Neutral Citation: [2024] UKFTT 00083 (TC)

Case Number: TC09048

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/09043

VAT – Deferred VAT due to COVID-19 - Penalty under Schedule 19 of Finance Act 2021 – Reasonable Excuse – Appeal dismissed

Heard on: 6 December 2023
Judgment date: 16 January 2024

Before

TRIBUNAL JUDGE MALCOLM FROST
REBECCA NEWNS

Between

DEREK SHAW RACING LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Lyndsey Shaw

For the Respondents: Gift Nyoni, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against a penalty imposed under Schedule 19 Finance Act 2021 ("FA 2021") for the non-payment of deferred VAT.

2. With the consent of the parties, the form of the hearing was V (video). 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.

BACKGROUND FACTS

3. The documents to which we were referred were a Statement of Reasons for HMRC of 10 pages and a Hearing Bundle (including legislation and authorities) of 86 pages.

4. Mrs Lyndsey Shaw (a director of the Appellant company) gave evidence and was cross examined.

5. From that evidence, we make the following findings of fact.

6. The Appellant in this case, Derek Shaw Racing Limited ("DSRL" of "the Company"), has been registered for VAT since 28 July 2007. The Company provided livery and transportation services in respect of racehorses.

7. As a result of the COVID-19 pandemic, the business struggled. Race events were cancelled as a result of the pandemic, meaning that there was no demand for the transportation services which were the prime source of income for the company. Creditors became insolvent. Many of the business' costs (hay and straw, payments on horse boxes, staff costs) remained the same, but income fell significantly. The company did not wish to place any of its four full-time staff on furlough and instead the staff agreed to each take a 25% pay cut.

8. The company took a COVID-19 'bounceback' loan, which is being repaid.

9. During the pandemic, DSRL benefitted from provisions under FA 2021 enabling it to defer payments of VAT for the period March 2020 to June 2020.

10. The deferred payments were due to be paid by 30 June 2021. No payment was made by that date.

11. On 15 March 2021, Mrs Shaw telephoned HMRC to discuss a time to pay arrangement in respect of the outstanding deferred VAT.

12. During the call:

(1) The HMRC call handler ("SS") advised Mrs Shaw that HMRC would be willing to agree to a further period of 11 months to repay the deferred amount.

(2) Mrs Shaw declined the suggestion on the basis that she could not pay money that she didn't have. Mrs Shaw suggested paying £500 monthly. SS noted that this would take over 49 months to repay and that length of time would be outside the parameters HMRC could agree.

(3) Mrs Shaw asked SS how she could have something put in place as she felt it didn't benefit anyone if the business was to stop trading, stating the business doesn't own anything and therefore no one is going to get paid.

(4) SS advised that DSRL could make voluntary payments to HMRC but that this would not be a formal payment plan with HMRC. SS indicated that HMRC would

follow their normal debt management processes and seek payment of the outstanding balance as in the absence of a formal repayment plan there is no hold on this.

(5) Mrs Shaw asked for confirmation that HMRC would not begin taking payments directly from the business bank account to recover the outstanding balance within the 11 month repayment period that had been announced. SS confirmed that HMRC would not take money directly from the business bank account in the absence of a formal repayment plan.

(6) SS confirmed the business would continue to receive letters from HMRC regarding the outstanding balance and normal legal action process would be followed. Mrs Shaw asked what the implications of the legal action process are, and SS advised it would more than likely eventually be passed to HMRC's collections team

(7) Miss Shaw said she would email her MP as it was "crazy", the business wasn't saying they aren't going to pay it and at this rate the government isn't going to get any money back from businesses. SS advised that HMRC had provided support by deferring payment of VAT for 12 months and was now allowing a further 11 months to repay, the business' proposal to repay over 49 months was outside the parameters HMRC can agree.

(8) A time to pay arrangement was not agreed.

13. Mrs Shaw considered that it would be advantageous if the matter was passed to a third-party debt collector as she considered they may be more flexible in the payment plan they may agree to.

14. Almost two years later, on 16 February 2023, DSRL received a letter from HMRC advising that the outstanding amount of £14,597.26 needed to be paid to avoid a penalty for the deferred VAT.

15. On 12 April 2023 HMRC issued a penalty assessment letter under Sch 19 FA 2021 for the amount of £729.85.

THE LAW

16. The relevant provisions are set out in Sch 19 FA 2021. This Schedule is entitled "Deferring VAT payment by reason of the Coronavirus emergency" and includes provisions under which payment for VAT sums may be deferred.

17. Paragraph 2 of Sch 19 FA 2021 provides:

> 2 Power to agree to further defer payment
>
> (1) The Commissioners (having agreed that payment of relevant VAT sums may be deferred until 31 March 2021) may—
>
> (a) agree that payment of a relevant VAT sum may be further deferred, and
>
> (b) make such arrangements as they consider appropriate for persons to pay relevant VAT sums.
>
> (2) The period for which payment is further deferred under sub-paragraph (1) may be different for different cases.
>
> (3) Arrangements made under sub-paragraph (1) may, among other things
>
> (a) require that, in order to participate in the arrangements, a person must meet specified conditions,

(b) require or enable a sum to be paid in instalments, including instalments of different amounts, and (c) make different provision for different cases.

(4) Nothing in sub-paragraphs (1) to (3) affects the powers otherwise available to the Commissioners in connection with the collection and management of relevant VAT sums or other sums.

18. HMRC therefore have a relatively wide discretion to agree payment terms.

19. Paragraph 4 of Sch 19 FA 2021 sets out HMRC's power to impose penalties, it provides:

4 Penalty

(1) A person who is liable to pay a relevant VAT sum is liable to a penalty if the person—

(a) fails to pay the sum on or before 30 June 2021, and

(b) fails to enter into payment arrangements in respect of the sum on or before that day.

(2) In sub-paragraph (1), "payment arrangements" means arrangements with HMRC (whether general or individually tailored) under which the sum is to be paid and includes arrangements entered into before this Schedule comes into force.

(3) A person is not liable to a penalty under this Schedule in respect of a relevant VAT sum if the person satisfies HMRC or, on appeal, a tribunal that there is a reasonable excuse for the failures described in sub-paragraph (1)(a) and (b).

(4) In sub-paragraph (3), "tribunal" has the same meaning as in VATA 1994 (see section 82 of that Act).

20. It is important to note that conditions 1(a) and 1(b) must both apply in order for a penalty to be imposed. That is to say, the taxpayer must both fail to pay the sum by 30 June 2021 and fail to enter into a payment arrangement by that date.

21. It is also important to note that the 'reasonable excuse' provision in paragraph 4(3) above only applies if there is a reasonable excuse for the 'failures' (plural). This means that there must be both a reasonable excuse for the failure to pay, and for the failure to enter into payment arrangements, before a reasonable excuse defence applies.

22. We note that s 71 Value Added Tax Act ("VATA") is not stated to apply to these provisions. Section 71 VATA provides that an insufficiency of funds is not a reasonable excuse for the purposes of ss 60-70 VATA. As a result of s 71 VATA not applying to the present provisions, we consider that Parliament intended that an insufficiency of funds could be a reasonable excuse for the failures set out in paragraph 4(1) above. This seems consistent with the underlying purpose of the Sch 19 regime to permit businesses to defer payment and use the deferred sums to meet liabilities of the business during the COVID-19 pandemic.

THE ISSUES

23. The issues for the Tribunal to determine are:

(1) Whether HMRC validly assessed the penalty in question; and

(2) Whether DSRL has a reasonable excuse for the failures to pay and to enter into payment arrangements in relation to the deferred VAT by 30 June 2021.

Validity of penalty

24. DSRL raised no issue as to whether HMRC's power to assess a penalty was engaged and validly exercised.

25. We find that DSRL failed to make payment of the deferred VAT by 30 June 2021 and failed to enter into payment arrangements by that same date. We find that HMRC validly assessed a penalty in relation to those failures.

Reasonable excuse

26. HMRC submitted, and we agree, that the overall approach to follow in determining whether or not DSRL has established a reasonable excuse is that set out in *Christine Perrin v Revenue and Customs Commissioners* [2018] UKUT 0156 (TCC). This provides for the following three steps (para 81):

> "(1) establish what facts the taxpayer asserts give rise to a reasonable excuse.
> (2) decide which of those facts are proven.
>
> (3) 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"

27. A useful test for whether or not a reasonable excuse exists is that provided in *The Clean Car Company v The Commissioners of Customs and Excise* [1991] VATTR 234 (per Judge Medd QC):

> "The test of whether or not there is a reasonable excuse is 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?"

28. We have also considered the question of when the reasonable excuse must exist. In this case, the statutory payment deadline was 30 June 2021, but a penalty was not in fact imposed until almost 2 years later, in April 2023. However, the paragraph 4 penalty provision refers to failures to pay or make payment arrangements by 30 June 2021. As a result, we consider that the question is whether or not DSRL had a reasonable excuse on 30 June 2021. It is not relevant whether or not that reasonable excuse ceased after that time (or indeed whether or not a reasonable excuse arose after that time).

29. A reasonable excuse must be established in respect of both the failure to pay and the failure to enter into payment arrangements. We therefore consider both points separately.

Reasonable excuse in failing to pay

30. Mrs Shaw, on behalf of DSRL asserted that the Company did not have sufficient funds to pay the amount due. Although we were not provided with detailed evidence of the financial state of the business at the time, we are prepared to accept Mr Shaw's oral evidence on this point. In June 2021 the COVID-19 pandemic still impacted the ability of businesses to operate. We consider it highly probable that a business that relies on large public events such as horse racing events would suffer considerable loss of income. Furthermore, the need to feed and care for horses meant that there were fixed costs that could not be easily reduced.

31. HMRC submit that they sympathise with challenges to business caused by COVID-19 but that the government offered a deferral of all VAT payments as a provision at the time for

a period of one year. HMRC also submit that they do not accept that DSRL has provided any evidence to support or demonstrate that there was a causal link between the impact of COVID-19 and DSRL's failure to pay the VAT due. We disagree and consider there is sufficient evidence of a lack of resources due to the COVID-19 pandemic.

32. We consider that the facts put forward as giving rise to a reasonable excuse in relation to payment are proven.

33. We consider that the statutory scheme permits a shortage of funds to be accepted as a reasonable excuse. In this case, the shortage of funds was due to the COVID-19 pandemic and was outside the control of DSRL. Accordingly, we accept that a reasonable excuse has been made out in relation to the failure to pay.

Reasonable excuse in failure to enter into payment arrangements

34. We have set out above our findings of fact in relation to the call between HMRC and Mrs Shaw in which a possible time to pay arrangement was discussed.

35. Mrs Shaw submitted that the business could not afford to agree to payments of more than £500 per month and that the intention would be to pay more when possible.

36. At the hearing, Mrs Shaw was at pains to point out that her preference was for the matter to be passed to external debt collectors so that she could negotiate her preferred payment terms. Indeed, she stated that the matter had been eventually passed to a debt collection agency and she had agreed acceptable terms with them.

37. She did not want to use furlough arrangements as she "didn't like taking things off the government". In any event, the 25% reduction in staff wages had the same effect as placing a staff member on furlough. She stated that she had done what she had felt was best for her staff and the welfare of the business.

38. Mrs Shaw also stated that the business was not in debt to anybody and made just enough money to pay the rent. She explained that she had taken bounceback loans that she was using to pay horse box finance. She described herself as having done everything she could to avoid the debt and to have "hit a brick wall" in dealing with HMRC. She said that if HMRC had accepted her offer of £500 per month that this would have knocked thousands of pounds off the debt.

39. Mr Nyoni, for HMRC, contended that DSRL was aware that failure to set up a payment plan or make full payment of the VAT due, would lead to a penalty. Despite this awareness DSRL failed act as a reasonable taxpayer, intending to comply with their VAT obligations, would have done by failing to agree a time to pay arrangement with HMRC or pay the VAT due.

40. Mr Nyoni stated that HMRC sympathise with the challenges and difficulties faced. However, HMRC's sympathies must be balanced by their duty to administer a fair tax system and to gather the funds to help the nation come out of the pandemic. Mr Nyoni submitted that HMRC's offer of an additional 11 months was reasonable.

41. Mr Nyoni also submitted that DSRL's request to pay £500 per month would result in the debt taking over 49 months to be cleared. This was too long and HMRC could not agree to a payment arrangement on this basis.

42. To the extent that Mrs Shaw's assertions above are expressions of Mrs Shaw's views, we are content to accept them as such. However, we are not persuaded that DSRL has established that the business could not afford to make the payments.

43. We were not provided with evidence as to any negotiation by DSRL with other creditors of the business in order to defer or reduce payments, or to attempts to secure other sources of financing to meet VAT liabilities.

44. We got the distinct impression that Mrs Shaw considered that VAT needed only to be paid out of remaining funds after all other bills had been paid. It is of course always commercially preferable for a trader to treat VAT payments as low priority. Delaying payments to employees or suppliers is likely to have a far more immediate impact on the business than a late VAT payment. However, it is precisely this behaviour that the penalty regime is intended to address. If a trader chooses to pay HMRC after other creditors then they must face the consequences of that choice, just as they would face the consequences of a failure to pay any other creditor.

45. Accordingly, we do not consider that DSRL has discharged its burden of proving that it has a reasonable excuse for failing to enter into a payment arrangement.

46. Furthermore, even if the facts asserted by Mrs Shaw were proven, we do not consider the approach taken to amount to a reasonable excuse. We do not consider that it was unreasonable of HMRC to reject a payment plan that would result in the deferred liability being repaid in 49 months (over 4 years). In such circumstances it was incumbent upon DSRL to consider what steps it could take in order to be able to propose more acceptable terms.

47. DSRL could have provided HMRC with detailed information as to how it was negotiating with other creditors, or the steps it had taken to secure finance to meet the VAT. This could have formed the basis of a negotiation of mutually-acceptable payment terms. Instead, DSRL decided not to enter into any such negotiation and to instead await referral to an external debt collector in the hope of securing its preferred payment terms. We do not consider this provides a reasonable excuse in the circumstances.

CONCLUSION

48. For the reasons set out above, we do not consider that DSRL has established a reasonable excuse for its failure to enter into payment arrangements in relation to the deferred VAT by 30 June 2021. As such we uphold the penalty imposed and dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 16th JANUARY 2024