



Neutral Citation: [2023] UKFTT 614 (TC)

Case Number: TC08856

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2022/02731

Value Added Tax –surcharge liability notices – properly served– yes – whether short of staff and difficulty contacting HMRC reasonable excuse for late return – no – whether belief direct debit set up for ‘Time to Pay’ plan would pay for ongoing VAT liability reasonable when previous payment needed to be made manually – no – appeal dismissed

Heard on: 4th April 2023

Judgment date: 30 June 2023

Before

**TRIBUNAL JUDGE RUDOLF KC
MEMBER C. JENKINS**

Between

SPIRIT MOTOR COMPANY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Mohammed Sadiq, Director of Spirit Motor Company Limited

For the Respondents: Mr Stefano Congiu, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The form of the hearing was remote via the Tribunal video platform, and all attended in that way. A face-to-face hearing was not held because in the interests of justice for the convenience of the parties a judge decided a remote hearing was appropriate. The documents to which we were referred were a 48-page bundle of materials including the Notice of Appeal, the Respondent's 17-page Statement of Reasons and the Respondent's standard 157-page legislation and court cases bundle in appeals involving VAT default surcharges. We heard evidence on behalf of the Appellant from Mr Sadiq who was cross-examined.

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. On 14th April 2023 the parties were provided with a summary decision. The Appellant indicated he wished to appeal, which the First-tier Tribunal (F-tT) has accepted as a request for a decision with full findings of facts.

FULL FINDINGS OF FACTS FOR THE DECISION

4. The Appellant appealed to the First-Tier Tribunal (Tax Chamber) ('F-tT') against the Respondent's decision to issue Value Added Tax ('VAT') default surcharges under section 59 Value Added Tax Act 1994 ('VATA') for the VAT periods 08/21 and 11/21. For 08/21 the surcharge was £2,613.33 and for 11/21 £3,662.09. The former was calculated at 10% of the outstanding VAT and the latter 15% as there have been previous surcharges which are not under appeal.

5. We have considered all the material supplied to us and the evidence given by Mr Sadiq who we conclude was an honest witness doing his best to assist the F-tT. He was frank and made appropriate concessions in his evidence in chief and when cross examined.

6. The following are our full findings of fact in this appeal.

7. The Appellant is a taxable person and has been registered for VAT for a long time. Mr Sadiq is the sole director (appointed in 2012) of the Appellant which deals in higher end prestige second hand cars. Prior to Covid it would sell about 55-60 cars a month. It has sales staff who are employed with a commission and accountants who prepare annual accounts and calculate the corporation tax owed. Mr Sadiq is responsible for the VAT returns, and, prior to Covid, a direct debit was in place upon which the Respondents drew for payment.

8. Prior to Covid the Appellant appears to have had an excellent VAT history by reference to the timely lodging of returns and the making of payments. When the Covid pandemic struck in March 2020 and for a long time afterwards severe problems arose. It is no coincidence that the first default was the period ending 08/20. Since that period there has been a default including 11/21 which was the final period, we were provided documents about.

9. As time went by the Appellant was able to keep trading but from split sites. Mr Sadiq had staffing problems and the paperwork was going to both sites. In particular, those problems meant it was difficult to locate what would be needed to ensure he was properly reclaiming against VAT that which the Appellant had spent. His personal situation with his children and their disabilities made his position harder in discharging his responsibilities to the Appellant; including VAT. Mr Sadiq suffered illness and bereavement in the period leading up to the surcharges under appeal. It seems more likely than not that at some point Mr

Sadiq misunderstood that whilst there was some deferral on the payment of VAT, returns still needed submitting having spoken to the Respondents.

10. Having received a letter regarding the first surcharge for the period 08/20, on 18th November 2020 Mr Sadiq was advised in terms by the Respondent to cancel the direct debit that allowed the Respondent to take VAT payments. The Appellant was advised of the Time To Pay scheme ('TTP') and told that returns very much did need making, and that three returns were outstanding. On that date the return for the 08/20 period was lodged with the Respondent. The direct debit was cancelled on 20th November 2020.

11. On 7th December 2020 a TTP was set up with a new direct debit to take a number of payments. These appear to have been due to expire on 15th November 2021 with a final payment of £3,844.

12. Thereafter returns for the next four periods, including the 08/21 period were late. Due to the direct debit being taken in relation to the TTP there does seem to have been some payments taken for VAT liability that post-dated it as set out at page 9 of the bundle and, for example, as accepted by the Respondent in their statement of reasons at §14. The final direct debit payment for £3,844 in fact appears to have been taken on the 12th November 2021.

13. In relation to the surcharges under appeal, the 08/21 return was due by 7th October 2021 and received by the Respondents on 12th October 2021. In clarifying his Notice of Appeal, Mr Sadiq for the Appellant believed that this single direct debit was for both his TTP and for future liabilities. However, any direct debit the Appellant had did not pay the VAT for 08/21. The VAT was paid on 25th November 2021 by credit card when Mr Sadiq discovered no payment had been made. In relation to the 11/21 return, that was due by 7th January 2022 and received on that date. The VAT was paid on 10th February 2022 by faster payment service, again, after no payment had been made by direct debit or otherwise.

14. On 21st February 2022 the Appellant requested a review of the decision to issue the surcharges for the periods 08/21 and 11/21. On 9th March 2022 the Respondents issued a review conclusion letter upholding the issuance of both surcharges. The Appellant was aggrieved by that decision and appealed to the F-tT by a Notice of Appeal dated 19th April 2022.

Matters to be considered

15. There are two principal matters to be considered. First, whether the Respondents have shown it is more likely that not that the default surcharge assessments to the Appellant for 08/21 and 11/21 were correctly issued. If so, secondly, whether the Appellant has shown it is more likely than not they have a reasonable excuse for the defaults. No issue of disproportionality has been raised.

The law

16. We turn to the law which we will apply in relation to this appeal by setting it out in the order of the principal matters that fall to be considered.

Default surcharges

17. The Appellant is a VAT registered person ("P") and therefore is a taxable person liable to account for VAT by making a return. Section 25 (1) VATA requires that this return, and if relevant, the payment of VAT is undertaken as proscribed by regulation. Between regulation 25 (1) and 40 (2) of the VAT Regulations 1995 ('the Regulations') the return and payment must be made no later than the last day of the month after which the period for the accounting and payment relates. In practice HMRC have extended that deadline by seven days by a direction made pursuant to regulations 25, 25A (20) and (40) (3) and (4) of the Regulations.

18. Section 59 (1) applies where HMRC have not received the return or payment by the deadline. That says:

“... 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.”

19. Assuming default under s59 (1) VATA and the regulations, by section 59 (2) (b) VATA in order for P to become liable to a surcharge, HMRC must serve a surcharge liability notice (‘SLN’) on P. If an SLN is not served, then there can be no financial penalty imposed. That SLN must set out the surcharge period within which P, if further default occurs, will be liable to pay a penalty. There is no financial penalty for the first default, usually expressed as 0%.

20. That period ends one year after the default and begins on the date of the SLN. After the first default the penalties accrue on a sliding scale of 2%, 5%, 10% and 15% provided the defaults occur within the surcharge period. The effect of section 59 (3) VATA is, for each default, to extend the surcharge period in the same way and to treat the periods as a single surcharge period. Once the surcharge period expires with no further default, the process resets so that any subsequent default begin the cycle again.

21. However, if the value of the penalty is less than £400 for any given default, HMRC do not issue a financial penalty. The surcharge period is still extended.

22. Where the Respondents can show that the SLN was issued by post, section 7 of the Interpretation Act 1978 has the effect of requiring the taxpayer to prove, on the balance of probabilities, that the SLN was not received. If the taxpayer can do this, then the SLN will not have been served, and no financial penalty can arise. Additionally, any surcharge period (if there was one) will not be validly extended which, in the case of multiple defaults, if that situation is held to have arisen care will need to be taken to properly calculate any outstanding value of any financial penalty for any validly issued SLN.

Reasonable excuse

23. If an SLN is validly served and if an Appellant satisfies the F-tT that there is a reasonable excuse for a late or non-return or payment, then they will not liable to any surcharge. Again, in the case of multiple defaults, if that situation is held to have arisen, care will need to be taken to properly calculate any outstanding value of any financial penalty for any validly issued SLN.

24. Section 59 (7) VATA states:

“(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)."

25. Section 71 VATA sets out two specific matters which do not provide a reasonable excuse namely:

*"(a) an insufficiency of funds to pay any VAT due 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."*

26. There is no statutory definition of reasonable excuse. It is something to be considered in light of all the circumstances of a particular case. What may be a reasonable excuse for one tax payer may not be for another depending on the circumstances. In The Clean Car Company v C&E Commissioners [1991] VATTR 234, HHJ Medd, QC said:

"The test of whether or not there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible taxpayer 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?"

27. In Garnmoss t/a Parnham Builders v HMRC [2012] UKFTT 315 (TC) Judge Hellier and Ms Hewitt pointed out:

"12. 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)".

28. Although not binding upon us, with the expression of principle contained within that paragraph, we respectfully agree.

29. In Perrin v HMRC [2018] UKUT 0156 (TCC) the Upper Tribunal dealt with reasonable excuse. Although that dealt with penalties to an individual taxpayer for late filing of self-assessments the guidance given at §81 by the Upper Tribunal applies as much in cases involving VAT default surcharges, save that the fourth step is not relevant. That guidance states:

"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?”

30. These are the steps we apply to the facts as we have found them to be.

Discussion and analysis

31. No issue is taken by the Appellant that the Respondent properly issued the SLNs for 08/21 and 11/21 and the F-tT concludes from that concession and having considered the material before it that this was the case. The Appellant accepts that it did not file its return in time and make payment in time in relation to 08/21 and that payment was not made in time in relation to 11/21 (although the return was filed on time).

32. Turning to the real issues in this appeal of whether the Appellant has shown there is a reasonable excuse or not, in relation to period 08/21 and step 1 of Perrin Mr Sadiq, for the Appellant says he was short of staff and that calls with the Respondent took 2-3 hours, time which he simply didn't have. Taken together he asserts this is a reasonable excuse for the late return and assumed the direct debit, which had been set up for the TTP, would then pay.

33. At step 2 we accept what he has said and find those proven. However, in relation to step 3 taking everything into account that we have found as facts and recognising the difficulties the Appellant's director had in relation to the late return it simply wasn't objectively reasonable for the taxpayer to be late. Although unfortunate he hadn't appreciated that returns were also needed toward the start the Appellant plainly knew that VAT and returns needed to be paid at the point of 8/21 becoming due, not least because of the previous surcharges that had been applied and Mr Sadiq's telephone call in November 2020. The staff shortage where it impacted upon the return of VAT and payment by the director who always had sole responsibility is not something that is a reasonable excuse, even if it might have meant the Appellant was not reclaiming on the return everything he would be entitled to. In our judgment, a reasonable taxpayer in the Appellant's position would ensure, at this point, that the return was on time. The lateness of the return ensured that any VAT payment would also be late. Although Mr Sadiq was undoubtedly busy and there were problems, what occurred is an illustration of what happens when things are left to the last day of the five-week period given to make a return and a payment.

34. In relation to the period 11/21 and step 1 of Perrin. Here the return was on time, but the payment was late. Mr Sadiq, for the Appellant, says he still believed the direct debit would take (albeit it hadn't for the previous period and had needed to make a credit card payment). He points out he had cancelled the original direct debit on the advice of the Respondent on 20th November 2020. He has shown that he entered into a TTP with a direct debit from 15th December 2020 which includes all periods up to 05/21. He states that with everything going on it was reasonable to believe that the direct debit would take the payment for 11/21.

35. At step 2 we accept everything that Mr Sadiq has said about these facts and beliefs and find them proved. At step 3 we ask ourselves whether it was objectively reasonable for the Appellant, through Mr Sadiq, to mistakenly believe that the direct debit was in place and would pay.

36. We do not for one moment detract from the position Mr Sadiq found himself in personally and with his family, as well as the problems with the business. Mr Sadiq was the person solely responsible for the Appellant's VAT. He was an experienced person in that regard. The Respondents assert that Mr Sadiq made a mistake in not setting up the direct

debit to pay onward VAT and therefore there is no reasonable excuse. We accept that it is right as a matter of fact that it was a mistake. We also remind ourselves of §12 of Garnmoss. However, that is not authority for the proposition that a mistake cannot be taken into account when assessing reasonable excuse, just that, in the context of that case, of itself it was insufficient. We do not find the mistake of itself is an answer for the Appellant. It is one of the circumstances we consider. Ultimately however by the time the payment for 11/21 was due on 7th January 2022 the Appellant had already needed to make a payment manually for the previous period. Whether that was an error with the bank or not, the reasonable taxpayer would know – as the Appellant knew – that there was a problem. It should have been checked with the bank or the Respondent. Had it been done, and the fact there was no direct debit exposed, then we have no doubt the VAT would have been paid. Having asked ourselves the question that we must, it was not in our judgment objectively reasonable for the taxpayer to omit to check whether there was a direct debit that would pay when it should have done, given what occurred with the previous non-payment. Again, what occurred is an illustration of what can happen when things are left to the last day of the five-week period given to make a return and a payment.

37. As Mr Sadiq himself said at the start of his evidence: *If it is down to the law, I am guilty and must pay the fines*. We pay tribute to the measured, calm and courteous way Mr Sadiq presented this appeal.

Conclusion

38. For the reasons given above the appeal is dismissed in relation to the surcharge for 08/21 and 11/21.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

**NATHANIEL RUDOLF KC
TRIBUNAL JUDGE**

Release date: 30th JUNE 2023