



Neutral Citation: [2023] UKFTT 548 (TC)

Case Number: TC08847

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/12932

*VAT Default Surcharge - whether time to pay agreement in place – whether  
reasonable excuse*

**Heard on:** 13 June 2023

**Judgment date:** 19 June 2023

**Before**

**TRIBUNAL JUDGE HOWARD WATKINSON  
SIMON BIRD**

**Between**

**SB WAKEFIELD LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Mr. Simon Bowett of the Appellant

For the Respondents: Mr. William Bargmann of HMRC Solicitor's Office

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video. The documents to which we were referred were a bundle of documents running to 161 pps., HMRC's Statement of Reasons, a 2-page position statement document from Mr. Bowett, and a legislation and authorities bundle running to 157 pps.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. This is an appeal by the Appellant against a VAT default surcharge under s.59(a) of the Value Added Tax Act 1994 ("VATA") for VAT period 10/21 at 2% in the sum of £1,607.14.

### LATE APPEAL

4. The review conclusion letter was dated 8.3.22 and provided onward appeal rights. The Appellant responded to the review conclusion letter on 25.3.22. HMRC then responded on 24.5.22 stating that the Appellant's only recourse was to the Tribunal. The Appellant then wrote to HMRC on 30.5.22 and wrote a separate letter to HMRC dated 21.6.22 thinking that this was an appeal to the Tribunal. HMRC pointed out the error in a letter of 27.7.22. The Appellant then filed a Notice of Appeal on 5.8.22. Whilst the appeal was notified late, HMRC do not object to the appeal being made late and, given that the Appellant attempted to appeal within 30 days of HMRC's letter of 24.5.22, we admit the late appeal.

### BACKGROUND

5. The Appellant is a vehicle retailer which has been registered for VAT since 1.3.04. If making a paper VAT return a taxpayer is required to submit a VAT return, and any payment due, not later than the last day of the month following the period to which the return related (Regulation 25(1) of the VAT Regulations 1995 ("VATR")). If a taxpayer files VAT returns electronically a taxpayer is permitted a further seven days to submit a VAT return, and make any payment due (by a direction made under Regulations 25, 25A(20) and 40(3)-(4) VATR).
6. The Respondents' case is that having entered the default surcharge regime due to the late payment of VAT due for VAT period 10/20, the Appellant defaulted for a second time in paying its VAT due of £80,357.35 for VAT period 10/21 late over three payments made on 8.12.21, 7.1.22 and 7.2.22. The Appellant accepted at the hearing that its payment of the VAT due for VAT period 10/21 was late and that it had no reasonable excuse for that late payment. However, the Appellant says that it did not default in payment for VAT period 10/20 because it had agreed a time to pay agreement ("TTPA") with HMRC, with the effect that the default in payment for VAT period 10/21 was in fact a first default, which would attract no surcharge.

### THE RELEVANT LAW

7. The VAT default surcharge is imposed by Section 59 VATA, which states, in as far as is relevant:

**"59.— The default surcharge.**

- (1) ... 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.

...”

8. Under Section 59(7)(b) VATA, if the Appellant satisfies the Tribunal that there is a reasonable excuse for the default in question then it will not be liable to the surcharge. Section 71(1) VATA provides that for the purpose of any provision of Sections 59-70 of VATA which refers to a reasonable excuse (a) an insufficiency of funds 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.

9. There is no statutory definition of “reasonable excuse”. In *Rowland v Revenue & Customs Commissioners* [2006] STC (SCD) 536 the Tribunal noted at [19] that the issue was to be considered in the light of all the circumstances of the particular case. In *The Clean Car Company Ltd v The Commissioners of Customs and Excise* [1991] VATTR 234 Judge Medd QC set out that the test is an objective one, where the Tribunal must ask itself: “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?”

10. The Respondents referred the Tribunal to *Christin Perrin v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 156 (TC) where at [81] the Upper Tribunal set out a useful approach that the First-tier Tribunal can take in considering the issue of reasonable excuse.

“81. When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

(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 and the time when that objectively reasonable excuse ceased. In doing so, it 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 FTT, 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 unreasonable 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."

11. The effect of s.108(2)(b) of the Finance Act 2009 ("FA09") is that the Appellant is not liable to a VAT default surcharge if a request to defer payment was made and agreed before the Appellant became liable to the surcharge i.e. before the payment due date for VAT due passed.

12. The key issues in this appeal are therefore:

(1) Was there a TTPA in place as at the end of 7.12.20, the last date for electronic payment of the VAT due for the 10/20 VAT period such that the Appellant did not enter the default surcharge regime meaning that the accepted default in payment for VAT period 10/21 was a first surchargeable default; and

(2) In any event, did the Appellant reasonably believe that there was a TTPA in place as at 7.12.20, such that it had a reasonable excuse for the late payment, with the same result as (1) above.

#### **FINDINGS OF FACT**

13. From the documents produced to us, and from what the Appellant said at the hearing, we find the following facts.

14. As set out in the "Schedule of Defaults (and Payments)", the Appellant entered the default surcharge regime because its payment for the 10/20 quarterly VAT period of VAT due of £48,070.88 was paid late on 21.12.20 when the second payment towards that sum of £24,035.44 was made (the first payment having been made on 7.12.20). At the time HMRC viewed this as a second default and issued a default surcharge at 2%, but this was later cancelled when HMRC accepted that there had been no earlier default. As this was the first default no surcharge was payable, but a surcharge liability notice ("SLN") was issued on 17.12.20 with a standard surcharge liability period.

15. On 21.12.20, as recorded in HMRC's internal systems, the Appellant telephoned HMRC to arrange a TTPA for sums including the sum of £24,035.44 paid on that date, which was the remaining liability for VAT period 10/20.

16. On 22.12.20 HMRC issued a TTPA letter to the Appellant in relation to payments including the payment of £24,035.44 paid on 21.12.20.

17. On 29.12.20 Mr. Bowett wrote a letter to HMRC in relation to the 10/20 VAT period default surcharge which included the following:

*“In respect to the balance of £24035.44p, this was half of the payment due on the 7<sup>th</sup> December. We had just gone through 4 weeks lockdown and when you come out of lockdown your bank balance has always significantly moved to the negative. As by paying the full amount could have embarrassed our Company with the bank, over the Xmas period, I paid 50% of the vat. After doing that I attempted to get hold of the HMRC, you want to try yourself. I must have been on the phone on at least three occasions for 20 to 30 minutes with no answer. How can we possible be expected to pay our taxes in the middle of a crisis when we cannot speak to anybody. This phone call was to request payment in January for the £24035.44.”*

18. This is as close to a contemporaneous note of what the Appellant did in December 2020 as the Tribunal has. Mr. Bowett disavowed that part of the letter set out above during the hearing, saying that it was incorrect and that on 6 or 7.12.20 the Appellant’s accountant, Mr. Patrik Hrizco telephoned HMRC, agreed a TTPA and thereafter paid the agreed 50% of the VAT due, £24,035.44, on 7.12.20 itself, with the remainder paid on 21.12.20.

19. The Tribunal finds that the contents of Mr. Bowett’s letter of 29.12.20 are accurate, and that Mr. Bowett’s later recollections are not. Instead, they are an example of the powerful bias that the litigation process itself can exercise on the memories of those involved.

20. There was no record in HMRC’s records of any call from the Appellant on 6 or 7.12.20. There was no email or note from Mr. Hrizco to Mr. Bowett or anyone else within the Appellant confirming any call on 6 or 7.12.20 or any TTPA being agreed with HMRC. There were no telephone records in evidence showing that the Appellant had called HMRC on 6 or 7.12.20, nor was there any evidence that those records had been asked for. Mr. Bowett’s roughly contemporaneous letter to HMRC of 29.12.20 did not set out the account later relied on, rather it suggested that no TTPA was agreed with HMRC until after 7.12.20. Finally, HMRC’s letter of 22.12.20 recorded the TTPA for the second payment of £24,035.44 paid on 21.12.20 and made no mention of any earlier TTPA for the same sum. Had there been an earlier TTPA we would have expected that letter to say so.

## **DISCUSSION**

21. The findings of fact above are key to this appeal.

22. Based on those findings the Tribunal concludes that there was no TTPA in place as at the end of 7.12.20 for the remaining VAT due for VAT period 10/20. The TTPA for the sum of £24,035.44 being the remaining VAT due for VAT period 10/20 paid on 21.12.20 was not made until 21.12.20 itself and the Appellant is therefore not assisted by s.108 FA09. In the absence of a TTPA the Appellant entered the VAT default surcharge regime in relation to VAT period 10/20.

23. Based on those findings the Tribunal concludes that the Appellant did not, and could not, have reasonably believed that there was a TTPA in place as at the end of 7.12.20. The Appellant’s reasonable excuse defence therefore fails on the facts.

24. Since the Appellant accepts that its payment of VAT due for VAT period 10/21 was late, and that it has no reasonable excuse for the same, it follows from our findings in relation to VAT period 10/20 that the Appellant was liable to the VAT default surcharge for the late payment of the VAT due for VAT period 10/21 at the 2% rate. That has been correctly

calculated to produce a surcharge of £1,607.14 and the surcharge has been properly notified to the Appellant.

**DECISION**

25. For the above reasons the appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

26. 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.

**HOWARD WATKINSON  
TRIBUNAL JUDGE**

**Release date: 19<sup>th</sup> June 2023**