



**TC04997**

**Appeal number: TC/2014/06816**

*VAT – default surcharge – taxpayer in “payment on account” regime –  
balancing payment made eight days late – whether the surcharge was valid –  
yes – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GROSVENOR CLEANING SERVICES LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ZACHARY CITRON  
MISS PATRICIA GORDON**

**Sitting in public at the Royal Courts of Justice, Belfast on 21 October 2015**

**Mr Brian Carey of UHY Hacker Young (Accountants) for the Appellant**

**Mr Dermot Ryder, Officer of HMRC, for the Respondents**

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## DECISION

- 5 1. This appeal concerns the validity of a 5% default surcharge imposed on the appellant, a company in the VAT “payment on account” regime, when it was eight days late in paying the third and balancing payment of VAT in the period in question.

### **The appeal**

- 10 2. HMRC issued a notice of assessment of surcharge on the appellant on 21 July 2014, imposing a 5% default surcharge (the “Surcharge”) in relation to its 5/14 period (ie the VAT accounting period ended 31 May 2014) in the amount of £32,460. The appellant’s accountants requested an internal review by HMRC; HMRC responded in a letter to the appellant dated 2 December 2014 stating that they did not accept that the appellant had a reasonable excuse and did not agree with the First-tier Tribunal’s  
15 decision in the *Trinity Mirror* case. The appellant appealed by notice of appeal dated 23 December 2014.

3. The appeal related solely to the Surcharge. A default surcharge for the 8/14 period (which was referred to in the notice of appeal) had been cancelled by HMRC prior to the hearing.

### **Evidence**

- 20 4. We had a documents bundle and an authorities bundle. Mr Carey gave evidence, as did Mr Eamonn Duignan, the finance director of the appellant. The facts were not in dispute.

### **Findings of fact**

5. The appellant engaged in cleaning services for large companies and was registered for VAT.

- 30 6. The appellant was issued with a notice of direction under s28(2A) of the Value Added Tax Act 1994 (the “Act”) by HMRC dated 30 April 2013. This stated (amongst other things):

“This notice directs you to make payments on account by electronic means as per the enclosed schedule.

Please see also Regulation 40A VAT Regulations 1995. You are also required to make VAT return balancing payments by electronic means.

35 ....

### Due dates for payments

Please note that the businesses in the Payment on Account regime are not entitled to the seven day extension to the due date for payments made electronically.”

7. The schedule to this notice set out the “monthly payments” required of the appellant for its 8/13, 11/13, 2/14 and 5/14 periods, as follows:

Tax period	Amount	Due by
8/13	119,862	31/7/2013
	119,862	30/8/2013
	Balance due	18/9/2013
11/13	119,862	31/10/2013
	119,862	29/11/2013
	Balance due	8/1/2014
2/14	119,862	31/1/2014
	119,862	28/2/2014
	Balance due	2/4/2014
5/14	119,862	30/4/2014
	119,862	30/5/2014
	Balance due	30/6/2014

8. During the 8/13 period, the appellant paid amounts of VAT, and submitted its VAT return, after the relevant due dates. As a result, the appellant was served with a surcharge liability notice, bringing it into the VAT default surcharge regime.
9. During the 02/14 period, the appellant made its first payment on account six days after the due date. The amount paid after the due date was £119,862. A 2% default surcharge, in the amount of £2,397, was levied.
10. During the 05/14 period, the appellant made its balancing payment (in the amount of £649,206) on 8 July 2014 - eight days after the due date, 30 June 2014. This gave rise to the Surcharge under appeal.
11. The background to the late payment of the amount due on 30 June 2014 was that the appellant’s staff had mislaid the letter the letter from HMRC with the required payment dates and so had used the “VAT payment deadline calculator” which was available on HMRC’s website; this indicated that HMRC must receive cleared funds by 7 July 2014.

## The law

12. Section 28 (Payments on account of VAT) of the Act gives authority for the Value Added Tax (Payments on Account) Order 1993 (SI 1993/2001) (the “Order”),  
5 article 4 of which requires certain persons to pay certain amounts (called “payments on account”) on account of VAT he may become liable to pay in respect of a prescribed accounting period. Article 8 of the Order provides that in respect of each prescribed accounting period a payment on account shall be made to HMRC not later than -:

10 “(a) the last day of the month next following the end of the first complete month included therein, and  
(b) the last day of the month next following the second complete month included therein.”

13. A prescribed accounting period, for a person registered for VAT, is every three  
15 month period ending on the dates notified in the certificate of registration issued to him or otherwise (regulation 25(1) of the Value Added Tax Regulations 1995 (SI 1995/2518)).

14. Under s28(2A) of the Act, HMRC may give directions to persons liable by  
20 virtue of the Order to make payments on account of VAT, about the manner in which they are to make such payments.

15. Section 59A (Default surcharge: payments on account) of the Act, so far as relevant, provides as follows:

(1) For the purposes of this section a taxable person shall be regarded as in default in  
25 respect of any prescribed accounting period if the period is one in respect of which he is required, by virtue of an order under section 28, to make any payment on account of VAT and either –

(a) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners by the day on which it became due;  
or

30 (b) he would, but for section 59(1A), be in default in respect of that period for the purposes of section 59.

(2) .... subsection (4) below applies in any case where –

(a) a taxable person is in default in respect of a prescribed accounting period; and

35 (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period which –

(i) begins ... on the date of the notice; and

(ii) ends on the first anniversary of the last day of the period referred to in paragraph (a) above

- (3) ...
- (4) Subject to subsections (7) to (11) below, if
- (a) a taxable person on whom a surcharge liability notice has been served is in default in respect of a prescribed accounting period;
  - 5 (b) that prescribed accounting period is one ending within the surcharge period specified in (or extended by) that notice; and
  - (c) the aggregate value of his defaults in respect of that prescribed accounting period is more than nil,

10 that person shall be liable to a surcharge equal to whichever is the greater of £30 and the specified percentage of the aggregate value of his defaults in respect of that prescribed accounting period.

(5) Subject to subsections (7) to (11) 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 during the surcharge period which are

15 periods in respect of which the taxable person is in default and in respect of which the value of his defaults is more than nil, 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) ...
- (d) ....

(6) For the purposes of this section the aggregate value of a person's defaults in respect of a prescribed accounting period shall be calculated as follows –

25 (a) where the whole or any part of a payment in respect of that period on account of VAT was not received by the Commissioners by the day on which it became due, an amount equal to that payment or, as the case may be, to that part of it shall be taken to be the value of the default relating to that payment;

(b) if there is more than one default with a value given by paragraph (a) above, those values shall be aggregated;

30 (c) the total given by paragraph (b) above or (where there is only one default) the value of the default under paragraph (a) above, shall be taken to be the value for that period of that person's defaults on payments on account;

35 (d) the value of any default by that person which is a default falling within subsection (1)(b) above shall be taken to be equal to the amount of any outstanding VAT less the amount of unpaid payments on account; and

(e) the aggregate value of a person's defaults in respect of that period shall be taken to be the aggregate of –

- (i) the value for that period of that person's defaults (if any) on payments on account; and
- 40 (ii) the value of any default of his in respect of that period that falls within subsection (1)(b) above.

(7) In the application of subsection (6) above for the calculation of the aggregate value of the person's defaults in respect of a prescribed accounting period –

(a) the amount of outstanding VAT referred to in paragraph (d) of that subsection is the amount (if any) which would be the amount of that person's outstanding VAT for that period for the purposes of section 59(4); and

5

(b) the amount of unpaid payments on account referred to in that paragraph is the amount (if any) equal to so much of any payments on account of VAT (being payments in respect of that period) as has not been received by the Commissioners by the last day on which that person is required (as mentioned in section 59(1)) to make a return for that period.

10

(8) 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 –

(a) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1)(a) above –

15

(i) that the payment on account of VAT 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 by the day on which it became due, or

(ii) that there is a reasonable excuse for the payment not having been so despatched, or

20

(b) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1)(b) above, that the condition specified in section 59(7)(a) or (b) is satisfied as respects the default,

he shall not be liable to the surcharge ....

(9) For the purposes of subsection (8) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

25

(b) ...

(10) ...

(11) ....

30

(12) For the purposes of this section the Commissioners shall be taken not to receive a payment by the day on which it becomes due unless it is made in such a manner as secures (in a case where the payment is made otherwise than in cash) that, by the last day for the payment of that amount, all the transactions can be completed that need to be completed before the whole amount of the payment becomes available to the Commissioners.

35

(13) In determining for the purposes of this section whether any person would, but for section 59(1A), be in default in respect of any period for the purposes of section 59, subsection (12) above shall be deemed to apply to the purposes of section 59 as it applies for the purposes of this section.

40

(14) ...

16. Section 59 (The default surcharge) of the Act, so far as relevant, provides as follows:

(1) Subject to subsection (1A) below 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

5 (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.

10 (1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) ... subsection (4) below applies in any case where –

(a) a taxable person is in default in respect of a prescribed accounting period; and

15 (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning... on the date of the notice.

(3) ...

20 (4) Subject to subsections (7) to (11) 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 ... that notice, and

(b) has outstanding VAT for that prescribed accounting period,

25 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.

(5) Subject to subsections (7) to (11) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a specified 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;

35 (c) ...

(d) ....

(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.



(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 –

5 (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 payment not having been so despatched, he shall not be liable to the surcharge ....

10 (8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) ...

15 (9) ...

(10) ...

(11) ...

### **Appellant's arguments**

20 17. The notice of appeal contended that the Surcharge was disproportionate on two grounds: first, that it was disproportionate to impose a penalty of £32,460 for an eight-day delay in payment; second, that the default surcharge regime operated more harshly with respect to companies in the payment on account (“POA”) regime, as compared to other companies.

25 18. At the hearing, the appellant withdrew its argument as to proportionality, due to the decision of the Upper Tribunal in *HMRC v Trinity Mirror plc* [2015] UKUT 0421 (TCC). Mr Carey instead submitted that the Surcharge was unfair, on a number of grounds:

30 (1) Mr Cary submitted that the appellant could have appealed against the surcharge for the 2/14 period as, he asserted, the default (the late payment of the first of the two payments on account for the period) had been caused by circumstances outside the appellant's control. However, as the amount was relatively small (£2,397), the appellant decided it was easier just to pay. Mr Cary pointed out that if the appellant had successfully appealed against this default in the 2/14 period, then the surcharge for the default in the 5/14 period would have been chargeable at 2% rather than 5%.

40 (2) Mr Carey further submitted that the POA regime provides a company 16 opportunities to default in each calendar year, whereas other VAT registered companies have only eight. He submitted that the appellant's default in the 5/14 period was its third in the year which meant that it was compliant 81% of the time. If a VAT registered company outside the POA regime was compliant that

amount of time, he submitted that its surcharge would be at a 2% rate (rather than the 5% rate imposed on the appellant).

(3) The Surcharge was unfair because it was imposed on the (larger) balancing payment in the period.

## 5 Respondent's arguments

19. HMRC submitted that it had made the appellant aware of its payment obligations under the POA regime; that the appellant produced no evidence of a reasonable excuse for the eight day-late payment in its 5/14 period; and that there is no legislative basis for treating the default in the appellant's 5/14 period as if it were the first period during the surcharge period in respect of which the appellant was in default (when it had been in default during its 2/14 period).

20. In relation to the argument that the POA regime has an unfair impact with regard to default surcharge in comparison to businesses not in the POA regime, HMRC submitted that it was Parliament's intention to distinguish between the small proportion of traders with the largest VAT liability, and other traders (under the Order, the POA regime applies only to those companies with annual VAT liability exceeding £2,300,000). HMRC noted that the Treasury's power to make the Order under s28(1) of the Act was tied to their considering it desirable to do so "in the interests of the national economy"; and that Parliament introduced provisions relating to the application of the default surcharge applying only to those within the POA regime (s59A of the Act).

## Discussion

21. The payment due from the appellant on 30 June 2014 (and which was paid eight days late) was not (unlike the payments due on (and paid by) 30 April and 30 May 2014) a payment on account. Rather, it was a payment of the balance of the amount due for the appellant's 5/14 period and due, as is the norm for taxpayers not in the POA regime, a month after the end of the period. However, the mechanics of sections 59 and 59A are such that balancing payments like that due from the appellant on 30 June 2014 are incorporated into default surcharge rules tailored for those in the POA regime. In this case, those rules work as follows:

(1) The late payment of the amount due on 30 June 2014 caused the appellant to be in "default" for the purposes of s59A in respect of its 5/14 period (see s59A(1)(b))

(2) Because a surcharge liability notice was served on the appellant (as a result of its default in its 8/13 period), s59A(4) applies (see s59A(2))

(3) Condition (a) in s59A(4) is satisfied as the appellant was in default in its 5/14 period

(4) Condition (b) in s59A(4) is satisfied as the 5/14 period ended on 31 May 2014, which was within the surcharge period (which originally ended on 31 August 2014, and was further extended due to the appellant's default in the 2/14 period)

5 (5) Condition (c) in s59A(4) is satisfied as the aggregate value of the appellant's defaults in respect of the 5/14 period was, under the calculation in s59A(6), more than nil. The precise figure is found by applying s59A(6)(d) and (e)(ii) and s59A(7), as the appellant's default was by reason of s59A(1)(b); these provisions link back to s59(6), which tells us that a person's "outstanding VAT" is "so much of the VAT for which he is so liable as has not been paid" by the last day on which is required to make a return for a period. Here, that is £649,206 – making that figure the aggregate value of the appellant's defaults in respect of its 5/14 period

10 (6) As conditions (a), (b) and (c) of s59A(4) are satisfied, the appellant shall be liable to a surcharge: this is the (compulsory) effect of s59A(4)

15 (7) The surcharge is charged at 5% because the 5/14 period was the second period of the appellant in the surcharge period in which the value of its defaults was more than nil. The appellant's 2/14 period was the first such period: the value of its defaults in that period was £119,862 (see s59A(6)(a)).

22. The outcomes stated at (7) and (8) in the preceding paragraph are subject to the "reasonable excuse" defence set out at s59A(8) but are otherwise (save for some exceptions which are not relevant to this case) mandatory.

20 23. The appellant chose not to advance arguments based either on the principle of proportionality (principally an EU law concept) or on the "reasonable excuse" defence in s59A(8). In our view, this was the right decision:

25 (1) The principle of proportionality in the context of the default surcharge rules was recently considered by the Upper Tribunal in *Trinity Mirror*. There, the default (payment one day late) was the first within the surcharge period, such that the surcharge was levied at the rate of 2%; the taxpayer was in the POA regime and the default was in respect of a the balancing payment for the period; the amount of the surcharge was £70,906.44. It was held that the correct approach was to determine whether the penalty went beyond what was strictly necessary for the objectives pursued by the default surcharge regime, which was to penalise VAT paid late. The Upper Tribunal found no exceptional circumstances that could render the surcharge in *Trinity Mirror* disproportionate: a financial penalty, based on a modest percentage of the amount of VAT unpaid by the due date, could not be regarded as going beyond the objectives of the default surcharge regime. We consider that the appellant was correct, following this decision of the Upper Tribunal, not to advance  
30 arguments based on the principle of proportionality.

35 (2) The notice and schedule from HMRC dated 30 April 2013 set out the payment dates for the appellant under the POA regime clearly. To have mislaid this information and then relied on general information on HMRC's website is an excuse but, not in our view, a reasonable one; again, it was right of the  
40 appellant not to advance a "reasonable excuse" argument.

24. Having decided not to argue disproportionality or reasonable excuse, the appellant put forward arguments based on general unfairness (as well as what would have happened if it had successfully appealed against the default in the 2/14 period).

5 However, where HMRC have enforced law that is clear and mandatory, we have no jurisdiction to allow an appeal on general grounds of unfairness (or hypothetical facts). As our analysis of s59A of the Act (paragraph 21 above) indicates, Parliament enacted careful and detailed legislation as to the application of the default surcharge to those in the POA regime, with mandatory effect. The outcome of that legislation is that the Surcharge was correctly levied; we say no more about appellant's arguments as to the fairness of that outcome, as it cannot affect our decision on the law.

### **Conclusion**

10 25. The appeal is dismissed; the Surcharge is upheld.

15 26. 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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**ZACHARY CITRON  
TRIBUNAL JUDGE**

**RELEASE DATE: 31 MARCH 2016**