



**TC05436**

**Appeal number: TC/2015/02166**

*VAT – default surcharge – reasonable excuse – whether confusion as to due date is a reasonable excuse – no – whether late payment by client amounted to reasonable excuse – no – whether hypothetical argument that invoicing could have been arranged differently amounted to a reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CUMBERLAND CONSTRUCTIONS LIMITED                      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE FAIRPO**

**Sitting in public at Fox Court, London on 27 January 2016**

**The Appellant did not attend and was not represented**

**Mr Ratcliff, presenting officer for the Respondents**

## DECISION

1. The appellant had advised by email that they would not attend and that the hearing should go ahead in their absence.

2. Having due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”), the Tribunal decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules.

### 10 The appeal

3. The appellant appeals against a default surcharge of £18,462.67 for the VAT period 10/12.

### Background

4. At the time of the VAT period under appeal, the appellant had been in the default surcharge regime for the previous three periods due to late payment of VAT. The payment for the 10/11 period had been made 5 days late, and a surcharge liability notice was issued; the payment for the 01/12 period had been made 16 days late, and a 2% default surcharge was issued; the payment for the 04/12 period had been made 15 days late, and a 5% default surcharge was issued.

5. The payment for the 10/12 period under appeal was due for payment on 7 December 2012, as the appellant filed the corresponding VAT return electronically. The return was filed on 28 November 2012, on time, but payment was not made until 14 December 2012. The payment was made by CHAPS and was, accordingly, 7 days late. As this was the third default following the issue of the surcharge liability notice, a 10% default surcharge of £18,462.67 was issued.

6. On 11 January 2013, the company appealed against the surcharge for the 10/12 period.

### Relevant law

7. Under the Value Added Tax Regulations 1995 (“VAT Regulations”) a VAT return must be submitted and payment made to HMRC, “on the last day of the month next following the end of a period to which it relates”. However, where returns are submitted electronically, HMRC has exercised its discretion under Regulation 25A of the VAT Regulations to allow an additional seven days after the end of the calendar month when payment would normally fall due (together with a further three days when the VAT is collected by direct debit) for submission of the return and payment.

8. Section 59 of the Value Added Tax Act 1994 (“VATA”) provides that a person who has not paid the VAT by the due date shall be served a liability notice. If having received a liability notice a subsequent VAT payment is not submitted or paid by the

due date he shall be liable to a surcharge equal to the “specified percentage of his outstanding VAT for that prescribed accounting period”. Under s59(5) VATA 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.

5 In relation to the first default the specified percentage this is 2% which increases to 5%, 10% and 15% for the second, third and fourth default respectively.

9. However, if the Tribunal is satisfied that there was a reasonable excuse for the late payment of VAT s 59(7) VATA provides that:

10 ... he shall not be liable to the surcharge ... and shall be treated as not having been in default in respect of the 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).

10. The legislation does not provide a definition of a “reasonable excuse” which is “a matter to be considered in the light of all the circumstances of the particular case”

15 (see *Rowland v HMRC* [2008] STC (SCD) 536).

11. Additionally, a taxable person is not liable to a default surcharge if he has a “time to pay” arrangement with HMRC provided that the arrangement is made before the date when the VAT is “due and payable” (see s 108 Finance Act 2009).

#### **Appellant’s evidence and submissions**

20 12. The appellant’s notice of appeal sets out the following ground of appeal:

(1) The appellant issues full VAT invoices “at the time of valuations from our clients not applications for payment as we should [have] done”. The appellant suggests that they could have issued a credit note for the invoices which had not been paid in the VAT period and reissued applications for payment, which

25 would have meant that the relevant VAT would not have been due until the period 01/13.

13. In correspondence with HMRC on 11 January 2013 and 12 January 2013, requesting review of the surcharge, the appellant also raised a number of other points. In the absence of the appellant at the hearing, these points have also been considered

30 as submissions by the appellant:

(1) The appellant was under the impression that the VAT payment was not due until 14 December 2012;

(2) The appellant was suffering from severe cashflow issues as a major client had not paid an invoice by the date promised; emails were attached to the

35 correspondence to demonstrate this;

(3) The surcharge was rather harsh and the appellant should not be penalised for a genuine mistake.

## **Respondent's evidence and submissions**

### *Due date for payment*

14. The Respondent ("HMRC") submitted that the acknowledgement provided the appellant on filing the VAT return would have specified the due date. It has been  
5 established in *Garnmoss Limited* [2012] UKFTT 315 that "the Act does not provide shelter for mistakes, only for reasonable excuses" and that confusion as to the due date for payment does not therefore constitute a reasonable excuse.

### *Cashflow difficulties*

15. HMRC submitted that the emails attached to correspondence purporting to show  
10 cashflow difficulties make reference to a payment of approximately £72,000 to be paid in early December, which is presumably the late payment being referred to. However, the amount of VAT due to HMRC for the 10/12 period was £184,626.76: a late invoice payment of £72,000 does not suggest that inability to pay VAT due was wholly due to the late payment of this invoice.

15 16. Further, the appellant had provided details of bank accounts for the relevant period which showed a balance of £198,542.27 at the due date for the VAT payment. HMRC therefore submitted that there was no insufficiency of funds on the due date and that the company had no grounds to claim an inability to pay by the due date.

### *Appeal grounds*

20 17. HMRC submitted that the grounds set out in the appeal to this Tribunal, that the appellant could have arranged its invoicing in a different way, is a hypothetical argument as there is no evidence that the appellant did endeavour to make any corrections or amendments. Accordingly, the VAT due for payment is that shown on the return. HMRC submitted that a hypothetical argument that the VAT payment  
25 could have been different cannot amount to a reasonable excuse for failure to pay the amount shown on the return.

### *Whether surcharge is harsh*

18. HMRC submitted that the case of *Trinity Mirror* [2015] UKUT 421 has  
30 established that the default surcharge regime is rational and unlikely to give rise to a disproportionate surcharge unless exceptional circumstances exist. HMRC submitted that there were no exceptional circumstances in this case and so the surcharge should not be considered to be disproportionate.

## **Discussion and decision**

### *Due date for payment*

35 19. The Tribunal agreed with HMRC and the finding in *Garnmoss* that confusion as to the due date cannot, alone, be regarded as a reasonable excuse. The appellant had

provided no explanation as to how the confusion arose and, indeed, this was the fourth consecutive period in which the appellant had failed to pay the VAT due on time. Having received a surcharge liability notice and two previous surcharges for late payment in those earlier periods, it is difficult to see how the appellant remained  
5 confused as to the due date for payment of VAT.

*Cashflow difficulties*

20. The Tribunal notes that the appellant provided bank statements which confirmed that the appellant had sufficient funds to make the VAT payment on time. Accordingly, the Tribunal considers that the late payment from a client cannot  
10 constitute a reasonable excuse for failure to pay VAT by the due date.

*Appeal grounds*

21. The grounds set out in the appeal document are entirely hypothetical; the appellant explains that invoicing could have been arranged differently but has not suggested that any attempt was made to change invoicing arrangements in that way,  
15 and no amendment to the VAT return has been submitted. A hypothetical argument cannot constitute a reasonable excuse for failure to pay VAT on time.

*Whether surcharge is harsh*

22. The decision of the Upper Tribunal in *Trinity Mirror* is binding on this Tribunal and no exceptional circumstances have been identified to render this surcharge  
20 disproportionate. Accordingly, we consider that the surcharge is fair.

*Conclusion*

23. The appeal is dismissed accordingly and the surcharge of £18,462.67 confirmed.

24. 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  
25 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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**ANNE FAIRPO  
TRIBUNAL JUDGE**

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**RELEASE DATE: 24 OCTOBER 2016**