



TC04611

Appeal number: TC/2015/04059

*VAT – penalty – default surcharge – whether reasonable excuse for defaults
– yes – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

INTRINSYS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN RICHARDS
ELIZABETH BRIDGE**

Sitting in public at Fox Court, Brooke Street, London on 24 August 2015

John McLean, Director of the Appellant, for the Appellant

Lynne Ratnett, Officer of HM Revenue & Customs, for the Respondents

DECISION

5 1. In this appeal, the appellant appeals against penalties imposed under the “default surcharge” regime set out in s59 of the Value Added Tax Act 1994 (“VATA 1994”).

2. The appellant accepts that it was late in paying VAT due in relation to its VAT period 01/14, that there was no “reasonable excuse” for this default and that a surcharge liability notice was issued in relation to that default.

10 3. The appellant also accepts that it was late in paying VAT due in relation to its VAT period 01/15. HMRC issued the appellant with a penalty of £8,043.13 (calculated as 2 per cent of the VAT due for that period). The appellant appeals against that penalty on the two following grounds:

15 (1) that there was a “reasonable excuse” for the late payment with the result that, by virtue of s59(7) of the Value Added Tax Act 1994 (“VATA 1994”), the penalty is not due; and

(2) that the penalty is disproportionate.

Evidence

20 4. We heard oral evidence from Mr John McLean, the finance director of the appellant, and Mrs Ratnett cross-examined him. We found Mr McLean to be a reliable and honest witness and we have accepted his evidence.

Findings of fact

5. We made the findings of fact set out at [6] to [14] below.

25 6. The appellant is registered for VAT and submits its VAT returns and payments electronically. It therefore has an extra 7 days after the normal statutory due date in which to submit its VAT returns and payments. The appellant’s VAT return and VAT payment for the period 01/15 were therefore due on 7 March 2015 (which was a Saturday).

30 7. Responsibility for preparing the VAT return lay with Robert Murphy, an employee in the appellant’s accounts team. Although there was another accountant within the accounts team (Ms Georgia Harding), Mr Murphy was the only one of the appellant’s employees who had the expertise to prepare VAT returns.

35 8. Mr Murphy fell ill and was absent from work on the Monday and Tuesday (and possibly all or part of the Wednesday) of the week in which the VAT return was due. He prepared the VAT return late in the evening of Thursday 5 March 2015.

9. The appellant banks with HSBC and uses the “HSBC.net” service to make high value same-day electronic payments. It did not use HSBC’s standard business internet

banking platform. The appellant could not pay the VAT due for 01/15 by using HSBC's standard business internet banking platform, or by making a "BACS" payment, since those facilities could not be used for payments in excess of £100,000 and the VAT due was considerably more than that.

5 10. HSBC's website includes a page headed "Business Internet Banking FAQs" which states, inter alia, that "CHAPS/Priority payment systems are open from 8am to 3.30 pm" and that BACS payments could be made up until 6.45pm. However, those statements had no relevance to the appellant's payment of its VAT bill for the 01/15 VAT period for reasons set out at [9] above.

10 11. Given the large amount of the VAT due, it was necessary for a director of the appellant to "countersign" electronic payment instructions sent to HSBC. Mr McLean gave evidence that, since he was the finance director, it was his task to countersign large payments such as this. That evidence was not challenged in cross-examination and HMRC did not put forward evidence to suggest that there was any other director
15 who could have countersigned the instructions. We therefore concluded that Mr McLean was the only director who could have countersigned instructions to pay the VAT bill for 01/15.

12. The HMRC account to which the appellant had to pay its VAT was with a bank other than HSBC. In order for a same-day payment of the VAT to be paid to this non-
20 HSBC account on 6 March 2015, under the "HSBC.net" platform, HSBC would need to receive electronic instructions by a "cut-off time" of 3.30 pm on 6 March 2015. However, if payment was being made to another account with HSBC, a same-day payment could be effected under the "HSBC.net" platform if electronic instructions were received by a "cut-off time" of 4.30 pm.

25 13. Even though the cut-off time for making a payment to a non-HSBC account was 3.30pm, Mr McLean had a genuine belief that it was 4.30 pm. He did not realise that there was an earlier cut-off time for making payments to non-HSBC accounts and had personal experience of making same-day payments after 3.30pm (although he now realises that those payments must have been to other HSBC accounts).

30 14. On 6 March 2015, Mr McLean was required to attend an important business meeting away from the office at which Mr Murphy was based. That meeting had required a number of diaries to be co-ordinated and Mr McLean gave evidence, which was not challenged in cross-examination, that it would not have been practicable to reschedule it. He was aware of the need to countersign the appellant's VAT payment
35 but, for reasons set out at [13], mistakenly thought that he had until 4.30pm to do so. The business meeting overran but Mr McLean arrived back at the office in time to countersign instructions to HSBC at 4.28pm on 6 March 2015. In fact, his return to the office was of no avail as these instructions were received after the cut-off time of 3.30pm with the result that the payment of VAT was made on the next working day (9
40 March 2015) which fell after the due date for payment.

The law

Statutory provisions

15. The legislation relating to the default surcharge is contained in s59 VATA 1994. A succinct description of how the default surcharge operates is set out in the decision
5 of Judge Bishopp in *Energys Holdings UK Limited v Revenue and Customs Commissioners* [2010] UKFTT 20 (TC). We gratefully adopt that description.

16. Section 59(7) of VATA 1994 sets out the defence of “reasonable excuse”. No
statutory definition is given of what **does** amount to a “reasonable excuse”. However,
s71(1) VATA 1994 sets out particular circumstances which are **not** to be regarded as
10 giving rise to a “reasonable excuse”.

Case law

17. There have been a large number of decisions of this Tribunal as to whether a
“reasonable excuse” exists in particular situations. However, those decisions all tend
to turn on their own particular facts and therefore there is little to be gained in seeking
15 to distil common principles that arise from all of those cases. Rather, we respectfully
agree with the words of Judge Berner in *Barrett v Revenue and Customs Commissioners*
[2015] UKFTT 329 (TC) at [154]:

The test of reasonable excuse involves the application of an
impersonal, and objective, legal standard to a particular set of facts and
circumstances. The test is to determine what a reasonable taxpayer in
the position of the taxpayer would have done in those circumstances,
and by reference to that test to determine whether the conduct of the
taxpayer can be regarded as conforming to that standard. Whilst other
cases in the First-tier Tribunal may give an indication of the approach
25 that has been taken in the particular circumstances at issue, those cases
cannot be regarded as providing any universal guidance.

18. In *HMRC v Trinity Mirror Plc* [2015] UKUT 0421 (TCC) the Upper Tribunal
has recently considered the approach that should be taken when considering the
proportionality of the default surcharge in a particular case. At [63] of their decision,
30 the Upper Tribunal said:

The correct approach is to determine whether the penalty goes beyond
what is strictly necessary for the objectives pursued by the default
surcharge regime, as discussed in detail in *Total Technology*¹ and
whether the penalty is so disproportionate to the gravity of the
infringement that it becomes an obstacle to the achievement of the
underlying aim of the directive which, in this context, we have
35 identified as that of fiscal neutrality. To those tests we would add that

¹ *Revenue and Customs Commissioners v Total Technology (Engineering Ltd)* [2012] UKUT 418 (TCC)

derived from *Roth*² in the context of a challenge under the Convention to certain penalties, namely “is the scheme not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?”

5 19. At [65], of their decision the Upper Tribunal concluded that, overall the default surcharge scheme, viewed as a whole, is rational. They then went on to say, at [66]:

10 However, we accept that, applying the tests we have described, the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgment, given the structure of the default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances. Although the absence of a maximum penalty means that the possibility of a proper challenge on the basis of proportionality cannot be ruled out, we cannot ourselves readily identify common characteristics of a case where such a challenge to a default surcharge would be likely to succeed.

Discussion and conclusion

20 20. The defaults occurred as a result of the combination of two events. The first was the illness of Mr Murphy and the second was Mr McLean’s mistaken belief that the applicable cut-off time was 4.30pm on 6 March and not 3.30pm.

25 21. Mr Murphy’s illness meant that the VAT return was not prepared until late in the evening on 5 March 2015. The failure to prepare it earlier could not, in the circumstances, be regarded as unreasonable since the appellant had no-one else who could prepare it.

30 22. We are satisfied that it was reasonable in the circumstances for Mr McLean to believe that the cut-off time for electronic payment instructions was 4.30 pm rather than 3.30 pm. 4.30 pm is within normal working hours and Mr McLean had previous experience of successfully issuing same-day payment instructions after 3.30 pm (although he had not realised that this would be possible only in the case of payments to another HSBC account). Moreover, while there are statements on HSBC’s website that point to a 3.30pm cut-off time, for reasons set out at [9] and [10] above, those statements were not relevant to the “HSBC.net” platform that the appellant used to make large payments.

35 23. It was not suggested to us that a reasonable director in Mr McLean’s situation would have rearranged his important business meeting in order to ensure that the VAT payment was submitted on time. Given that we have concluded that Mr McLean had a reasonable, though mistaken, belief that he could issue same-day payment instructions by 4.30 pm, we would not expect him to have rearranged that meeting. Rather, we are satisfied that it was reasonable for him to go ahead with the meeting

² *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728

and ensure that he was back at the office in time to issue the payment instructions by what he thought was the deadline of 4.30 pm.

24. Finally, having missed the cut-off time of 3.30pm, given the findings of fact that we make at [10], we are satisfied that there were no other reasonable steps that could
5 be taken to enable the VAT payment to be made in time.

25. We are, therefore, satisfied that the appellant's conduct was that of a reasonable taxpayer motivated by a desire to comply with its tax obligations and that there was a "reasonable excuse" for the default in paying the VAT due for the period 01/15.

26. We have considered the appellant's arguments on proportionality even though, given the conclusion we express at [25], it is not strictly necessary to do so. There was no evidence before us that the penalties imposed on the appellant are inconsistent with the principle of fiscal neutrality embodied in the Principal VAT Directive. Nor was there any evidence that this is a "wholly exceptional case" such as to justify the conclusion that the penalty being charged is disproportionate. Therefore, applying the
10 approach set out in *Trinity Mirror*, we have not accepted the appellant's argument that
15 the penalties charged are disproportionate.

27. Our conclusion is that the appeal should be allowed.

28. 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
20 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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**JONATHAN RICHARDS
TRIBUNAL JUDGE**

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RELEASE DATE: 1 SEPTEMBER 2015