



TC04577

Appeal number: TC/2015/02551

VAT penalty – reasonable excuse – does reliance on a third party deny a reasonable excuse defence – held - no – was there a reasonable excuse – held - yes – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MORRISROE UK LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SARAH ALLATT
ELIZABETH BRIDGE**

Sitting in public at Fox Court on 19 June 2015

Ms S Northern for the Appellant

Ms L Ratnett, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

1. The appeal is against a default surcharge of £16,237 for the VAT period 10/14. The surcharge was a 2% due to a late payment of VAT for the period 1/14, placing the appellant within the default penalty regime.
2. The Appellant has the following grounds of appeal:
 - (1) There is a reasonable excuse for the late payment of VAT for the period 10/14
 - (2) The amount of the surcharge is disproportionate
 - (3) There is a reasonable excuse for the late payment of VAT for the period 1/14.

Background and Evidence

3. Morrisroe UK Ltd have appointed an accountant, Mr Prem Nair of Tryfor Ltd, to prepare their VAT returns.
4. We heard from Mr Nair and found him a credible and honest witness. Ms Northern for the Appellant also produced a thorough and detailed schedule of helpful corroborating evidence to his statement.
5. Mr Nair stated that he had prepared VAT returns for the past 5 years for Morrisroe UK Ltd. Returns have always been submitted on time and during the period the only late payments are those relevant to this appeal.
6. The first late payment, for the period 1/14, was due to cash flow problems experienced by the Appellant. This was in turn due to cash flow problems experienced by their customer, a group company, that was awaiting a large VAT refund from HMRC.
7. The second late payment, for the period 10/14, was due to exceptional circumstances experienced by Mr Nair on the day the VAT payment was due to be made.
8. Mr Nair explains that he lives with his wife, his children, and his elderly parents, who have multiple health problems including dementia and Parkinson's disease. His wife is the main carer for his parents. The Tribunal were shown a letter from a GP confirming the health problems and the fact Mr Nair's parents require significant care. During the week that ended with the day in question (Friday 28 November 2014) Mr Nair's wife was away in India. The Tribunal were shown travel documents to corroborate this. Mr Nair and his wife had arranged, via Social Services, for professional carers to come from 11 – 1pm every day.

9. Mr Nair explained that it was particularly crucial that the carers came at this time because if his mother started to think that no lunch was going to be prepared for her and her husband, she would feel pressure to prepare the meal herself. This is dangerous as she cannot implement basic kitchen safety.

5 10. Mr Nair also explained that in the past the carers have not come in time and his mother has indeed tried to prepare a meal herself.

11. At 11am Mr Nair therefore phoned his home to check the carers had arrived. He got no answer and made repeated calls that were still not answered. He eventually got through to the care agency who told him that the carers were at his house.

10 12. On the day in question Mr Nair's 10 year old daughter was unwell and could not go to school. He explained she had been generally unwell all week but had gone to school every day but the Friday when she had a fever.

15 13. In his wife's absence he had made arrangements for getting his daughter to school and back, and for looking after her at the end of the day, but the illness was naturally unforeseen.

14. He explained the carers for his parents were not able to look after his daughter, and it was not safe to expect his parent's to do so, in fact he particularly wanted them to keep separate so as to minimise the chances of his parents getting ill.

20 15. Having arrived at the office at 9am, at 12.30pm he therefore decided to leave the office to check on everything at home. He returned after 3pm. These timings were confirmed by the company secretary of Morrisroe UK Ltd who had seen Mr Nair in the office at the relevant times on the day in question.

25 16. He then submitted the return but had missed the bank cut off time to make the payment, which was therefore made at the next available opportunity (Monday 1 December 2014)

17. This evidence was not challenged by HMRC.

The Law

18. The law is contained in sections 59 and 71 VATA 1994 and in various case law.

59 The default surcharge.

30 (1).... 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

35 (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.

...

5 (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,

10 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.

15 (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;

20 (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.

25 (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.

30 (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—

35 (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,

40 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).

71 Construction of sections 59 to 70.

5 (1) For the purpose 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 a reasonable excuse; and

10 (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.

19. For the late payment of VAT for the period of 10/14, the appellant contends the circumstances above constitute a reasonable excuse.

15 20. HMRC contend that the situation falls within s71 (b) and that the late payment was due to reliance on a third party, whose dilatoriness cannot constitute a reasonable excuse.

Decision – First Ground of Appeal

20 21. We believe that although mere reliance on a third party cannot constitute a reasonable excuse, neither can it remove the possible defence of reasonable excuse if unforeseen events happen to that third party.

22. We therefore consider the following questions

(1) Was it reasonable for Morrisroe UK Ltd to rely on Mr Nair of Tryfor Ltd?

(2) If it was, was there a ‘reasonable excuse’ for the late payment?

25 23. We consider it reasonable for Morrisroe UK Ltd to rely on Mr Nair. He was qualified as an accountant. He had performed the duty in question for the company for a considerable period of time without any problems. During the week and the day in question he was clearly doing the work required and this was observed by the company secretary.

30 24. The company has stated there were back up plans for the preparation of the return, and payment of VAT, but not for the sudden deterioration of circumstances on the day in question.

25. We find that the reasonable excuse relied on is not ‘the fact of the reliance on the third party’ nor ‘the dilatoriness of the third party’ but ‘the third party, on whom it was reasonable to rely, had a reasonable excuse.’

35 26. We therefore find the possibility of a reasonable excuse is not excluded by s71(b) VATA 1994.

27. We therefore consider whether ‘reasonable excuse’ applied to the events surrounding the late payment.

28. We find that there was a reasonable excuse for the late payment in question.

29. In the case of the appellant, Morrisroe UK Ltd, up until at least 11 am on the day in question, everything was going to plan. It is entirely reasonable that whatever back up plans were in place they could not be put into practice with enough time to make the payment.

30. In the case of the third party, Mr Prem Nair had every intention to complete the return (which was done) and the payment (which was not) on the day in question. He had put plans in place to deal with the absence of his wife. His daughter’s illness was unforeseen but nevertheless he still expected to be able to complete his duties. The real problem arose with the unanswered telephone calls, at which point he was faced with two ill and incapable parents, alone with his 10 year old daughter, and he knew, based on previous experience that they were likely to be placing themselves and her in a dangerous situation.

31. We find this constitutes a reasonable excuse for the failure to make the payment.

Second and Third Ground of Appeal

32. We therefore do not need to consider the other two grounds of appeal, namely that the penalty is disproportionate or that there was a reasonable excuse for the late payment for the period 1/14.

33. However for completeness we briefly set out our findings in these two areas as well.

34. We find that the issue of proportionality has been fully considered in the case of *Total Technology* [UKUT 418 (TCC)].

35. The appellant contended that 2 factors gave rise to the disproportionate nature, firstly that the amount (over £16,000) was far in excess of the interest missed by HMRC due to the late payment (around £266), and secondly the amount was in excess of 10% of the annual net profit for the company.

36. We consider neither of these points differentiates the case materially from *Total Technology*, in which it was held that ‘there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed.....In assessing whether the penalty in any 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.’ Our view is that this case does not have such extreme amounts such that the penalty is disproportionate.

37. We find that the late payment for the 1/14 period was due to lack of funds and, even though this was caused by the customer (a group company) awaiting a

repayment from HMRC, this does not create a circumstance where the late payment has a reasonable excuse. Lack of funds specifically cannot be a reasonable excuse, even though the circumstances surrounding the late payment may occasionally constitute a reasonable excuse.

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38. 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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**SARAH ALLATT
TRIBUNAL JUDGE**

RELEASE DATE: 18 AUGUST 2015

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