



TC05308

Appeal number: TC/2015/07301

VAT – default surcharge – payment late by two days – whether reasonable excuse for holding mistaken belief; no – whether penalty disproportionate; no – surcharge upheld – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DCC LOGISTICS LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE HEIDI POON
 PETER SHEPPARD FCIS, FCIB, CTA**

**Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds
on 17 February 2016**

Mr David Campling, Director for the Appellant

**Mr C Butler, presenting officer of HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

1. Mr David Campling, Managing Director of the appellant company, appealed
5 against the default surcharge imposed of £1,231.27 at 2% in relation to the VAT
period 09/15. The VAT payment was due on 7 November 2015, which was a
Saturday, and the payment was made two days later on Monday 9 November 2015.

2. Mr Campling stated on the Notice of Appeal: ‘My contention is that if we had
sent the money for the 7th November it would not have [*sic* been] credited until
10 Monday 9th November and it is a large penalty for such a small amount of time.’
Furthermore, that being a small business the ‘unexpected cost’ of the penalty affects
the cash flow and threatens the future of the business which ‘contributes through
various taxes around £1 million per year to the [E]xchequer’.

3. The issues for the Tribunal to determine in respect of this appeal are:

- 15 (1) Whether the penalty has been correctly assessed;
- (2) Whether the appellant had a reasonable excuse in holding the belief
that if the due date of payment was a Saturday, the payment could then be
sent for the following Monday;
- (3) Whether the penalty was disproportionate for being two days late.

20 The Law

4. The Tribunal is provided with the generic bundle of legislation and authorities
in relation to the default surcharge regime. The legislation includes sections 59- 59A
(on default surcharge), 70-71 (on mitigation of penalties), 83 (on appeal), of the
VATA 1994 (‘VATA’), and regulations 25, 25A and 40 of VAT Regulations 1995 on
25 accounting, payment and records.

5. The provisions for the default surcharge regime are under s 59 of VATA. Of
direct relevance to this appeal is sub-s 59(1)(b) VATA, which states that a taxable
person shall be regarded as being in default in respect of a prescribed accounting
period if, by the statutory due date, the Commissioners *have not received the amount*
30 *of VAT shown on the return as payable by him in respect of that period.*

6. Similar wording to the same effect is found under sub-s 59A(1)(a) which
provides for default surcharge in cases where payments on account are concerned, and
the taxable person shall be regarded as in default if *a payment which he is so required*
to make in respect of that period has not been received in full by the Commissioners
35 *by the day on which it became due.*

7. By virtue of s 59(7), a taxable person is not liable to the surcharge if he had a
reasonable excuse for the default. What amounts to a reasonable excuse is largely
determined by the facts of the case, with reference to case law authorities.

8. The authorities referred to in this decision are: *Coales v HMRC* [2012] UKFTT 477 (TC) ('*Coales*'); *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239 ('*Clean Car*'); *Garnmoss Ltd T/A Parham Builders v HMRC* [2012] UKFTT 315 (TC) ('*Garnmoss*'); *C&E Comrs v Salevon Ltd* [1989] STC 907 ('*Salevon*'); *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) ('*Total Technology*'); and *HMRC v Trinity Mirror Plc* [2015] UKUT 0421 (TCC) ('*Trinity Mirror*').

The Facts

9. The business of the appellant company is to provide transport for new and used cars. The company has existed since 1979, and became VAT registered in 1994. Mr Campling had been involved in the management of the company before taking ownership in July 2013, and growing the company to its current turnover of around £1.7million in a rolling year.

10. The schedule of defaults shows two surcharge periods. The first surcharge period started with the default for 03/13 and ended with 12/13 with three defaults in the 12-month period. Two defaults were removed and one was reduced. All three defaults in this period relate to the late submission of VAT returns, the delays were substantial in two instances: 03/13 due on 30 April 2013 was received on 5 August 2013 (3 months late); 09/13 due on 31 October 2013 was received on 12 November 2013; 12/13 due on 31 January 2014 was received on 3 April 2014 (2 months late). The default for 09/13 also involves the late payment of VAT due of £22,087.67, which was settled by seven part-payments between 14 November 2013 and 14 March 2014, probably under a 'time-to-pay' arrangement.

11. The second surcharge period started with period 09/14 with the payment of the VAT of £29,683.67 being made on 10 November 2014 (3 days late). It did not result in any surcharge with it being the first default in a new surcharge period. A Surcharge Liability Notice (SLN) was served on 14 November 2014. The default under appeal for period 09/15 was the second default in the 12-month period, resulting in the imposition of a surcharge of £1,231.27, being 2% on the VAT payable of £61,563.98 for the quarter.

12. As regards payment method, the appellant seemed to have used the Faster Payment Service (FPS) to pay all its VAT liabilities, at least for those periods for which a default has been recorded.

The appellant's case

13. By letter dated 25 November 2015, Mr Campling appealed to HMRC against the surcharge imposed by notice dated 13 November 2015. It states:

'I feel a penalty of £1,231.27 is excessive given that the money was with [HMRC] on the first working day after its due date especially that the due date was not a working day, this error was a genuine mistake as all our banking transactions are carried out on working days.'

14. In evidence, Mr Campling advised the Tribunal that he had been out of the country and returned on Friday 6 November at 7am. He reckoned that since the VAT payment was due on Saturday 7 November, which was not a working day, and that £61,000 was a large sum of money for cash flow, he decided to make the payment on the next working day, which was Monday 9 November. He further informed the Tribunal that for FPS, he can do online payments via the internet, and the delivery time into the recipient's account varies; that the payment may be credited by 5pm of the same day but it is not guaranteed; that FPS online does not allow the payment to be made at the weekend; that he has to visit the branch to access the facility to make a payment if it is to be guaranteed as a same-day payment.

HMRC's case

15. For period 09/15, the due date of Saturday 7 November 2015 was for electronic VAT returns and payments. That the VAT return was received on 30 October 2015, and the appellant would have received an 'Acknowledgement' on submission of the return, advising the payment due date and the need to check with the bank as to the cut-off time for making a payment by way of Faster Payment Service.

16. HMRC emphasised that the statutory due date for period 09/15 was 31 October 2015, and that HMRC's practice allows an extra 7 days 'grace period' for electronic returns and payments, extended by an additional 3 days if payments are made by direct debit; that the VAT Help Letter (VAT 172) clearly states that the taxable person is required by law 'to make sure that payment of the VAT due has cleared to HMRC bank account by the due date'. Furthermore, the Surcharge Liability Notice sent to the appellant gives clear guidance on the reckoning of the due date of payment, as does Notice 700/50 on 'Default Surcharge', and information on HMRC's website such as 'VAT payment deadline calculator', and 'Payment help series' PH/FS4 on how the due date is reckoned for different payment methods.

17. HMRC further submitted that Faster Payment Service has been introduced by the banking industry to enable the customers to make immediate payments by internet or telephone banking; that it is possible for a trader to make faster payments on bank holidays and at weekends depending on the terms and conditions agreed with the bank and the limits set; that due dates regularly fall on a weekend or a bank holiday, and the trader has the responsibility to arrange for payment at an earlier date.

18. In submission, HMRC referred the Tribunal to *Garnmoss* and *Trinity Mirror* in respect of reasonable excuse in a case of error, and the issue of proportionality.

Discussion

19. On the first issue, there is no dispute that the payment for 09/15 was late, and that it was the second default in a surcharge period for which the rate of 2% was correctly determined and applied to the VAT liability due for the quarter of £61,563.98 to arrive at the penalty of £1,231.27.

20. The second issue concerns whether the claim by Mr Campling that ‘this error was a genuine mistake’ amounts to a reasonable excuse. In *Garmoss*, where there as a bona fide mistake made, Judge Hellier states at [12] that while the mistake ‘was not a blameworthy one, the Act does not provide shelter for mistakes, only for reasonable
5 excuse.’ The Tribunal further distinguishes the facts of *Garmoss* from the present case. In *Garmoss* the mistake concerns a mis-posting of a journal entry, whereas Mr Campling’s ‘mistake’ has its origin in a belief he held; that is, if the due date for payment falls on a Saturday, then the next working day should suffice as the due date.

21. In *Coales*, Judge Brannan states at [32]: ‘The test contained in the statute is not
10 whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse’. He rejects the conclusion that an honest and genuine belief, even if unreasonable, can amount to a reasonable excuse, and that the reasonableness of a belief has to be subject to the same *objective* test for reasonable excuse as set out by Judge Medd in *Clean Car*:

15 ‘... can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view, it cannot. ... In my judgment it is an objective test in this sense. One
20 must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’

22. Mr Campling is a man of business who has been in management for over 20
25 years and has successfully grown the business to its current state within a short time since taking ownership. The VAT payable for 09/13 at £22,087, compared with 09/15 at £61,564, gives some indication of the growth in turnover. The company has been in default and the period 09/15 under appeal represents the fifth default since Mr Campling took ownership of the company. It is reasonable to expect that he is familiar
30 with the absolute strictness in the determination of the due date for each VAT period.

23. We note the company has had previous defaults cancelled or reduced by HMRC, for whatever reasons which we have not examined as they do not directly concern this appeal. But the two cancellations and one reduction, and whatever
35 inference Mr Campling may have drawn from them, do not affect our conclusion that a reasonable taxpayer should know that due date means *by* the due date, and not the next possible working day. Sections 59 and 59A refer to the VAT being ‘received in full’ *by the day on which it became due*. It is an unreasonable assumption for a trader to make that if he cannot meet the due date for payment on a Saturday, then the next working day will be adequate for discharging his payment obligation on time. A
40 prudent taxpayer, on knowing that he cannot make a payment on a Saturday, would have made it on the Friday, and indeed Mr Campling could have made the payment one day earlier, as he was back in the country at 7am on Friday 6 November 2015.

24. Mr Campling also referred to cash flow as a reason not to pay one day earlier than required. In terms of cash flow, a VAT registered trader to some extent has

5 enjoyed the advantage of cash flow by holding on to the VAT receipts from customers for a period up to four months before he needs to pay them over as his VAT liabilities. The fact that the VAT receipt by a registered trader should become his VAT 'liability' in due course is an ultimate reminder that the trader is 'the temporary custodian' of the 'money destined for the Exchequer' (Nolan LJ in *Salevon* at 911).

25. On the matter of proportionality, this Tribunal does not have jurisdiction to consider issues concerning proportionality in terms of fairness or reasonableness in the judicial review sense, as there is no statutory authorisation in this respect.

10 26. Applying the principles from *Total Technology*, the penalty is not disproportionate even if it does not distinguish between lateness by a day, a week or even a month because the surcharge penalty is 'for failure to file and pay by the due date, not for delay after the due date' (at [89]). The scaling in the surcharge regime is therefore not by reference to the number of days a payment is made late, but by the number of defaults in a surcharge rolling period, which gives rise to an escalating percentage of surcharge rate, at 2%, 5%, 10% and 15%, in proportion to the number of defaults in a rolling period. The Upper Tribunal decision in *Trinity Mirror* supports the conclusions reached in *Total Technology*, and states that the surcharge regime, viewed as whole, is a rational scheme that does not infringe Convention Rights or the principle of proportionality under EU law.

20 **Decision**

27. For the reasons stated above, the appeal is dismissed. The surcharge penalty of £1,231.27 for the period 09/15 is confirmed.

25 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 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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**DR HEIDI POON
TRIBUNAL JUDGE**

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