[2016] UKFTT 130 (TC)

# TC04918

**Appeal number: TC/2015/06295**

***DEFAULT SURCHARGE – VAT paid late – whether reasonable excuse for the delay – no – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**S K AND J CREATIONS LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JANE BAILEY**
**MRS RAYNA DEAN FCA**

**Sitting in public at Centre City Tower, Birmingham on 16 February 2016**

**Mr Jonathan Fraser, director, for the Appellant**

**Mrs Glynis Millward, presenting officer, for the Respondents**

DECISION

## Introduction

1. This appeal is against the imposition upon the Appellant of a default surcharge in the sum of £454.69 under Section 59 Value Added Tax Act 1994 ("VATA 1994"). This surcharge was imposed by the Respondents in respect of the Appellant's failure to pay VAT by the due date for payment for the period ended 06/15.

## Background

2. The Appellant was registered for VAT with effect from May 2013. Following registration the Appellant was due to file VAT returns, and pay VAT, on a quarterly basis.

3. For the period ended 03/14, the Appellant filed its VAT return by the statutory deadline of 30 April 2014. Payment of VAT was due by 7 May 2014 (if made by electronic means) but was not received from the Appellant until 3 June 2014. On 16 May 2014 the Respondents issued the Appellant with a Help Letter, outlining the assistance available if the Appellant was in financial difficulties.

4. For the period ended 06/14, the Appellant filed its VAT return by the statutory due date of 31 July 2014. On 1 August 2014, Mr Fraser telephoned the Respondents to seek a Time To Pay arrangement ("TTP") in respect of the VAT due. The Respondents agreed a TTP with the Appellant for the VAT due for this period.

5. Under the TTP, the Appellant paid the VAT due for the period ended 06/14 in six instalments between August 2014 and January 2015. Some of these instalments appear to have been made later than the Respondents were expecting and it appears, from an email sent by Mr Fraser to the Respondents on 29 October 2014, that at some point between August 2014 and 29 October 2014 the Appellant received what Mr Fraser described as "one threatening warning and one threat to send a debt collector". On 5 December 2014, Mr Fraser emailed the Respondents to inform them that the final payments would be made later than had been agreed, and to complain about "the unwarranted letters sent with threats to reclaim unpaid amounts".

6. For the period ended 09/14 the Appellant filed its VAT return on the due date of 31 October 2014. The Appellant did not pay the VAT due of £1,098.47 until 15 November 2014. This payment was made electronically and so the Appellant's payment was eight days late. According to the Respondents' Ledger Details, on 14 November 2014 the Respondents issued the Appellant with a Surcharge Liability Notice ("SLN").

7. For the period ended 12/14, the Appellant filed its VAT return on 29 January 2015, two days before the due date of 31 January 2015. The Appellant did not pay the VAT due of £3,210.17 until 28 February 2015. This payment was made electronically and so was 21 days late. According to the Respondents' Ledger

Details, on 13 February 2015 the Respondents issued the Appellant with a Surcharge Liability Notice Extension ("SLNE"). Ordinarily a surcharge of 2% of the outstanding VAT would have been charged for a first default following entry into the default surcharge regime but, in the Appellant's case, this would have resulted in a surcharge of £64.20. In accordance with their usual practice where a 2% surcharge would be less than £400, the Respondents did not impose a surcharge.

8. For the period ended 03/15, the Appellant filed its VAT return on the due date of 30 April 2015. The Appellant did not pay the VAT due of £3,508.40 until 18 May 2015. This payment was made electronically and so was 11 days late. According to the Respondents' Ledger Details, on 15 May 2015 the Respondents issued the Appellant with a Surcharge Liability Notice Extension ("SLNE"). Ordinarily a surcharge of 5% of the outstanding VAT would have been charged for a second default following entry into the default surcharge regime but, in the Appellant's case, this would have resulted in a surcharge of £175.42. In accordance with their usual practice where a 5% surcharge would be less than £400, the Respondents did not impose a surcharge.

9. For the period ended 06/15, the Appellant filed its VAT return within time on 31 July 2015. The Appellant did not pay the VAT due of £4,546.98 until 10 August 2015. This payment was made electronically and was three days late. According to the Respondents' Ledger Details, on 14 August 2015, the Respondents issued the Appellant with a Surcharge Liability Notice Extension ("SLNE"). For a third default following entry into the default surcharge regime, the Appellant was issued with a surcharge of 10% of the outstanding VAT. This resulted in a surcharge of £454.69.

10. On 24 August 2015 the Appellant appealed to the Respondents against the imposition of the 10% surcharge in the sum of £454.69. This appeal was rejected. On 16 October 2015 the Appellant appealed to this Tribunal.

**Appellant's submissions**

11. Mr Fraser accepted that the payment for the period ended 06/15 was made late. He made two main points on behalf of the Appellant in support of the Appellant's appeal: that the Appellant had not received any letters to say that there would be a financial consequence to making late payment of VAT, and that once the Appellant had submitted its appeal, no one employed by the Respondents would engage in correspondence with the Appellant. Mr Fraser said that he felt the "small man needed to stand up for himself".

12. Mr Fraser told us that there was no intention on the part of the Appellant to make late payment and that he and his wife (co-director of the Appellant) were well organised and responsible people but they also both had busy lives, working long hours and raising a family. Mr Fraser accepted that taxes should be paid on time but asserted that if the Respondents did not write to let him know that there were consequences to late payment, how could he know that there would be any consequences? Mr Fraser was vehement in stating that the Appellant had not received any notification from the Respondents that a surcharge could be imposed if the

Appellant continue to make late payment of VAT. Mr Fraser's opinion was that the Appellant should be given a warning in respect of the period ended 06/15, and a surcharge should be imposed only if the Appellant was late again in paying its VAT.

13. In relation to the level of engagement on the part of the Respondents, Mr Fraser felt strongly that the Respondents had not taken sufficient steps to correspond with him in relation to the Appellant's appeal. We saw no evidence of any failure on the part of the Respondents to respond to letters sent by the Appellant but, if Mr Fraser continues to feel strongly that the response of the Respondents was insufficient, we encourage him to take his case to the Adjudicator. As we explained to Mr Fraser during the course of the hearing, the Tribunal's jurisdiction is to determine whether the Appellant is liable to pay the surcharge in dispute.

**Respondents' submissions**

14. On behalf of the Respondents, Mrs Millward directed us to Subsection 59(7) VATA 1994, outlining that any person who had a reasonable excuse would not be liable to a surcharge. Mrs Millward then took us to Section 71 VATA 1994, which excluded certain matters from constituting a reasonable excuse.

15. Mrs Millward took us next to Section 7 of the Interpretation Act 1978 and submitted that the SLN and SLNEs which had been posted to the Appellant were deemed to have been served. Mrs Millward confirmed that no post which had been sent to the Appellant had been returned to the Respondents as undelivered post.

16. The Respondents' case was that the Appellant had entered the default surcharge regime when it was late in paying VAT for the period ended 09/14. The Appellant had then been in default for the next three periods. We were shown a copy of the Respondents' Ledger Details for the dates on which the SLN and SLNEs had been sent to the Appellant. Mrs Millward confirmed that the Appellant's returns were all submitted on time.

17. On behalf of the Respondents, Mrs Millward submitted that there was no definition of what constituted a reasonable excuse but that the Respondents considered it should be something outside the Appellant's control. Mrs Millward referred us to *Garnmoss Limited v. HMRC* [2012] UKFTT 315 (TC) in support of the submission that mistakes do not constitute a reasonable excuse. Mrs Millward reminded us that the Appellant was aware that a TTP could be agreed if there were financial difficulties and that the Appellant had an obligation to pay its taxes on time.

18. We were also referred to *HMRC v Trinity Mirror plc* [2015] UKUT 0421 (TCC) in support of the Respondents' submission that the default surcharge regime was not in itself disproportionate or unfair.

**Decision**

19. The onus of proof is first upon the Respondents to establish that the Appellant was in the default surcharge regime and, while in that regime, the Appellant made late

payment of VAT. If we are satisfied this is the case then the onus shifts to the Appellant to satisfy us that it has a reasonable excuse for making late payment.

20. It is agreed that the Appellant was late in paying the VAT due for the period ended 09/14, and so was in default in respect of that period. On the basis of the Respondents' Ledger Details, we are satisfied that a SLN was sent to the Appellant on 14 November 2014. Section 7 of the Interpretation Act 1978 deems service of an item sent by post to have been effected at the time at which the letter would be delivered in the ordinary course of post. We are satisfied that the SLN was served upon the Appellant.

21. It is agreed that the VAT due for the period ended 06/15 was paid late. Therefore we are satisfied that, on the face of it, a surcharge may be imposed for the period ended 06/15. The onus then shifts to the Appellant, and so we consider whether the Appellant has satisfied us that it had a reasonable excuse for making late payment of the VAT due for the period ended 06/15.

22. Mr Fraser accepted that there is an obligation on all taxpayers to pay their taxes on time, and that the Appellant was late in making payment for the periods ended 09/14, 12/14, 03/15 and 06/15. Mr Fraser's explanation for the delay was that he and his wife had slipped up in their administration and that the late payment was accidental rather than deliberate. We do not consider that this explanation constitutes a reasonable excuse for late payment of the VAT due.

23. The other explanation offered for the Appellant's delay in making payment was that the Appellant had not been informed of the consequences of paying late. We do not consider that a lack of awareness that surcharges could be imposed can possibly constitute a reasonable excuse for the Appellant's failure to pay VAT on time. The Appellant was aware that there was an obligation to pay VAT on a quarterly basis and Mr Fraser accepted that VAT should be paid on time.

24. On the basis that the Appellant has not satisfied us that it had a reasonable excuse for its delay in making payment for the periods ended 09/14, 12/14, 03/15 and 06/15, we are satisfied that the surcharge for the period ended 06/15 was correctly imposed at the rate of 10%. We confirm the surcharge in the sum of £454.69.

**Mr Fraser's submissions on relating to receipt of the SLN and first two SLNEs**

25. Although that disposes of the appeal, as Mr Fraser's submissions concerning the Appellant's non receipt of the SLN and the first two SLNEs formed such a large part of his submissions, we consider it appropriate to comment on this point.

26. On the basis of the Respondents' Ledger Details, we are satisfied that a SLN was sent to the Appellant on 14 November 2014, and that SLNEs were sent to the Appellant on 13 February, 15 May and 14 August 2015. Mr Fraser stated that the Appellant did not receive the SLN sent on 14 November 2014 or either of the first two SLNEs.

27. It is extremely difficult for an appellant to prove a negative, and so to assess the likelihood of the Appellant not receiving the SLN and first two SLNEs, we looked at the surrounding circumstances, whether other post from the Respondents had been received by the Appellant, how Mr Fraser had reacted when he received the SLNE of 14 August 2015 and whether there was any reason to doubt what Mr Fraser told us.

28. We asked Mr Fraser if the Appellant had received other correspondence which was in the bundle. Mr Fraser was unable to give us a definite answer, stating first that the Appellant "probably" had received other items but subsequently that he did not know if those items had been received. Mr Fraser confirmed that the address used for service by the Respondent throughout the period of the VAT registration was, and remains, correct.

29. Mr Fraser was adamant that the Appellant definitely had not received the SLN or first two SLNEs stating that, if he had received a notification that the Appellant was being fined, he would have telephoned the Respondents immediately. We note that the SLN and first two SLNEs did not notify the Appellant of a surcharge, as all three explicitly made clear that no surcharge was to be imposed at that time.

30. We looked also at the Appellant's response once it received notification of the £454.69 surcharge to see whether the issue of non-receipt was raised. Although Mr Fraser told us that as soon as he received the surcharge he had immediately made it clear to the Respondents that he had not received any earlier notifications, that is not quite correct – there is no reference is Mr Fraser's letters of 24 August 2015 or 10 September 2015 to the Appellant not having received the earlier SLNEs or SLN. This is despite the template for the SLNE of 14 August 2015 stating:

> We have also extended the surcharge period previously notified to you to [date].

31. If the Appellant did not receive the SLN and first two SLNEs then we would have expected this to be the primary point made by the Appellant in the first two letters of appeal. However, Mr Fraser's letter of 24 August 2015 stated (in full):

> The payment was due on the Friday and we paid the next working day. If you think we are paying over £400 based on that then you have another thing coming.
>
> What about spending your time chasing people who don't pay VAT.
>
> Is it any wonder the general public have the opinion of you that they do when you waste not only my time but taxpayers money paying the postage on rubbish like this.

32. Mr Fraser's next letter, dated 10 September 2015, stated (again in full):

> The letter is an appeal to the previous, unfairly suggested, charge. I did send a response to your original letter through we are yet to receive any

> kind of reply. I also spoke to a Mr Ahmed (HMRC Chesterfield) a day or so after receiving the charge and he suggested that I appeal.
>
> We shall, going forward, make sure that we pay all payments on time. We are a small business and I spend the majority of my time working away from the home address. My wife is the other member of the company and spends her life bringing up 3 children. Please apply common sense and withdraw the charge.

33. It is not until Mr Fraser's letter of 7 October 2015 that the issue of the Appellant's non-receipt of the SLN and first two SLNEs was first raised. In that letter Mr Fraser stated:

> I spoke to a David Cooper, based in Bournemouth, on Monday to appeal the response that we had to say that the original appeal against the late payment fine did not warrant cancellation.
>
> As I explained to Mr Cooper on Monday we have never had a letters (sic), before the one detailing the fine at the end of August, to say that we were on occasion late and continuation could end up with a fine. If we'd have had these letters then, as responsible adults, we would have made certain that payments were made on time and not late in any way.
>
> The original conversation that I had with a Mr Ahmed in Chesterfield alluded to the fact that the likely outcome would be the HMRC giving us the opportunity to make a number of future payments on time or be fined which is something that I deem fair. The outcome to the subsequent appeal was a NO based on absolutely nothing with no explanation. All the payments (5 of the 9) that were late have not been late by month (sic) but days and weeks which hardly classes us as career criminals which is how we are being made to feel.

34. Finally, we considered whether the remainder of what Mr Fraser had told us was credible and whether we could rely upon what Mr Fraser said. In explaining the background to the Appellant's late payment, Mr Fraser told us that he and his wife were scrupulous in ensuring that their bills were paid on time, and Mr Fraser offered us the example of his council tax which he said was paid by direct debit to make sure it was not paid late. When we asked Mr Fraser why he had not set up a direct debit arrangement to ensure that the Appellant's VAT was similarly paid on time, Mr Fraser told us that he did not know when the Appellant's VAT was due and so it was not possible to set up a direct debit. We checked we had heard this correctly, and Mr Fraser insisted that he did not know the dates on which the Appellant was due to pay VAT.

35. This statement is contradicted by Mr Fraser's statements (in his letters dated 24 August 2015 and 7 October 2015) that the Appellant's payment for the period ended 06/15 was only three days late, and that the other payments were late by days and weeks, not months. We note that the extent of the delay was not discernible from the

wording of the template SLNE. We conclude that Mr Fraser must have been aware of the due dates for payment of the Appellant's VAT, in order to know the extent of the delay. Therefore when he told us that he did not know the due dates for payment of the Appellant's VAT, Mr Fraser was not being truthful.

36. Drawing these factors together to consider the likelihood of the Appellant not receiving the SLN and the first two SLNEs, we note:

(a) The Appellant's address remained the same throughout the relevant period;

(b) The Appellant must have received the SLNE of 14 August 2015 as this was the SLNE which notified the Appellant that a surcharge of £454.69 had been imposed and against which the Appellant now appeals;

(c) The Appellant must have received at least two items of correspondence from the Respondents between August and December 2014, as that correspondence was the subject of two email complaints from Mr Fraser;

(d) No post had been returned to the Respondents as being undelivered;

(e) Mr Fraser's explanation that he would have responded to notification of a fine does not mean that the Appellant did not receive the SLN and the first two SLNEs, because those notifications did not notify the Appellant of the imposition of a surcharge;

(f) We would have expected an appellant which did not receive earlier notifications to raise this issue immediately but Mr Fraser did not raise this point in the first two letters of appeal sent on behalf of the Appellant; and

(g) Although Mr Fraser was adamant that the SLN and first two SLNEs were not received, Mr Fraser undermined his own credibility by making a statement to us (on another point) which was demonstrably not truthful.

37. In the circumstances, we do not conclude it is likely that the SLN and first two SLNEs were not received by the Appellant.

## Conclusion

38. We appreciate that Mr Fraser feels aggrieved that the Appellant should have to pay a surcharge in respect of its default when the VAT was paid only three days late. However, neither the competing priorities of a busy life nor failure to appreciate the consequences of late payment constitute a reasonable excuse for the Appellant's late payment of VAT.

39. We are satisfied that the surcharge for the period ended 06/15 was correctly imposed on the Appellant and we confirm that surcharge in the amount of £454.69. The Appellant's appeal is dismissed.

40. 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.

**JANE BAILEY**
**TRIBUNAL JUDGE**

**RELEASE DATE: 25 FEBRUARY 2016**