



TC06804

Appeal number: TC/2017/09279

*VAT – default surcharge – moving premises - whether reasonable excuse –
no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARBLE COMMERCIAL CONTRACTING LTD Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE FAIRPO
MS HELEN MYERSCOUGH**

Sitting in public in Northampton on 23 March 2018

**The appellant was represented by its director, Ms Carstens
Mr Smithson, presenting officer for HMRC**

DECISION

Introduction

- 5 1. This is an appeal against a VAT default surcharge of £9,356.00 arising as a
result of a late payment of VAT for the VAT period 04/17. The payment was made on
7 June 2017 but, as the appellant is in the Payment On Account system for VAT, was
due on 31 May 2017. The seven day extension to the payment deadline is not
10 available to those in the Payment On Account system and so the payment was made
late.
2. The application to the Tribunal was made on 18 December 2017. HMRC issued
a review conclusion letter on 25 September 2017 and so the deadline for appealing to
this Tribunal was 30 days later. HMRC objected to the late application.
- 15 3. The appellant explained that the review conclusion letter had invited them to
submit any further information that would affect the review decision by email and so
they had provided further evidence by email on 5 October 2017. As they had done so,
their understanding was that it was not appropriate to apply to the Tribunal until a
reply had been received.
- 20 4. Although HMRC had replied on 16 November 2017, the letter was not received
by the appellant until 13 December 2017 because HMRC had sent the original to the
appellant's former address. It was only after the appellant chased for a reply that a
copy was received. The appellant appealed as soon as they received that letter, which
advised them that they would need to make an application to this Tribunal to bring a
late appeal.
- 25 5. HMRC replied that the provision of further information was offered for fairness
but was clearly separate to the requirement to notify the tribunal in time.
6. HMRC stated, in approaching the matter on the basis of the five questions in
Data-Select Ltd v CRC [2012] UKUT 187, they considered that only the question of
reasonable excuse needed to be addressed by the Tribunal.
- 30 7. We noted HMRC's statement but nevertheless considered all the circumstances
and concluded that the appellant had given a good explanation in the context of a non-
substantial delay. Further, HMRC had addressed the additional information provided
in their letter of 16 November 2017 and, as both parties had attended the hearing
prepared to address the substantive issues, we considered that there would be no
35 significant prejudice if the application was granted.
8. Balancing the various considerations established in case law, we granted the
application to bring a late appeal and the hearing proceeded.

Appellant's case

9. The appellant provides agency and payroll services to third parties. It is a small business, with two directors and one employee. It has a very high turnover relative to profit because it invoices clients for all payments made to others on their behalf.

5 10. The appellant accepted that payment was made late and that the default surcharge was correctly calculated. The appellant submitted, in summary, that there was a reasonable excuse for the late payment and also that the penalty was disproportionate and also briefly submitted that it was unreasonable for the penalty to be based (in effect) on the appellant's turnover.

10 11. In their grounds of appeal, the appellant submitted that they had a reasonable excuse for the late payment as they believed that they had an additional seven days to make the payment on the basis that payment was made electronically. The relevant filing deadlines had been researched online and it was clear that the due date for payment was one calendar month and seven days after the end of the relevant VAT
15 period.

12. The appellant further explained that, although HMRC's information refers to exceptions to this due date, the example given is the VAT annual accounting scheme. The appellant had not chosen to be in a VAT "scheme" and so thought that this would not apply. Although the appellant was aware that it was required to pay VAT through
20 the Payment On Account system, it believed that this was simply a mechanism to spread the payments and that the payment terms would remain the same. Payment reminders had been set up in this belief as a failsafe; previous payments had been made well in advance and so the failsafe had not been needed before.

13. In the hearing, the appellant further explained that at the relevant time they had
25 moved premises with the new lease starting on 1 June 2017. The move was complicated as they had had a sudden increase in rent on their old premises, with a new landlord requiring double the rent for the property. The directors had to find new premises quickly, as the business could not afford the increased rent. In mid-May 2017, they had found new premises and signed the lease on 18 May 2017. As the
30 lease began in June, they had moved in at the end of May in the week commencing 29 May 2017 as they had access to the premises two days before the lease started.

14. The appellant explained that the business was, accordingly, under substantial time pressure when the payment was due. It had funds available to pay the VAT but, as it was thought that the payment was not due until seven days after the end of the
35 month, there was less focus on making the VAT payment than would otherwise have been the case. They were surprised to receive the penalty notice as they had thought that they had the extra seven days.

15. When asked whether the business had been able to meet other financial commitments during the move, such as the payroll payments, the appellant stated that
40 these had been made on time as the employee was responsible for dealing with them and had been less involved with the move.

16. In addition, the appellant explained that, given their banking limits, the VAT payment has to be made in two instalments on a Tuesday and Thursday. It cannot be paid on a Friday because the business has make payroll payments on behalf of third parties on a Friday and has no capacity to make VAT payments as a result.

5 **HMRC's case**

17. HMRC noted that the appellant had entered the default surcharge regime in the 10/16 VAT period when payments on account were made late. It was submitted that the appellant was therefore aware of the consequences of late payments of VAT, having received a Surcharge Liability Notice as a result.

10 18. The appellant had been within the Payments On Account Regime (POA) since the 07/16 VAT period, and had been issued with a POA Notice of Direction and a Mid Term POA schedule on 12 May 2016 detailing the due dates for payment for the 07/16, 10/16, 01/17 and 04/17 VAT periods.

15 19. The POA Notice of Direction states that businesses in the POA Regime are not entitled to the seven day extension to the due date for payment made electronically. The POA Mid Term Schedule also sets out the due date for payment of the balancing amount for the 04/17 period as 31 May 2017. The leaflet sent with the Schedule also confirmed that the seven day extension for payments was not available for those within the POA regime. HMRC submitted that the appellant had not denied receiving these documents and had produced the Schedule in their own evidence.

20 20. For the 04/17 period, the balancing payment was due on 31 May 2017 and was received on 7 June 2017, and so was made seven days late. A default surcharge of 2% of the VAT due for that period (£3,576,910) was issued, in the amount of £9,356.00, in 18 July 2017 under s59 Value Added Tax Act 1994.

25 21. HMRC submitted that the appellant's case was that they had forgotten to make the payment. Although this was clearly a mistake, HMRC submitted that that does not make it a reasonable excuse and that this had been established in case law such as *Coales* [2012] UKFTT 477 (TC) at §32:

30 "The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse"

22. HMRC also submitted that a similar point was made in *Garmoss* [2012] UKFTT 315 (TC) at §12 where the Tribunal stated that:

35 "What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus this default cannot be ignored ..."

23. HMRC submitted further that:

(1) The appellant clearly understands that they are in the Payment On Account system.

5 (2) Correspondence provided by the appellant from HMRC clearly shows the dates on which payment was due and so the appellant cannot have been unaware that the payment was due by the end of the calendar month following the VAT period.

(3) The move in premises did not affect the appellant's ability to access the Government Gateway and online banking and so there was no good reason for the payment to have been made late.

10 24. HMRC submitted that a move of premises is not an unusual event for businesses. The lease had been signed on 18 May 2017 and so the business had two weeks to make provision to ensure that it met its VAT obligations on time. The VAT return had been received on 10 May 2017 and HMRC submitted that payment could have been made at the same time.

15 25. HMRC submitted that *Clean Car* [1991] VAT TR 234 established that the question of whether there is a reasonable excuse is whether

20 "what the taxpayer did [was] a reasonably thing for a reasonable 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?"

26. HMRC submitted that the appellant's actions in this case do not amount to a reasonable excuse.

25 27. With regard to proportionality, HMRC submitted that the Upper Tribunal in *Trinity Mirror* [2015] UKUT 421 (TCC) held that the default surcharge regime, viewed as a whole, is a rational scheme and that using the VAT unpaid as the objective factor by which the surcharge varies is not a flaw in the system and is appropriate as the achievement of fiscal neutrality required by EU law depends on VAT being paid on time. It would only be in a wholly exceptional case that the default surcharge might be regarded as disproportionate, and the Upper Tribunal
30 could not readily identify characteristics of a case where a challenge to a default surcharge on grounds of proportionality would be likely to succeed.

35 28. HMRC submitted that this Tribunal is bound by the decision in *Trinity Mirror* and that this is not a wholly exceptional case in which the default surcharge could be regarded as disproportionate.

Discussion

29. We considered the parties' submissions and concluded that we do not consider that the appellant has a reasonable excuse for the late payment.

40 30. Although the appellant submitted in the hearing that the payment was late because the business was moving premises, it is clear from the information provided

5 and the evidence that at least part of the reason that they did not attend to the VAT payment on time was because they incorrectly believed that they had an additional seven days to make the payment. That was an error but we agree with the decisions in *Garnmoss* and *Coales* that honest belief and genuine mistake does not amount to a reasonable excuse.

10 31. We also considered the appellant's submissions that the directors' time was entirely taken up with the move so that the move itself was a reasonable excuse for the late payment. We note that the VAT return was filed soon after the end of the VAT period, at a time when the directors were apparently working to find new premises, and the lease for the new premises was signed almost two weeks before the VAT payment was due and ten days before the move actually took place. The business' employee was able to continue making other payments on time, and so the appellant had continuing access to banking and other online systems.

15 32. We agree with the test as to reasonable excuse set out in *Clean Car* and consider that a reasonable taxpayer in the circumstances of the appellant would have made arrangements to ensure that the VAT payment was made on time. Accordingly, we do not consider that the move in premises amounted to a reasonable excuse.

20 33. With regard to proportionality, this Tribunal is bound by the decision in *Trinity Mirror*. We did consider whether the low profits to turnover ratio in this business could make it a "wholly exceptional" case. The appellant's turnover for VAT purposes is high because it accounts for the payroll payments to third parties as principal, instead of treating the payments as disbursements paid on behalf of its clients. The appellant therefore has a high cost of sales and so relatively low profits but we consider that that does not make it "wholly exceptional" so as to enable us to
25 ignore the decision in *Trinity Mirror*.

Decision

34. The appeal is dismissed and the default surcharge upheld.

30 35. 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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**ANNE FAIRPO
TRIBUNAL JUDGE**

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