



**TC05403**

**Appeal number: TC/2016/01129**

*VAT default surcharge - payment made two days late - the Appellant had subcontractors to pay and a financial limit on bank transfers - whether reasonable excuse - no - whether penalty disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**CONCRYL LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER JOHN COLES**

**Sitting in public at Fox Court, Brooke Street, London on 13 July 2016**

**Ms Nicky Lyon, of Chartwells Chartered Accountants, for the Appellant**

**Ms Akua Adusei, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### **The Appeal**

1. Concryn Limited (“the Appellant”) appeals against a Surcharge Liability Notice issued by HMRC on 14 November 2014 in respect of VAT period 09/14 and a default surcharge of £586.04 issued on 13 February 2015, in respect of VAT period ended 12/14; in each case the Appellant having failed to submit, by the due date, payment of VAT due.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payments.

### **Background**

3. The Appellant registered for VAT on 24 September 2001. Its main business is that of a Resin Floor Contractor. The director is Mr D Kerr.
4. The Appellant was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg. 25(1) and Reg 40(1) VAT Regulations 1995.] The Appellant’s preferred method of payment was via the Faster Payment Service (“FPS”).
5. 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. 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 second default the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the third, fourth and fifth defaults.
6. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for electronic filing and payment.
7. If payment is by direct debit HMRC will automatically collect payment from the business’s bank account three bank working days after the extra seven calendar days, following the standard due date.
8. The Appellant entered the VAT default surcharge regime in period 09/14 when a non-financial Surcharge Liability Notice was issued for a first default. The period 09/14 had a due date of 7 November 2014 for electronic payments and electronic VAT submission. The return was received on 30 October 2014 and payment was

received in three instalments on 5 November 2014, 6 November 2014 and 9 November 2014. Two payments of £20,000 were made prior to the due date and the balancing payment £11,916.49 was paid on 9 November 2014, being two days later than the due date. No penalty was issued because it was a first default.

5 9. The period 12/14 had a due date of 7 February 2015 for electronic payments and electronic VAT submission. The return was received on 2 February 2015 and payment was received in three instalments on 2 May 2015, 5 August 2015 and 6 August 2015, being respectively 84 days, 179 days and 180 days later than the due date.

10 10. A penalty in respect of the second default was issued at 2%. The surcharge was calculated at 2% of the VAT due of £29,302.48.

11. 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: -  
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‘(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 –

20 (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

25 (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.’

12. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -  
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‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

35 Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

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

### **Appellant's contentions**

14. The Appellant's grounds of appeal are that:

- 5                   • The VAT for period 09/14 was late because of bank transfer limits.
- The VAT due for period 09/14 was £51,916.49. £40,000 had been paid on time. The sum of £11,916.49 remained outstanding at the due date and was paid on 9 November 2014, only two days late. The penalty is therefore disproportionate.
- 10               • A surcharge liability notice should therefore not have been issued.
- The second default should therefore only have attracted a first Default Surcharge Notice.

15               15. At the hearing Ms Lyon explained that, having taken their clients further instructions, the Appellant had subcontractors to pay on 7 November 2014 and because of the £20,000 bank limit on payments unfortunately had to make a choice between making payments to subcontractors or HMRC. She agreed that if the Appellant was aware of the payment limit it should have allowed for that by, for example, making payment early or coming to some form of arrangement with their bank. She also accepted that the Appellant could have contacted HMRC and  
20 requested time to pay. Unfortunately the proprietors were not aware that it was possible to do that.

16. Ms Lyon said that she was aware of another case where HMRC considered similar circumstances as a reasonable excuse.

### **HMRC's contentions**

25               17. The period 09/14 had a due date of 7 November 2014 for electronic VAT payments and returns. The VAT return was received on time. The Appellant paid its VAT electronically by FPS. The tax due was £51,916.49. The sum of £11,916.49 was paid two days late. As the payment was received late the Surcharge was correctly imposed.

30               18. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 01/14 Surcharge Liability Notice.

19. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

35                                   *“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.”*

20. The reverse of each notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).
- 5 21. The requirements for submitting timely electronic payments can in any event be found:
- In notice 700 “the VAT guide” paragraph 21.3.1 which is issued to every trader upon registration.
  - On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
  - On the E-VAT return acknowledgement.
- 10 22. The Surcharge has therefore been correctly issued in accordance with the VAT Act 1994 s 59(4), payment having been received by HMRC after the due date.
- 15 23. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellant made no contact with HMRC prior to the due dates for payment and did not make any request for a time to pay arrangement.
- 20 24. One of the grounds of appeal is that the final instalment was late due to the limit set by the bank. This would suggest that the Appellant was aware that there was a limit on its bank transactions. This being the case, HMRC would expect the Appellant to have measures in place so that payment for the total liability would be made, albeit in instalments, by the due date.
- 25 25. The Appellant says that the balancing payment of £11,916.49 could not be made on 7 November 2014 due to the bank payment limit. The first two part payments were each in the sum of £20,000.00 on 5 and 6 November 2014, which it would seem was the daily payment limit on the Appellant’s account. The final payment was for £11,916.49 which was under that limit. If the Appellant had subcontractors to pay it should have contacted HMRC and asked for time to pay. The Appellant’s bank statements show that they were clearly not short of funds so they could have also paid early, for example on 4 November 2014.
- 30 26. Surcharges issued under VATA 1994 s 59 are a penalty based solely on the amount of VAT paid after the due date, no matter the length of delay. The rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount because of mitigating circumstances.
- 35 27. The Surcharge Liability Notice issued for the period 09/14 is not appealable as being disproportionate under VATA 1994 s 83 because there was no financial value attributable to the Liability Notice.
28. The Appellant says that the surcharge is unfair given the two day delay which occurred. The case of *Total Technology (Engineering) Limited v HMRC* [2012] UKUT 418 (TCC) (“*Total Technology*”) was heard in the Upper Tribunal when it was held that:

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- 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
  - 2) The Tribunal found that the DS penalty does not breach EU law on the principle of proportionality.
  - 3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:
    - 10 (a) The number of days of the default
    - (b) The absolute amount of the penalty
    - (c) The ‘inexact correlation of turnover and penalty’
    - (d) The ‘absence of any power to mitigate’

15 The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality.

20 29. The issue of proportionality was further considered by the Upper Tribunal in *The Commissioners for Her Majesty’s Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 421 (TCC) (“*Trinity Mirror*”). That decision creates a binding precedent on appeals before the First-tier Tribunal considering issues of proportionality.

30. In *Trinity Mirror* the Upper Tribunal stated that:

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- The default surcharge regime, viewed as a whole, is a rational scheme (In agreement with the decision of the Upper Tribunal in *Total Technology* (paragraph 65);
  - 30 • Using the amount unpaid as the objective factor by which the amount of surcharge varies is not a flaw in the system; to the contrary, it is appropriate as the achievement of the aim of fiscal neutrality according to EU law depends on the timely payment of the amount due (paragraph 65);
  - 35 • Whilst it could not absolutely rule out the possibility that a default surcharge might be disproportionate, given the structure of the regime, this is likely to occur only in a wholly exceptional case.(paragraph 66);
- It could not readily identify characteristics of a case where a challenge to a default surcharge (on grounds that the surcharge is disproportionate) would be likely to succeed (paragraph 66);
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- it did not endorse the suggestion that exceptional circumstances that might give rise to a disproportionate penalty could include cases such as *Energys* [2010] UKFTT 20 (TC) where there had been what was described as a 'spike' in profits for a particular VAT period for which the surcharge had been imposed, even if the consequent liability for VAT was of a different order of magnitude than was normal for the trader concerned(paragraph 67);
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- it accepted that the scheme of the default surcharge regime is to impose a penalty for failing to pay VAT on time, and not to penalise further for any

subsequent delay in payment (paragraph 68), in line with the decision of the Upper Tribunal in *Total Technology* (in particular paragraph 88);

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- The surcharge of £70,906.44 incurred by *Trinity Mirror PLC* could not be regarded as disproportionate by reference to EU law or the European Convention on Human Rights (paragraphs 71 and 72).

10 31. HMRC contends that the Upper Tribunal judgement in *Trinity Mirror* supports the position that the default surcharge in respect of the late payment of VAT for the accounting period 12/14 is not disproportionate and therefore complies with EU law [and the European Convention on Human Rights].

### **Conclusion**

15 32. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

33. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period.

20 34. For the reasons argued by HMRC and set out in paragraphs 23 - 25 above the Appellant does not have a reasonable excuse for the late payment of VAT in that period of 09/14.

25 35. With regard to the default in period 12/14, the Appellant also says that the surcharge is unfair and disproportionate. For the reasons submitted by HMRC and set out in paragraphs 28 - 31 above, this is not a ground of appeal which can be considered by the Tribunal.

36. The burden of proof is on the Appellant to show that he has a reasonable excuse for the late payment of VAT for the periods 09/14 and 12/14. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

37. The appeal is accordingly dismissed and the surcharges upheld.

30 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  
35 "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**

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**RELEASE DATE: 20 OCTOBER 2016**

10 Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal)  
(Tax Chamber) Rules 2009 on 18 October 2016