT) for each quarter.

43. The surcharge applies even if payment is only one day late. The rates of surcharges are laid down in law and neither HMRC nor the Tribunal has the power to reduce the amount due to mitigating circumstances. The only remedy is for the Appellant to show that there was a reasonable excuse for the failure.

44. The Appellant makes reference to the decision of the First-tier Tribunal case of *Trinity Mirror* where the matter appealed was a default surcharge of 2% and which was held to be disproportionate for being one day late. The First-tier Tribunal allowed the appeal. HMRC has appealed the decision to the Upper Tribunal.

45. HMRC therefore contends that the Appellant has not given any reasonable excuse for the failure to pay the VAT liabilities by the due dates.

Conclusion

46. The Appellant's first and second grounds of appeal, are that Mark Friedman a director of the Appellant Company, works at different locations and does not always have access to the internet to make online payment, and that due to potential fraud issues the Appellant was reluctant to make online payments. As HMRC argue, working at different locations is a foreseeable event and alternative provision should have been made both for the filing of VAT returns and the making of payments. There is also a second director who presumably could have organised VAT payments. Further, again as HMRC argues, making payments online is not the only method of payment and the Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment. It was for the directors to make arrangements to ensure timely compliance with its obligations to file returns and make payments on or before the due date.

47. The Appellant says that its customers do not always make payments on time and that it therefore encounters cash flow problems. Section 71(1) (a) VATA 1994 states that an insufficiency of funds to pay any VAT due is not a reasonable excuse. The Appellant does not make any reference to or provide further details in respect of each of the periods under appeal, to show whether or not there was an underlying cause for the cash flow problems. Issues with late payment by customers are no more than normal hazards of trade and do not provide a reasonable excuse for the late payments.

48. The Appellant's remaining ground of appeal is that the surcharges are excessive, unfair and disproportionate. However the amounts charged are in accordance with the legislation set out in s 59 VATA 1994. As the Upper Tribunal said in *Total Technology*, there is nothing in the VAT default surcharge regime which leads to the conclusion that its architecture is fatally flawed or that it infringes the principle of

proportionality. The Tribunal in *Total Technology* recognised that the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no, discretion for HMRC to relieve a surcharge once imposed.

5 49. Although the Appellant regards the penalty as unfair a surcharge is only imposed
on a second or subsequent default, and after the taxpayer has been sent a Surcharge
Liability Notice warning him that he will be liable to surcharge if he defaults again
within a year. The taxpayer therefore knows his position and should be able to
10 conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is
geared to the amount of outstanding VAT. The percentage applicable to the
calculation of the penalty increases with successive defaults if they occur within
twelve months of each other. It is then open to the taxpayer to show whether a
reasonable excuse exists for the late payment.

15 50. The burden of proof is on the Appellant to show that the underlying cause of its
failure to meet its VAT payment obligations was due to unforeseen circumstances or
events beyond its control. In the Tribunal's view, for the reasons put forward by
HMRC, that burden has not been discharged and there was no reasonable excuse for
the Appellant's late payment of VAT for the periods under appeal.

51. The appeal is accordingly dismissed.

20 52. 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
25 "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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MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 13 July 2015

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