



Neutral Citation: [2024] UKFTT 00338 (TC)

Case Number: TC09142

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Ashford Tribunal Hearing Centre

Appeal reference: TC/2023/08685

*VAT – default surcharge – reasonable excuse*

**Heard on:** 26 February 2024

**Judgment date:** 17 April 2024

**Before**

**TRIBUNAL JUDGE MCREGOR  
HELEN MYERSCOUGH**

**Between**

**The Good Pack Limited**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Robert Bryer, Direct of The Good Pack Limited

For the Respondents: Mr Gift Nyoni, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This appeal concerned a VAT default surcharge of £1115.41 for the period 01/23 issued to the Appellant, The Good Pack Limited (“TGPL”).

### EVIDENCE

2. We had a document bundle of 90 pages and Mr Bryer gave oral evidence at the hearing.

### LAW

3. Regulation 25(1) of the VAT Regulations 1995 provides that a return must be submitted to HMRC by all VAT registered persons not later than the last day of the month following the end of the period to which it relates.

4. Regulation 40 of the VAT Regulations 1995 states:

“40(2) Any person required to make a return shall pay to the Controller such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.”

5. HMRC has discretion under Regulations 25A(20) and 40 of the VAT Regulations 1995 to allow extra time for the filing of a return and the making of payment when these are carried out by electronic means.

6. For online returns, the standard deadline is extended by seven calendar days (except for Payment on Account and Annual Accounting businesses). The extended due date will be shown on online returns, and also applies to online returns where payment is not required (nil or repayment returns). The legal basis for this extension to due date is a Direction made under regulations 25, 25A(20) and regulation (40)(3) and (4) VAT Regulations 1995.

7. Liability to default surcharge is governed by Value Added Tax Act 1994 (“VATA 1994”), s 59, the material parts of which are set out here:

(1) Subject to subsection (1A) below, if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

(a) the Commissioners have not received that return, or

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

...

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(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

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

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 (and, accordingly,

any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

...

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

8. The interpretation of reasonable excuse is found in section 71 of VATA 1994:

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

#### **BACKGROUND FACTS**

9. The following background facts were not in dispute:

(1) The Appellant is a taxable person and has been registered for the purpose of VAT with effect from 01 January 2012.

(2) The Appellant submits VAT Returns on a quarterly basis.

(3) The first relevant period was the period 10/22 which covered 01 August 2022 – 31 October 2022.

(4) The return for period 10/22 was received on 2 December 2022.

(5) On 14 December 2022, TGPL requested a time to pay arrangement in respect of the VAT due for the 10/22 period. HMRC agreed to an arrangement for 12 monthly payments ending in December 2023.

(6) The second relevant period was the period 01/23 which covered 1 November 2022 to 31 January 2023.

(7) The return for period 01/23 was received on 8 March 2023 and the VAT was paid to HMRC on 15 March 2023.

(8) On 5 April 2023, TGPL requested a review of the decision to issue the surcharge for the period 01/23.

(9) On 30 May HMRC issued a Review Conclusion Letter which upheld the surcharge.

(10) On 8 June 2023, TGPL requested a further review.

(11) On 16 Jun 2023, HMRC issued a further letter upholding the surcharge.

(12) On 22 June 2023, TGPL submitted a notice of appeal to this Tribunal.

**PARTIES ARGUMENTS**

10. Mr Bryer submitted that:

- (1) HMRC were being unreasonable over an 18 month period, subjecting his business to a barrage of challenges, including anti-money laundering investigations, refusal of their research and development claims and now default surcharges;
- (2) The period after the mini-budget was a very bad period for his business because of the impact on interest rates;
- (3) They had had troubles with their book-keeper;
- (4) He had tried to phone HMRC to ask for help, but by the time they said no, the VAT was already late;
- (5) The system had tried to take the direct debit from TGPL's but the payment bounced as the funds weren't available, however, this meant that he wasn't able to make a payment using the online system because it showed nothing being payable on that day;
- (6) He paid the VAT due but his thanks from HMRC was to fine him over £1000

11. HMRC submits that:

- (1) by submitting their VAT return after the due date and failing to pay their VAT liability by the due date the Appellant failed to comply with VATA 1994 and the VAT Regulations 1995.
- (2) the Appellant failed to pay VAT due for Period 10/22 by the due date and so was issued with a surcharge liability notice ("SLN").
- (3) The SLN gave a surcharge period of 17 December 2022 – 31 October 2023.
- (4) the Appellant subsequently failed to make payment and file their VAT return for Period 01/23 by the due date and so became liable to a surcharge at 2% as it was within the surcharge period.
- (5) The total amount of the outstanding VAT was £55,770.35 and so the penalty charged was £1115.41.
- (6) The Surcharge Liability Notice of Extension (SLNE) notified the Appellant that the surcharge period was extended until 31 January 2024.
- (7) the rates of penalty have been calculated in line with the legislation.
- (8) In the absence of any statement from the Appellant to the contrary, the Respondents position is that the notices have been served and they have been received by the Appellant.

12. With regards to the question of whether TGPL had a reasonable excuse, HMRC invites us to apply the principles set out in *Perrin v HMRC* [2018] UKUT 0156. HMRC submits that none of the reasons put forward by TGPL objectively constitute a reasonable excuse:

- (1) TGPL has not provided any evidence that they were suffering from an insufficiency of funds, whether caused by the mini-budget or any other event;
- (2) TGPL has not demonstrated that it tried to secure funding to meet its VAT liabilities;

(3) TGPL requested a second time to pay arrangement in respect of the 01/23 period but it was refused by HMRC. This was because HMRC only allows one time to pay arrangement to be in existence at one time and there was already such an agreement in place for the 10/22 period. Mr Bryer had been informed of this when setting up the first time to pay arrangement.

(4) In any event, by the time Mr Bryer sought to arrange the second time to pay arrangement, the VAT due for the 01/23 period was already late and no evidence has been provided of any calls prior to that date.

(5) The short period of delay is still treated as a delay that can give rise to a surcharge, as set out in *Trinity Mirror v HMRC* [2015] UKUT 421.

(6) The issues with book-keeping have not been explained;

(7) Reliance on third party advisers, or the changeover between them, cannot be relied upon as a reasonable excuse because the directors have ultimate responsibility for the timely submission of the return and the payment of VAT due.

#### DISCUSSION

13. My Bryer accepted that there were two successive late VAT payments for the periods 10/22 and 01/23 and that the time to pay arrangement for the first period had not commenced until after the payment was first due.

14. On that basis, the conditions for TGPL to be within a surcharge liability period and for a penalty to be issued for the second late payment were met.

15. The amount of the surcharge was calculated at 2%, which is in accordance with the statutory scheme and the percentage has been correctly applied to the late paid VAT.

16. Mr Bryer also did not dispute that he received the surcharge liability notice, as evidenced in his initial request for a review dated 5 April 2023.

17. The remaining questions therefore relate to whether TGPL had a reasonable excuse for the late payment and/or whether we can waive or reduce the penalty on other grounds, such as fairness or proportionality.

18. On reasonable excuse, we apply the principles set out in *Perrin*. We are reminded of this summary of the law on reasonable excuse at paragraph 70 of the Upper Tribunal's decision:

“the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer.”

19. The Upper Tribunal went on to give guidance about the sufficiency of a reasonable excuse argument, at paragraph 71:

“In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times.”

20. Finally, the Upper Tribunal set out guidance about the process this Tribunal should follow:

- (1) first, establish what facts the taxpayer asserts give rise to a reasonable excuse;
- (2) second, decide which of those facts are proven;
- (3) third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, e.g. by asking the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

21. We consider first the assertion that trading conditions caused by the mini-budget could be a reasonable excuse. Mr Bryer explained that the increase in interest rates that followed the mini-budget had caused a number of property transactions to fall through and that this had had a consequent effect on the company’s trading position. While we accept as a general matter that changes to mortgage market conditions can have an adverse effect on a business operating in the estate agency business, we did not see or hear any specific evidence of the impact on TGPL and its business, nor an explanation or evidence of how or why this impact continued until March 2023. We therefore find that this fact is not proven under the second limb.

22. Mr Bryer explained that his book-keeper for at least the 10/22 period was very last minute and so the amount of VAT that was payable in respect of that period was double the usual VAT payment. He explained that this was due to an unusually high number of non-VAT registered agents being brought into the company. He said that he had now taken over the book-keeping himself but he wasn’t sure if he had taken over by the time of the 01/23 return.

23. Once again, the evidence of the book-keeper’s contribution to the issues and delays were not compelling and, coupled with the fact that Mr Bryer wasn’t sure whether this had continued during the submission of the second period’s return, we find that this fact was also not proven.

24. The statement that a direct debit had bounced is clearly corroborated by contemporaneous evidence, including in the telephone call made to HMRC. However, the fact that there were not funds in the account to pay the VAT cannot by itself constitute a reasonable excuse. Mr Bryer argued that he couldn’t make another payment that day because HMRC’s systems did not reset until the next day when it became apparent that the payment had failed.

25. However, by the time that the direct debit payment failed, the VAT payment was already late. The evidence also confirms that Mr Bryer knew that the payment would fail because there weren’t funds in the account.

26. A prudent taxpayer in TGPL’s position, a taxpayer with an existing surcharge liability period and a time to pay arrangement in place which relied on continuing to make payments on time, should have put systems in place to ensure that the direct debit did not bounce and the return and payment were made on time. Therefore the bouncing of the direct debit cannot amount to an objective reasonable excuse.

27. Finally, Mr Bryer asserted that he had tried to call HMRC before the due date to discuss his options. Again, the burden of proof is on Mr Bryer to show that he did this and what the purpose of the phone call would have been.

28. The statutory due date was 28 February 2023, but this is extended by 7 days for electronic returns and payments, which would have been 7 March 2023. The return was filed

on 8 March and the payment was made on 15 March. The recorded phone call by Mr Bryer was made on 10 March.

29. Mr Bryer has not provided any evidence that he tried to call HMRC prior to 7 March 2023 or that he attempted to make any payment prior to 15 March 2023, therefore he has not proven the fact he attempts to rely on to provide a reasonable excuse defence.

30. Therefore we find, taking into account all the circumstances of this case, that TGPL did not have a reasonable excuse for the late payment.

31. Finally, Mr Bryer sought to argue that the surcharge was unfair. HMRC pointed us to the decision of the Upper Tribunal in *Total Technologies v HMRC* [2012] UKUT 418, where they decided that the default surcharge regime as a whole is not disproportionate. They also concluded that they were entitled to consider the proportionality of an individual penalty, but that in that case the penalty was not found to have been disproportionate.

32. They took into account the short delay, the absolute amount of the penalty, the inexact correlation of turnover and penalty and the absence of any power to mitigate the penalty. In TGPL's case, the number of days delay was over a week. The absolute amount was £1115.41. While this is a not inconsiderable sum, in the context of a business of TGPL's size, with two quarterly VAT bills in excess of £50,000, it does not constitute such a large figure as to be inherently disproportionate. We also do not consider that there are any other elements of TGPL's surcharge that render it inherently unfair or disproportionate.

#### **DISPOSITION**

33. For the reasons give above, we uphold the default surcharge, as issued.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

34. 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.

**ABIGAIL MCGREGOR  
TRIBUNAL JUDGE**

**Release date: 17<sup>th</sup> APRIL 2024**