



TC03377

Appeal number: TC/2012/07608

VAT default surcharge – insufficiency of funds – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MALCOLM ABRAM BRANDWOOD

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 MRS MARYVONNE HANDS**

**Sitting in public at Nottingham MJC, Carrington Street, Nottingham on 20
November 2013**

The Appellant did not attend and was not represented

Mr Philip Osborne, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

- 5 1. This an appeal by Malcolm Abram Brandwood ('the Appellant') against a VAT
default surcharge of £609.36, for his failure to submit, in respect of his VAT period
ended 31 March 2012, by the due date, payment of the VAT due. The surcharge was
calculated at 5% of the VAT due of £12,187.27.
- 10 2. The point at issue is whether or not the Appellant has a reasonable excuse for
making late payment.
- 15 3. The Appellant did not attend the hearing. He had earlier written to the Tribunal to
say that due to other commitments he would not be attending and indicated that he
was content for the appeal to proceed in his absence. The Tribunal was therefore
satisfied that the Appellant had been notified of the date, time and venue of the
hearing and that it was in the interests of justice to proceed.

Background

- 20 4. Prior to the default for 03/12, the Appellant had previously defaulted on his VAT
payment in respect of period 09/11, when a VAT surcharge liability notice was
issued, and again in respect of period 12/11. The Appellant had also defaulted for
periods September and December 2009, June, September and December 2010.
- 25 5. Section 59 Value Added Tax Act 1994 ("VATA") sets out the provisions in
relation to the default surcharge regime. Section 59 requires a VAT return and
payment of VAT due on or before the end of the month following the relevant
calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].
- 30 6. Under s 59(1) a taxable person is regarded as being in default if he fails to make
his return for a VAT quarterly period by the due date or if he makes his return by that
due date but does not pay by that due date the amount of VAT shown on the return.
The Commissioners may then serve a surcharge liability notice on the defaulting
taxable person, which brings him within the default surcharge regime so that any
subsequent defaults within a specified period result in assessment to default
surcharges at the prescribed percentage rates. 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. In relation to the first default
the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the
35 second, third and fourth default.
7. HMRC have discretion to allow extra time for both filing and payment when these
are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs 25A
(20), 40(2)]. Under that discretion, HMRC allow a further seven days for filing and
payment. The due date for the 03/12 period was 30 April 2012.

8. The Appellant paid VAT on a quarterly basis usually by BACS. The Appellant's return was received by HMRC on 26 April 2012 and was therefore on time. The VAT was due no later than 7 May 2012. By that date £1,915.44 had been paid leaving a balance due of £12,187.27. Payment was made late by seven BACS instalments
5 between May, June and July 2012, the final balance being paid on 23 July 2012.

9. For the quarter ended 30 September 2011 the Appellant had paid all but £84.56 by the due date. In the quarter ending December 2011, the Appellant had paid his VAT by regular instalments, but still leaving £84.56 outstanding. It follows that had the Appellant paid that amount by 7 November 2011, he would not have been in default
10 for the two earlier quarters and the penalty for the period under appeal would have been much reduced.

10. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59 (7) VATA sets out the relevant provisions : -
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‘(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

20 (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

25 (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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 ..’

11. The burden falls on the Appellant to establish that he has a reasonable excuse for the late payment in question. It is s 59(7)(b) VATA on which the Appellant seeks to rely on the basis that for reasons set out below the VAT was paid late because he was suffering severe cash flow shortages.
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12. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

35 ‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct –

(a) any insufficiency of funds to pay any VAT is not reasonable excuse.’

13. Although an insufficiency of funds to pay any VAT due is not a reasonable
40 excuse, precedent case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

14. The onus of proof rests with HMRC to show that the surcharges were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of a balance of probabilities.

5 Appellant's Case

15. The Appellant does not dispute that his VAT payment for the period 03/12 was due on 30 April 2012, or that he was late making payment.

10 16. In his letter of appeal to the Tribunal, the Appellant said that he had requested a time to pay arrangement but this had been refused by HMRC. He also said that trading had been difficult throughout 2011 and 2012 and that he had tried to pay VAT in advance in order to ensure that his liability was paid on time. He said that unfortunately the "new year business had slumped" and this had prevented him from continuing his regular payments in advance.

15 17. The Appellant said that although his business now seems to have "turned a corner", and most of his workforce had retained their jobs, the penalties charged by HMRC were making matters difficult and only hindering the recovery of his business

HMRC's Case

20 18. The Period 03/12 had a due date of 7 May 2012 for electronic VAT payments. The VAT return was received electronically by HMRC on 26 April 2012 and was therefore on time. The amount due on the tax return was £14,102.71. The payment was made by BACS instalments, each made after the due date late and the final balance was not received by HMRC until 23 July 2012.

25 19. The potential financial consequences attached to the risk of a default would have been known to the Appellant after the issue of the Surcharge Liability Notice in June 2011, given the information contained in the Notice. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

30 'Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.'

20. The requirements for submitting timely electronic payments can also be found -

- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
- 35 • On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

21. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

5 22. Therefore HMRC say that the surcharge has been correctly issued in accordance with VATA 1994 s 59(4).

23. Mr Osborne for HMRC said that the Appellant's stated grounds of appeal were clearly not valid grounds of appeal. The slump in the Appellant's trade, which had an adverse effect on his business, was not a reasonable excuse. It is specifically stated in s 71(1) VATA that an insufficiency of funds is not a reasonable excuse.

10 Conclusion

24. The Appellant was clearly aware of the due date for payments of his VAT and the potential consequences of late payment.

15 25. The Appellant's main ground of appeal is that he was suffering financial difficulties caused by a slump in business. In essence, the reason for the late payment of VAT was insufficiency of funds.

26. In *Customs & Excise Commissioners –v- Steptoe [1992] STC 757* the tax-payer argued that although the proximate cause of his default was insufficiency of funds, the underlying cause of that insufficiency, namely the unexpected failure by a major customer to pay him on time, amounted to a reasonable excuse. The Court determined on a majority that the statutory exclusion of insufficiency of funds as an excuse did not preclude consideration of the underlying cause of insufficiency and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test had to be applied strictly.

27. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure, the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person's exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

35 28. Having considered the Appellant's circumstances and the background facts and circumstances leading up to the default the Tribunal accepts that the underlying cause of the default was a shortage of funds. However a prudent tax person in circumstances similar to that of the Appellant would have put in place appropriate precautionary measures. The VAT due belonged to HMRC and should not have been used as part of the Appellant's cash flow.

29. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal's view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 03/12 period.

30. The appeal is accordingly dismissed and the surcharge upheld.

31. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 24 February 2014