



TC02093

Appeal number: TC/2011/03409

VAT- failure to pay VAT on time – time to pay agreement expired before payment of VAT – further time to pay agreement not within section 108 Finance Act 2009 as not entered into before default arose – no reasonable excuse for failure – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLAREMONT EXECUTIVE SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: CHAIRMAN HENRY RUSSELL OBE
NICHOLAS ALEKSANDER**

Sitting in public at 45 Bedford Square, London WC1 on 20 July 2011

Mr Jason Ipekdyan, managing director, for the Appellant

Mr Bruce Robinson, HM Inspector of Taxes, for the Respondents

DECISION

The appeal

5 1. Claremont Executive Services Limited (“Claremont”) appeals against a default surcharge penalty of £5,077.48. The penalty was imposed by the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) because the tax for the accounting period ending on 30 November 2010 was not received by the due date. As the return was made electronically, the due date was 7 January 2011.

10 2. According to the HMRC’s schedule of default, five separate payments of the tax due were made on 22/02/11 (£3849.87), 08/03/11, 15/03/11, 22/03/11, 29/03/11 and all were paid by BACS. In view of the history of previous defaults the rate for the surcharge is 15%.

The legislation

15 3. Section 25 of the Value Added Tax Act places the obligation to pay VAT by reference to accounting periods:

25(1) A taxable person shall—

(a) in respect of supplies made by him, and

20 (b) in respect of the acquisition by him from other member States of any goods, account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

25 4. Section 59 provides for surcharges in the event of default of payment of VAT. Subsection 59(1) states a taxpayer is in default if payment of VAT is late:

59(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

30 (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.

35 5. Subsection (4) provides for a surcharge to be levied at the amount of VAT at the percentage listed in subsection (5):

(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,

5 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.

10 (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;

15 (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

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

6. Subsection (7) provides for appeal to the tribunal:

25 (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

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

35 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).

40 7. Provision for deferring payment of tax in certain circumstances is made in s108 of the Finance Act 2009,

108 (1) This section applies if —

- (a) a person (“P”) fails to pay an amount of tax within the Table in subsection (5) when it becomes due and payable,
- (b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and
- 5 (c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”).
- (2) P is not liable for a penalty for failing to pay the amount mentioned in subsection (1) if —
- 10 (a) the penalty falls within the Table, and
- (b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.

The evidence

- 15 8. A bundle of documents was produced by HMRC. We heard oral evidence from Mr Jason Ipekdyan, managing director of Claremont, whom we found to be a reliable witness and we accept his evidence.

The facts

Claremont’s business

- 20 9. Claremont’s business is the hire of luxury cars and they have been trading since 1988. They encountered trading difficulties in the last two years, since when the directors have taken a 25% reduction in salary and two employees have been made redundant. The summer months were generally the best months for trading and consequently were the most profitable for the business.

Tax liabilities and the bank loan

- 25 10. On May 26 2010, Claremont applied to the Royal Bank of Scotland (“the Bank”) for a loan of £125,000 to pay their arrears of PAYE and VAT. The Bank agreed in principle and informed Claremont that the loan would be processed in four to six weeks.
- 30 11. Further discussions and negotiations about the loan took place between Claremont and the Bank. Mr Ipekdyan referred at the hearing to the Bank’s request for a debenture, which Claremont did not wish to accept. The subsequent negotiation resulted in a two month delay in processing of the loan, and Appellant agreed to accept the debenture. In October the Bank asked Appellant for further details.
- 35 12. On 29 October 2010, Claremont wrote to the HMRC and informed them of a current outstanding VAT liability of £79,517.70, of which a first instalment of £40,000 was due by 31 October. They explained they had applied for a loan from the

Bank, which had been approved, but would take a further two to four weeks to complete.

13. Claremont wrote again to HMRC on 3 December 2010 to note that £11,000 surcharge on their 08/10 VAT liability and referring to a payment plan for this, as well as their application to the Bank for the loan. This surcharge was cancelled by HMRC's letter to Claremont of 24 January 2011.

14. In December 2010 the loan facility was finally agreed, as a loan of £95,000 and a £30,000 overdraft facility.

The return and tax due on 7 January 2011

15. Aware of Claremont's impending VAT liability to pay VAT for the 10/11 quarter on January 7 2011, their solicitor wrote to the Bank, asking the Bank to write to HMRC. On 21 December the Bank wrote to HMRC to state that the bank facility would allow the currently outstanding arrears to be repaid in full, and goes on to state,

"I would ask that you assist the client in deferring any further correspondence for the next couple of weeks whilst matters are dealt with internally and with our documentation team to draw this matter to a conclusion"

16. The HMRC telephone log shows an entry on 13 January 2011 when Neil Fenton from the Bank telephoned and explained Claremont's finance package would take two to three weeks to be finalised. A further telephone log entry on 18 February refers to a call from Mr Ipekdyan to request time to pay on the 11/10 tax due of £33,849.87. Mr Ipekdyan states that this sum was paid on 22 February, following receipt of funds from the Bank.

17. The Notice of Assessment of Surcharge, against which Claremont is appealing, was issued on 14 January. The surcharge was £5077.48, which is 15% of the tax due (£33,849.87). Claremont wrote on 25 February 2011, to HMRC to say they had put a payment plan in place after speaking to a representative of HMRC. They ask that the surcharge is cancelled.

Claremont's arguments

18. Claremont put forward three grounds of appeal:

19. First, that agreement to defer the VAT payment due on January 7 2011 was reached when Mr Anwar of HMRC Debt Management visited Claremont in the week commencing February 14.

20. Second, Claremont has traded for 13 years and it is only in the last two to three years that payment plans have been needed. A surcharge of £5000 will undo their cost cutting and their strategic decisions to make the company profitable

21. Third, the Bank took an unreasonable time to finalise the loan and this had a major impact on Claremont's ability to pay HMRC.

22. On the first ground, Mr Ipekdyan explained at the hearing that Claremont would normally seek to put a deferred payment plan into place when faced with a VAT liability which they were unable to discharge by the due date. In the grounds for appeal and in correspondence, Claremont argued that, following a meeting with Mr Anywar of HMRC at the premises in the week commencing 14 February 2011, a payment plan was accepted and implemented. They wrote to HMRC on 25 February 2011 to say that they he has spoken to a representative from HMRC and put in place the plan which comprised a first payment of £3849.37 and three further weekly payments of £10,000 to pay off the outstanding balance.

23. On the second ground, Mr Ipekdyan explained that they had been in the business of hiring luxury cars since 1988. They had sought to trade out of the recession, and the surcharge would adversely affect the capacity of the business to recover.

24. On the third ground (the matter of the delay of the bank loan) Claremont asserted that, despite every effort they made, the Bank took four months to provide them with the funds, which set them back considerably with their creditors. They state that, in November 2010, they made a formal complaint to the Bank over the handling of their loan application.

20 The HMRC's contentions

25. HMRC contend that the request for a payment deferral plan was not made in time. Mr Robinson for HMRC stated that s108 of the Finance Act 2009 allows a payment plan to be put into place, but that a request to do so must be made before the tax is due. In this case, the request should have been made by the 7 January (the last date for electronic filing and payment of the tax). The request was not made until 18 February. HMRC's record of contacts do not show that Claremont made contact before the due date. HMRC argued that Claremont was advised in a letter dated 3 November 2009 that they were required to agree a payment plan before the due date

26. On the second ground, HMRC argued that the impact of the surcharge on the business is not a relevant consideration. Surcharges are intended to be a deterrent against late payment of tax.

27. On the third ground, the inability of Claremont to pay the tax by the due date, HMRC stated that insufficiency of funds is not reasonable excuse, but the underlying cause of the insufficiency may constitute excuse. The HMRC view is that such a cause would be a major event, such as a major supplier going out of business. The process of negotiating a bank loan was not regarded by them as an exceptional event.

Reasons for the decision

28. The issues before the tribunal are, (1) was there a valid default surcharge, and (2) does Claremont have reasonable excuse for late payment?

29. It is not in dispute that that full payment of the 11/10 quarter was not received by 7 January. Because of the history of previous defaults, as demonstrated by the Schedule of Defaults submitted by HMRC, the surcharge is calculated at 15%.

5 30. Therefore Claremont needs to demonstrate reasonable excuse in order to succeed in the appeal. A time to pay agreement under the provisions of s108 of the Finance Act 2009 would constitute reasonable excuse. Subsection (2) states

“P [a person] is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if –

the penalty falls within the Table, and

10 P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period”

15 31. The request by the Bank for deferring any correspondence for ‘a couple of weeks’ was made on the 21 December, and a generous interpretation of ‘a couple of weeks’ would bring this period to a close on 7 January by which date the tax was due. Claremont did not seek a further agreement until 18 February, which was six weeks after due date. The tribunal does not find there was a time to pay agreement in force.

32. The impact of the surcharge on the business is not a matter which the tribunal can consider.

20 33. The reason for the insufficiency of funds may constitute reasonable excuse if the circumstances were exceptional and could not be foreseen. *Customs and Excise Commissioners v Steptoe* [1992] STC 757 established that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency might do so.

25 34. In the Steptoe case the taxpayer was an electrical contractor, 95% of whose work was for the London Borough of Redbridge, which was an extremely slow payer. The taxpayer was late in making his returns for two periods in a year (11/86 and 08/87). In each case the delay was about two months. He was again in default for the 11/87 period and for the 02/88, 05/88 and 11/88 periods. The excuse put up by the taxpayer
30 for late payment in these periods was cash flow difficulties. That was rejected by the Commissioners, but accepted by the tribunal (on the grounds of Redbridge Council’s conduct in paying late), and, on appeal to the High Court, by the judge.

35 35. The Court of Appeal held that the taxpayer did have reasonable excuse in view of the consistent late payment of invoices by Redbridge Council, so that he was without funds to pay the tax by the due date. Lord Donaldson expressed the test which must be applied in this instance

5 “If the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

10 36. The appellants argued that the insufficiency was caused by considerable delays in finalising the details of the bank loan which had been agreed in principle some months previously. The tribunal's view is that by October (at the very latest) it was clear that the Bank was not going to proceed rapidly with its loan, and should have been alert to the possibility that the grant of the loan could be subject to further delay. Even though the bank had agreed revised terms for the loan in December, given the
15 bank's history of delays and the upcoming Christmas holidays, the appellants were aware of the risk that the loan would not have been advanced in time to make the 7 January VAT instalment. Although the appellants asked the bank to contact HMRC (which they did by letter on 21 December and by telephone on 13 January), they ought also to have made contact with HMRC themselves to request further time to
20 pay in order to avoid the risk of further default surcharges. No such contact was made until 18 February. No such request was made until after the payment date, and for that reason we consider that the appellants do not have a reasonable excuse for their default.

Decision

25 37. Our decision for the matter under determination is that Claremont did not have reasonable excuse for the late payment of VAT for the 11/10 period, and the appeal is dismissed.

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 “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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40 **HENRY RUSSELL**
TRIBUNAL JUDGE

RELEASE DATE: 18 June 2012

