TC07654

VALUE ADDED TAX – default surcharges – reasonable excuse – cash flow problems due to compulsory purchase order on land of the appellant or related company – not proved that cash flow problems unavoidable even with appropriate foresight and due diligence – excuse not objectively reasonable - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08159

BETWEEN

BUCKSTONE GROUP LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON
MRS SONIA GABLE

Sitting in public at Alexandra House, Manchester on 27 January 2020

Mr M Dugdale, director, for the Appellant

Ms R Pilgrim, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerned default surcharges totalling just over £16,000 imposed on the appellant company for seven VAT periods in 2016 and 2017; in particular, whether there was a reasonable excuse for the failures to pay VAT when due.

BACKGROUND TO THE APPEAL

2. HMRC decided that the appellant company was liable to default surcharges for six sequential 3-month VAT periods – the 01/16 period to the 04/17 period – and also for the 10/17 period (we shall refer to these seven VAT periods as the "VAT periods in question"). These decisions were confirmed on statutory review by HMRC. The appellant company notified the Tribunal of its appeal against these decisions by notice of appeal dated 10 December 2018.

EVIDENCE

3. We had a hearing bundle containing Tribunal documents, copies of VAT return submissions and other key documents, correspondence between the parties between May 2015 and January 2019, legislation and case law.

4. Mr Dugdale, a director of the appellant company, gave oral evidence at the hearing. As the appellant company had no legal or tax specialist representation at the hearing, and in keeping with the overriding objective of the Tribunal's rules to conduct hearings fairly and justly, we asked Mr Dugdale questions at the hearing in order to elicit the appellant company's case (and then invited HMRC to ask questions in cross examination).

5. The bundle contained a letter from HMRC to Mr Dugdale at the appellant company of 7 January 2019 asking for the following (by 19 January 2019):

> (a) "A breakdown of monies received, per calendar month, from 01 November 2015 to 07 December 2017.
>
> (b) Copy bank statement from 01 November 2015 to 07 December 2017.
>
> (c) A copy of your Bank Facilitation letter, if applicable, detailing the arrangements in place as at relevant due date(s).
>
> (d) Details of any action taken to obtain outstanding payment/credit.
>
> (e) Do you account for VAT via the cash accounting scheme, whereby tax is accounted for on the basis of monies actually received and paid during the period in question?
>
> (f) Do you have a factoring or self-billing agreement? If so please provide full details.
>
> (g) Brief details of your customer base, providing approximate percentages, where possible represented by any major clients.
>
> (h) Details of the usual credit terms, including full details of any staged payment arrangements, if relevant.
>
> (i) A breakdown of your bad debts (by customer) up to the current date.
>
> (j) Please confirm the name of the company that owned the property subject to the CPO
>
> (k) At what date was [the appellant company] made aware of the Compulsory Purchase Order

(l) Details of if/when [the appellant company] relocated and if all of this company or parts of this company relocated.

(m) If applicable, what date did [the appellant company] received (sic) CPO compensation

(n) Has [the appellant company] ceased to trade. If yes on what date did [the appellant company] cease to trade.

(o) Any other information/documentation you wish to be considered."

6. The hearing bundle contained no evidence of a response by the appellant company to the above information request. Some of the requested information was given orally by Mr Dugdale in response to the Tribunal's questions at the hearing (and has been taken into account in our findings of fact). However, the specific information requested in items (a), (b), (c), (j), (k) and (m) above was not provided.

7. The hearing bundle contained none of the following:

(1) statutory accounts of the appellant company or related companies;

(2) bank statements of those companies or records of their receipts and payments;

(3) correspondence or legal documents relating to the compulsory purchase order over a property belonging to the appellant company or one of its related companies.

FINDINGS OF FACT

8. The appellant was a family-owned company of which Mr Dugdale had been a director for many years (other members of the Dugdale family had been board members for some periods of time as well). It was formed in 2004. Its original business was the manufacture of bodies (coach work) for commercial motor vehicles. In more recent years it (and its related companies) had moved into the related business of leasing trailers.

9. The related companies to the appellant company included Buckstone Motor Bodies Ltd, Buckstone Transport Services Ltd and Buckstone Trailer Rental Ltd (together with the appellant company, the "related Buckstone companies"). Mr Dugdale, as a director of all these companies, thought of them as one economic unit; such that, in his oral evidence, Mr Dugdale was unable to specify which of them carried out precisely which activity (or owned particular properties). The related Buckstone companies had not, however, been registered as a group for VAT purposes. The appellant company was itself VAT registered.

10. In around 2010 – Mr Dugdale could not be more specific than "about 10 years" before the hearing took place – a compulsory purchase order ("CPO") process began as regards land held by one of the related Buckstone companies (Mr Dugdale was not certain if the appellant company was strictly the legal owner of the land subject to the CPO). The land in question was a site of about 6 acres in Oldham on which the manufacture and vehicle-leasing activity of the related Buckstone companies took place. As many as 100-200 trailers were on the site at any one time, at the height of the business. The purpose of the CPO was to regenerate the land for housing. The CPO process extended over approximately seven years – it was not until around 2017 (again, Mr Dugdale could not be more specific than "about three years" before the hearing) that the related Buckstone companies finally quit the site. Payment in compensation for the CPO was in instalments over that period. It was not clear which of the related Buckstone companies was legally entitled to such payments.

11. The CPO process had a negative effect on the trading revenues of the related Buckstone companies. There was uncertainty over whether a new site could be acquired. Compensation under the CPO was neither as large as, nor paid as fast as, Mr Dugdale would have hoped. The

banks lending to the related Buckstone companies, on receipt of payments under the CPO, applied them to paying off overdraft facilities; the banks were generally unwilling to lend afresh for new investment by the business. In Mr Dugdale's words, the CPO process caused the business to stall and threw it into decline. At some time over the period (we were not told exactly when and how), the decision was made to run down the business and sell or otherwise dispose of its income-producing assets (such as the trailers).

12. The situation as described above caused cash flow difficulties for the related Buckstone companies (viewed, as Mr Dugdale did, as a single unit). There was no information before the Tribunal with details of receipts and outgoings for the appellant company or for the other related Buckstone companies. The financial problems were not caused by customers defaulting or paying late – on the whole, customers were paying on agreed terms. The problem was caused by the damage to the business of the impending loss of its site, combined with the delay (at least from Mr Dugdale's perspective) in receiving compensation payments for the CPO. As a result, when it come to the due date for payment of VAT for the VAT periods in question, there was insufficient cash to pay both HMRC and other creditors (viewed across the related Buckstone companies as a unit). Payment to HMRC was deferred until such time as there was cash available.

13. For the VAT periods in question, the appellant company did not pay HMRC the VAT shown as due on the VAT return by the date required under VAT law and regulations. It did however pay all such amounts by a later date.

14. The appellant company was in the default surcharge regime from the 10/15 period to the 10/17 period.

15. The table below sets out information about the default surcharges under appeal, as well as the appellant company's sales and other VAT outputs in the VAT periods in question:

VAT period	Total value of sales and other outputs excluding VAT	VAT due	Date VAT due	Date VAT paid in full	Rate of surcharge	Amount of surcharge
01/16	£227,229	£27,199.98	28 February 2016	9 August 2016	2%	£543.99
04/16	£144,222	£8,315.98	31 May 2016	4 October 2016	5%	£415.79
07/16	£201,555	£15,356.39	31 August 2016	5 December 2016	10%	£1,535.63
10/16	£292,615	£27,199.64	30 November 2016	4 April 2017	15%	£4,079.94
01/17	£261,282	£29,861.24	28 February 2017	9 April 2018	15%	£4,479.18
04/17	£209,271	£27,139.30	31 May 2017	9 April 2018	15%	£4,070.89
10/17	£83,495	£6,975.40	30 November 2017	9 April 2018	15%	£1,046.31
TOTAL						£16,171.73

RELEVANT LAW

16. Regulation 25(1) of the VAT Regulations 1995 provides that a person who is registered for VAT must submit a VAT return to HMRC no later than the last day of the month next following the end of the VAT accounting period to which it relates. There is a seven day extension for persons who submit returns electronically. Under regulation 40(2), any person

required to make a return must pay any VAT shown as payable on the return to HMRC not later than the last day on which that return is due.

17. Liability for a default surcharge arises under section 59 Value Added Tax Act ("VATA") 1994. Section 59(1) provides that a taxable person is in default where HMRC do not receive a VAT return and any VAT shown as payable on such return on or before the due date. Where a person is in default, HMRC may issue a surcharge liability notice ("SLN"). If, having been served with a SLN, the taxable person defaults again during the period of one year (the "Surcharge Period") from the end of the period of default, the person becomes liable to a surcharge. On each subsequent default, the Surcharge Period is extended to run for 12 months from the end of the latest period of default.

18. The surcharge is the greater of £30 and a specified percentage of the outstanding VAT. The percentage specified increases according to the number of VAT periods in respect of which the person is in default during the Surcharge Period starting with 2% for the first period of default. For the second period in respect of which the taxable person is in default during the Default Surcharge Period, the specified percentage is 5%. The maximum percentage is 15% where there have been four or more periods in default during the Surcharge Period.

19. Section 59(7) VATA 1994 provides that a taxable person is not treated as in default in respect of any VAT period if the person satisfies HMRC, or on appeal the Tribunal, that in respect of the period:

(1) the return or the VAT due was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by HMRC within the time limit; or

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

20. Section 71(1)(a) VATA 1994 provides that for these purposes an insufficiency of funds to pay any VAT due is not a reasonable excuse. Section 71(1)(b) VATA 1994 further provides that, 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.

21. HMRC have the burden of proving that the appellant company failed to pay the VAT on time and is liable to pay the default surcharge. The onus then passes to the appellant company to prove that there was a reasonable excuse for its failure to pay on time. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

22. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?...
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

29. That this is the correct test was confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default….In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without reasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

23. As the Upper Tribunal stated in *ETB (2014) Ltd v HMRC* [2016] UKUT 0424 (TCC) at [11], in the leading case on the meaning of reasonable excuse in the context of an insufficiency of funds (*Customs and Excise v Steptoe* [1992] STC 757), the Court of Appeal held unanimously that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency – the underlying cause of the taxpayer's default – might do so. At [15], the Upper Tribunal summarised the position thus:

> "In summary the question to be asked when considering whether someone has a reasonable excuse for failing to pay an amount of tax on time because of a cash flow problem is whether the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not, without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as having a reasonable excuse for the VAT having been paid late until it would be reasonable to expect the taxpayer to have found alternative funding or taken other action to counteract the insufficiency."

THE PARTIES' ARGUMENTS

24. The "grounds for appeal" section of the appellant company's notice of appeal stated this:

> "Our grounds for appeal are clearly stated in the attached letters to HMRC.
>
> Our business was rendered unsustainable by a compulsory purchase order which took a long time to complete and resulted in inadequate compensation for the impact on the business.
>
> Whilst you may feel that HMRC and the local council are not connected, to us they are both arms of government and we are therefore being penalised twice."

25. Mr Dugdale set out the appellant company's grounds of appeal thus in a letter to HMRC dated 24 September 2018:

> "Our business continued to decline which was brought about by a Compulsory Purchase Order (CPO) issued by the Government for the purpose of taking possession of our property. The CPO was a very long process over several years which in turn stalled our business; we were offered no support by the requiring authorities in relationship to funding and relocation which threw the business into decline. Our funders RBS, a Government owned body, in turn gave us no support and clawed back all our lending facilities from compensations received. We coped with this as best we could and were doing all we could to raise sufficient cash to settle liabilities but the business has now stalled.
>
> The directors should not be held responsible for the surcharges incurred which are a direct result of the problems brought upon us by the CPO. Under the CPO compensation we should have been entitled to all costs which would have included these charges that arose from the delays with our claim.
>
> In order to fully settle our account, the only option was to cease trading and look to maximise the return from the sale of assets which was the only option available to us. Having now sold our business assets we have paid our PAYE and VAT account in full including the disputed interest and vat charges; we have paid the charges without prejudice whilst this appeal is pending due to the threat of a winding up petition …
>
> I am asking for you to recognise that the whole of our dilemma has been brought about, not by bad management, but as a total result of Government actions. We did everything in our power to pay all payments we collected through PAYE and VAT; we should not be held responsible for penalties imposed due to the actions of others."

26. HMRC's case was essentially that the appellant company had not proved that there was a reasonable excuse for its failure to pay the VAT in question when due. HMRC noted that the appellant never responded to their letter of 7 January 2019 requesting further information.

DISCUSSION

27. Given our finding at [13] above, the appellant company was in default in respect of the VAT periods in questions, and also had outstanding VAT for those periods, for the purposes of s59 VATA 1994. The question was therefore whether there was a reasonable excuse for its having failed to pay the VAT in question when due.

28. The first step, following the guidance in *Perrin*, is to establish what facts the appellant company asserts give rise to a reasonable excuse. They are as follows:

(1) the appellant company, viewed with the other related Buckstone companies as a single economic unit, was undergoing cash flow difficulties at the due dates for payment of VAT in the VAT periods in question;

(2) these cash flow difficulties were attributable to a seven-year CPO process over the main operating site of the business of those companies that damaged the business and ultimately forced the sale of the assets of the business;

(3) the damage was caused by the combination of the impending loss of the site (and consequent uncertainty about the business' future) and the compensation payments under the CPO process being made later than expected by the business;

(4) the cash flow difficulties meant that there was insufficient cash to pay all creditors when due; decisions had to be taken about which creditors to pay with limited cash; the VAT in question was not paid when due, but it was ultimately all paid. In one VAT period during the period of time from January 2016 to October 2017 (the 07/2017 VAT period), when enough cash was available, the VAT was in fact paid on time.

29. The next step is to consider whether the facts supporting the excuse are proven. We accept Mr Dugdale's oral evidence in the generic terms in which it was expressed and so find

that the facts as set out above are sufficiently proven. We do, however, note the very general terms in which those facts are expressed. In particular, nothing in any detail is said about:

(1) the extent of the cash flow difficulties at the relevant points in time, as no figures are given;

(2) which of the related Buckstone companies owned the land subject to the CPO and/or had the right to compensation under the CPO process; or

(3) how those companies decided which creditors to pay with the limited cash available.

30. The third step is to consider whether, viewed objectively, those proven facts amount to an objectively reasonable excuse for the default. The test articulated in *ETB (2014)* guides us as to what is objectively reasonable in the context of an insufficiency of funds: do the proven facts indicate that the lack of funds was unavoidable, even if the appellant had exercised the reasonable foresight and due diligence of a person (in the appellant company's circumstances and with its experience) having a proper regard for the fact that the tax was due on particular dates?

31. In our view – and taking into account the appellant company's circumstances and experience as a small family-owned business in difficult financial circumstances – reasonable foresight and due diligence would have included some if not all of the following:

(1) understanding the legal rights and obligations of the appellant company and each of the related Blackstone companies (as separate legal entities) as regards the CPO and as regards their various creditors

(2) monitoring the anticipated cash flow of each such company at the time the VAT obligations in question became due

(3) making reasonable efforts to ensure the legal rights of the companies concerned – including to CPO compensation – were enforced

(4) considering carefully, where cash was insufficient on a due date for payment of a VAT liability, the options for (and consequences of) paying one creditor rather than another, ensuring that HMRC were treated on an equal footing with other creditors

(5) contacting creditors other than HMRC to see if alternative arrangements for payment could be agreed

(6) approaching alternative providers of funding, once it became clear that RBS would not advance new loans

32. The proven facts, being at a high level of generality, do not extend to any of the above acts of foresight and due diligence on the appellant company's part. We are allowing for the fact that a small business with limited funds would carry out these acts in an efficient, cost-conscious manner – but we have no evidence of their being done to any extent at all. We note that the information requested by HMRC in their letter to the appellant company of 7 January 2019 but never provided, as set out at [6] above, might have shed light on a number of the above actions.

33. It follows that, in our view, the appellant company has not proven, on the balance of probabilities, that its cash flow difficulties could not have been avoided by its exercising an appropriate degree of foresight and due diligence. The facts on which the appellant company bases its excuse for not paying the VAT due on time, though proven, are insufficient to provide an objectively "reasonable" excuse.

34. Finally, we note Mr Dugdale's statements to the effect that the CPO was carried out by an arm of government, and so the appellant company is "doubly penalised" by the imposition of VAT default surcharges (administered by another arm of government, HMRC). The Tribunal's powers in this case are restricted to adjudicating liability to VAT default surcharges – we have no powers in relation to the CPO – the appellant company must look elsewhere for legal remedies, if any, it may have in respect of the CPO process.

CONCLUSION

35. The appeal against the default surcharges for the VAT periods in question is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 25 MARCH 2020