[2017] UKFTT 0661 (TC)

TC06088

Appeal number: TC/2017/01274

VALUE ADDED TAX – default surcharge – payment made late because of mistaken belief that there was an active direct debit in place – whether or not a reasonable excuse – yes – appeal upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPIRAL PACKS (LONDON) LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE TONY BEARE
MRS AMANDA DARLEY

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 16 August, 2017

Mrs Fiona Francis for the Appellant

Miss Fatouma Yusuf, officer of HM Revenue and Customs, for the Respondents

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DECISION

1. This decision relates to a VAT default surcharge in the amount of £16,213.12 to which the Appellant has been assessed in respect of its VAT period 09/16.

2. There is no dispute between the parties in relation to the relevant facts. Those may be summarised as follows:

(a) The Appellant has been within the default surcharge regime since its period 03/15;

(b) The due date for the electronic filing of the Appellant's VAT return in respect of its VAT period 09/16 was 7 November 2016;

(c) The Appellant filed its VAT return for that VAT period early (on 27 October 2016);

(d) The Appellant has in the past experienced difficulties in meeting its VAT payment obligations. It has entered into two Time to Pay ("TTP") agreements under which instalments of its VAT payment obligations have been collected by way of direct debit under the National Direct Debit Service (the "NDDS") – once in respect of its VAT period 12/15 and then again in respect of its VAT period 06/16. Collection through the NDDS involves the establishment of a direct debit covering the specified instalment payments;

(e) Separately, the Appellant has in the past set up five general direct debits ("DDIs") for the purpose of meeting its VAT liabilities, four of which pre-dated the VAT period which is the subject of this appeal and one of which took effect on 26 January 2017 and does not relate to the VAT period which is the subject of this appeal;

(f) Each of the four DDIs that were set up prior to the VAT period which is the subject of this appeal were cancelled because the Appellant had insufficient funds at the bank at the relevant time. On each occasion that a DDI was cancelled, HMRC informed the Appellant of that fact and the fact that, if the Appellant wished to continue to pay by way of direct debit, it would need to set up a new DDI;

(g) When a taxpayer such as the Appellant enters into a TTP agreement with HMRC to which the NDDS applies, it arranges the direct debit in question on the telephone with HMRC. In contrast, where a taxpayer such as the Appellant enters into a DDI, it does so on-line. So, in both cases, the direct debit is established by agreement between the taxpayer and HMRC and HMRC then informs the relevant bank. The only difference is that, in the case of an NDDS direct debit, the arrangement is made on the telephone whereas, in the case of a DDI, the arrangement is made on-line;

(h) Where a VAT payment is made electronically by fast payment ("FPS"), the due date for payment is extended by seven days. In contrast, where a VAT payment is made by direct debit, the payment is collected automatically on the third working day after the extra seven days and can therefore be paid later than where FPS is used;

(i) What that means in this case is that the standard due date for the Appellant to pay its VAT in respect of the VAT period 09/16 was 31 October 2016, if the Appellant were to make its payment by way of FPS, the Appellant would have to pay the relevant amount by 7 November 2016 and, if the Appellant were to make its payment by way of direct debit, the Appellant would have to pay the relevant amount by 10 November 2016;

(j) As noted above, the Appellant had entered into a TTP agreement (and accompanying NDDS direct debit) in respect of its VAT period 12/15. In respect of its VAT period 03/16, it asked HMRC to enter into a further TTP agreement but HMRC refused. Instead, HMRC suggested to the Appellant that it should pay the relevant amount in instalments as soon as it could by way of FPS in each case and the Appellant did this;

(k) In relation to its VAT period 06/16, the Appellant succeeded in reaching a second TTP agreement (and accompanying NDDS direct debit) with HMRC;

(l) The TTP agreement (and accompanying NDDS direct debit) related to the Appellant's VAT period 06/16 and were not applicable to the Appellant's VAT period 09/16. Therefore, the Appellant should either have made its VAT payment in respect of the later VAT period by way of FPS on or before 7 November 2016 or entered into a new DDI in respect of its VAT liabilities in general (in which case it would have been able to pay the relevant VAT by 10 November 2016 without incurring a default surcharge);

(m) In the event, the Appellant assumed that the NDDS direct debit that had been operating in relation to its VAT period 06/16 was an active direct debit and would cover the VAT payment due in respect of its VAT period 09/16. In order to confirm that assumption, the Appellant checked with its bank and was informed that there was an active direct debit in favour of HMRC at the relevant time;

(n) As soon as the Appellant realised that the payment in respect of its VAT period 09/16 was not covered by an active direct debit, which was in the morning of 10 November 2016, it paid its VAT liability in respect of the relevant VAT period in full by FPS later that day;

(o) So the overall result was that HMRC received the VAT due from the Appellant in respect of the relevant VAT period on the same day that HMRC would have received such payment had there been an active direct debit in place but, because there was no such active direct debit in

place and the payment was made by way of FPS, the payment was in fact 3 days late.

3. There is one further agreed fact to be mentioned and that is that a similar problem arose in respect of the Appellant's VAT period 09/13. On that occasion, the previously applicable DDI had been cancelled (and the Appellant had been informed of that fact) but the Appellant was wrongly advised by its bank that the relevant DDI was still active and therefore its payment was late. On that occasion, HMRC agreed to cancel the default surcharge in respect of the relevant VAT period. We mention this prior cancelled default surcharge because the present circumstances are in many ways similar to those which pertained in respect of the VAT period 09/13. On the earlier occasion, the Appellant had been told by HMRC that its existing DDI was cancelled but then received a contrary message on making enquiry of its bank. On this occasion, the Appellant was told by HMRC on entering into the TTP (and related NDDS direct debit) in respect of its VAT period 06/16 that the NDDS direct debit related only to the VAT instalments in respect of its VAT period 06/16 but, again, received a contrary message from its bank.

4. It can be seen from the above summary of the agreed facts that HMRC accepts that the Appellant has acted in good faith and has made a genuine mistake in this case. The only point on which it disagrees with the Appellant is whether that mistake amounts to a reasonable excuse for the purposes of sub-section 59(7)(b) of the Value Added Tax Act 1994. If the Appellant's mistake does amount to a reasonable excuse, then the default surcharge must be cancelled. Otherwise, the default surcharge must stand.

5. Miss Yusuf makes the following points in support of HMRC's proposition that the mistake made by the Appellant does not amount to a reasonable excuse:-

(a) Section 6.3 of Public Notice 700/50 Default Surcharge states that:

"Genuine mistakes, honesty and acting in good faith are not reasonable excuses…";

(b) In paragraph 12 of the Upper Tribunal decision in *HMRC v Garnmoss Limited (t/a Parham Builders)* UKFTT 315 (TC) ("*Garnmoss*"), the Upper Tribunal made the following comment:-

"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 under the provisions of subsection (7).";

(c) The Appellant should have been aware of the difference between a DDI and an NDDS direct debit because it had experience of both types of direct debit. As noted above, before the VAT period in question, the Appellant had set up four DDIs which had subsequently been cancelled and had also entered into two NDDS direct debits pursuant to its two TTP agreements with HMRC. So the Appellant should have known the difference between the two types of direct debit and therefore that the

NDDS direct debit applicable to its VAT period 06/16 covered only the payments due in respect of that VAT period and not all future VAT payments, including the VAT payment due in respect of the VAT period 09/16;

5 (d) Miss Yusuf also points to the Appellant's bank statement covering the relevant period in which it is clear that the direct debit which is in place is an NDDS direct debit;

(e) Critically, Miss Yusuf refers us to the events which took place in respect of the VAT periods 12/15 and 03/16. She points out that there was an 10 NDDS direct debit in place in respect of the earlier of those two VAT periods and yet, when the Appellant sought to satisfy its VAT payment obligations in respect of the later VAT period, it used FPS and did not simply assume that there was an existing direct debit in place. Miss Yusuf points out that this was exactly the same scenario which the 15 Appellant faced in respect of its VAT periods 06/16 and 09/16. The earlier of those VAT periods was covered by a TTP agreement (and accompanying NDDS direct debit), whereas the later VAT period was not. So, says Miss Yusuf, why is it that the Appellant met its VAT payment obligation in relation to 03/16 by way of FPS and yet assumed 20 that there was an active direct debit in place to meet its VAT payment obligation in respect of its VAT period 09/16?;

(f) Miss Yusuf also points out that, on submitting its VAT return for the period 09/16, the Appellant would have received an acknowledgement which states:-

25 "Any tax due must be paid electronically and received by HM Revenue & Customs by [Payment Due Date]. Payment should be made electronically, by Bankers Automated Clearing Services (BACS), Bank Giro Credit Transfer or by Clearing House, Automated Payment System (CHAPS)."

30 This contrasts with the acknowledgement which the Appellant would have received on submitting its VAT return for the period 09/16 if an active DDI had been in place, which would have been as follows:

"The tax due as declared on this return £xxx will be debited from your bank account on xx/xx/xx. If you have submitted this VAT Return on 35 behalf of the VAT Registered entity, you must print this acknowledgement and present to the accountholder/authorised signatory of the account prior the stated Direct Debit collection date."

Thus, says Miss Yusuf, the Appellant should have been aware from the form of acknowledgement which it received to the submission of its 40 VAT return in respect of the relevant VAT period that there was no active direct debit in place and taken steps to make its VAT payment in respect of the relevant VAT period by FPS on or before 7 November 2016; and

(g) Finally, Miss Yusuf directs us to the terms of the letter which HMRC sent to the Appellant in relation to the NDDS direct debit set up in respect of the VAT period 06/16. Although this was not available to us at the hearing, a copy of the letter was kindly provided to us shortly afterwards by Mr. Francis. That letter states at the end of the penultimate paragraph that:

> "This arrangement does not cover future liabilities, which you should pay on time."

6. In support of its proposition that the Appellant's mistake amounts to a reasonable excuse, Mrs Francis makes the following points:

(a) At the relevant time, neither she nor Mr Francis was aware that there was any difference between an NDDS direct debit and a DDI. As far as they were concerned, there was simply either an active direct debit with HMRC or not;

(b) Mrs Francis did in any event confirm with the Appellant's bank prior to 7 November 2016 that there was an active direct debit in place with HMRC;

(c) At the relevant time, Mrs Francis was aware of the fact that sufficient funds were available in the Appellant's bank account to cover the entire VAT payment due in respect of the VAT period 09/16 – a fact which is supported by the Appellant's bank statement – and so she would have ensured that the Appellant paid the full amount by way of FPS on 7 November 2016 if she had had any doubt that there was an active direct debit in place for the purpose of discharging that obligation;

(d) On the basis of her belief that there was an active direct debit in place, Mrs Francis assumed that the instruction about making electronic payment set out on the acknowledgement to the Appellant's VAT return for the relevant period was irrelevant in its case because payment would be made by way of the active direct debit in any event; and

(e) The reason why the Appellant made its VAT payments in respect of the VAT period 03/16 by way of FPS (and did not simply assume that there was an active direct debit in place) is that the circumstances in that case were different because the Appellant did not have the wherewithal to meet its VAT payment obligation in respect of that VAT period in one lump sum. So, once its application for a TTP agreement in respect of that VAT period had been turned down by HMRC, it decided, on the advice of HMRC, to make the relevant VAT payment in instalments as soon as it had the cash to do so. Thus, it made payments in instalments by way of FPS in the belief that, by virtue of its having done so, HMRC would not call on the active direct debit which the Appellant believed to exist at that time. In contrast, in the case of the 09/16 VAT period, the Appellant had sufficient cash to meet its VAT payment obligation in one lump sum and simply assumed that the direct debit by virtue of which its VAT payment obligation in respect of the 06/16 VAT period had been met remained active and would apply.

7. Before setting out our conclusions in relation to this matter, we would make two preliminary observations.

8. The first relates to the ill-health of Mr. Francis during the relevant period. Miss Yusuf said at the hearing that the ill-health of Mr Francis does not amount to a reasonable excuse because Mr Francis had been unwell for some time and the Appellant should have put in place systems to ensure that his role in relation to the VAT obligations of the Appellant were properly fulfilled by some other person or in some other way. But we believe that the issue which arises out of Mr Francis's ill-health is a little more nuanced than that.

9. It appeared to us at the hearing that Mrs Francis was not seeking to rely on Mr Francis's ill-health to justify the mistake that had been made. Instead, she simply explained that that was the reason why she was performing Mr Francis's role in relation to the VAT obligations of the Appellant's affairs. Her position appeared to us to be that the same default could easily have occurred even if Mr Francis had been in good health and playing a full role in the Appellant.

10. It seems to us that the relevance of Mr Francis's ill-health is not so much that the wrong person was dealing with the VAT affairs of the Appellant but more that Mr and Mrs Francis were having to deal with Mr Francis's ill-health in their personal lives and that this might be a factor in why they made the mistake that they did in relation to whether or not the relevant VAT payment was covered by an active direct debit.

11. The second concerns the extract from paragraph 6.3 of Public Notice 700/50 Default Surcharge that is set out above. It seems to us that, as drafted, that summary of the law is a little misleading. It is true that the mere fact that a mistake is genuine and is made honestly and in good faith is not sufficient in and of itself to amount to a reasonable excuse. But that is not to say that such a mistake can never be a reasonable excuse. It is perfectly possible for a person acting reasonably and prudently to make a mistake which it is reasonable to make and, in that case, the mistake could be a reasonable excuse. We therefore agree with the statement made by the Tribunal in *HMRC v County Inns Limited* [2015] UKFTT 204 (TC) that "a mistake that has been made reasonably is, in principle, capable of being a reasonable excuse".

12. Turning to our conclusion, we have found the position in this case to be very finely-balanced.

13. On the one hand, HMRC can fairly point to the fact that the letter which confirmed the existence of the NDDS direct debit in respect of the VAT period 06/16 did state that the relevant direct debit did not apply to the future VAT liabilities of the Appellant. However, we would observe that this statement is not as clearly signposted as it could be, in that it appears at the end of a paragraph dealing with self-assessment liabilities. A recipient of the letter which had entered into the NDDS direct debit in relation to a liability to VAT could be forgiven for assuming that the paragraph as a whole was inapplicable. In our view, a sentence of this significance

ought to be made more prominent and placed in a separate paragraph from a paragraph dealing with self-assessment liabilities. Nevertheless, it is true that the Appellant received a letter from HMRC in which the limitations of the NDDS direct debit were stated and we therefore regard that as the most compelling argument in HMRC's favour.

14. We are inclined to place slightly less weight on the fact that the acknowledgement of the VAT return in respect of the VAT period 09/16 referred to the need for electronic payment whereas the terms of the acknowledgement that the Appellant would have received if it had had an active DDI in place would have referred expressly to that direct debit. This is because, in the first place, the Appellant would have received only the former acknowledgement and would not have had the alternative wording to hand to make the comparison and, in the second place, it is not unreasonable in our view for a person receiving an acknowledgment on such terms who believes that there is an active direct debit in place to regard the terms of the acknowledgement as being "standard form" and therefore inapplicable because of the active direct debit. We also consider that Mrs Francis's explanation of why the Appellant's VAT payments in respect of 03/16 were made by way of FPS and that a similar error was not made on that occasion is reasonable.

15. Notwithstanding the various caveats set out in paragraph 13 and 14 above, we consider that there is sufficient substance in those contentions by HMRC to conclude that, if Mrs Francis had simply assumed that the Appellant's NDDS direct debit in respect of its VAT period 06/16 remained active, that would not have amounted to a reasonable excuse. But, critically, Mrs Francis did not simply proceed on the basis of that assumption. Instead, she took the step of checking with the Appellant's bank before the due date for payment that there was an active direct debit in place. We note that, in paragraph 20 of the *Garnmoss* case to which we were referred by HMRC, the Upper Tribunal noted that, if the taxpayer had been told by the bank in unequivocal terms that its payment would arrive by the due date, then the Upper Tribunal would have found that the taxpayer had a reasonable excuse. There are other examples of cases where a taxpayers mistaken reliance on a statement made by its bank has been held to amount to a reasonable excuse – see *Rodcom Europe Limited v Revenue and Customs Commissioners* (2008) VAT Decision 20874, *Pyments Alcester Limited v HMRC* [2016] UKFTT 461 (TC) and *Nigel Lowe Consulting Limited: Nigel Lowe Holdings Limited v Revenue and Customs Commissioners* [2009] UKFTT 130 (TC). So we think that the fact that Mrs Francis checked with the Appellant's bank before adopting the course of action which she did is of great significance.

16. We note that, consistent with the above cases, HMRC has previously accepted that the Appellant's reliance on an erroneous confirmation from the Appellant's bank (in relation to the Appellant's VAT period 09/13) was sufficient to amount to a reasonable excuse. However, we do not think that this helps us very much in terms of our conclusion because, whilst it might be said that HMRC's position in the current case is inconsistent with its position in relation to the Appellant's earlier VAT period, it might be equally be said that the Appellant should have learnt from its mistake on the previous occasion and that that justifies HMRC's contrary approach in this case.

17. Nevertheless, we do find the suggestion in paragraph 20 of the *Garnmoss* case to be a formidable argument in favour of the Appellant's position. In addition, we are inclined to place some weight on the fact that Mr Francis is clearly suffering from ill-health. Although Mrs Francis has stepped into the breach in terms of fulfilling the Appellant's tax obligations, their personal circumstances are likely to have played a part in whether or not a mistake like the one which occurred was made.

18. After weighing up the competing arguments set out above, we have concluded that the balance of the arguments lies by a narrow margin in favour of the Appellant. We accordingly hold that the Appellant does have a reasonable excuse for its default in this case and we uphold its appeal.

19. Finally, we should observe that the default surcharge in question is a significant amount of money for a business of this nature and that HMRC has not in fact suffered any adverse cash flow consequence as a result of the Appellant's default. (This is because, as soon as it realised its mistake, the Appellant took steps to ensure that the relevant amount was paid by way of FPS on 10 November 2016, which is the date when that payment would have been due if in fact there had been a DDI in place.) Although it is not relevant to the question which we have been asked to consider and has therefore played no role in our reaching our conclusion, the above does suggest that that conclusion has produced a fair result in the circumstances.

20. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 31 AUGUST 2017