Neutral Citation: [2025] UKFTT 96 (TC)

Case Number: TC09422

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2024/03628

VAT - Default Surcharge – whether to grant permission to appeal out of time – Martland applied – permission to appeal not granted. Whether, if permission to appeal had been granted, a reasonable excuse established – no – Perrin applied

Heard on: 13 December 2024
Judgment date: 30 January 2025

Before

TRIBUNAL JUDGE DAVID HARKNESS
TRIBUNAL MEMBER REBECCA NEWNS

Between

XCEL CONSULT LIMITED **Appellant**

-and-

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

Representation:

For the Appellant: Ms Omotola Oladepo of AACSL Accountants Limited

For the Respondents: Ms Hifsa Shabir litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The hearing took place on 13 December 2024 using the Teams video hearing system. The documents to which we were referred were a bundle of 100 pages, an authorities bundle of 261 pages and a statement of reasons of 27 pages produced by HMRC. We were also referred to HMRC guidance at **https://www.gov.uk/tax-appeals/reasonable-excuses**. Mr Adeniyi, a director of the Appellant, gave evidence in person.

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.

DECISION

3. The tribunal decided that permission to appeal out of time should not be granted.

4. The tribunal also considered what decision it would have reached if it had granted permission to appeal out of time. The tribunal decided that, if the tribunal had granted permission to appeal out of time, the tribunal would have dismissed the substantive appeal.

SUMMARY

5. The first issue we considered was the request for permission to appeal out of time. The Appellant sought to sought permission to appeal against default surcharges in respect of VAT for six periods in 2021 and 2022. The statutory period for making an appeal in respect of a relevant decision by HMRC is 30 days. In this case the appeal was made approximately five months after the end of the statutory period. The reasons given for the late appeal were essentially that the default had been caused by a previous accountant acting for the appellant, that the appellant had suffered a bereavement and health issues. Applying the relevant case law, we found that the length of the delay in making the appeal was "serious and significant"; in the circumstances of this case the reasons advanced for the late appeal were not "good reasons"; and, in evaluating all the circumstances of the case, the case was not one which merited giving permission to appeal out of time.

6. However, in case we were wrong on that issue, we went on to hear from the parties in relation to the substantive matter which was the subject of the appeal. The substantive matter was an appeal against VAT default surcharges made under s.59 Value Added Tax Act 1994 ("VATA"). It was accepted on behalf of the Appellant that the default surcharge notices had been properly served and the default surcharges correctly calculated. Accordingly the only matter to consider was whether the Appellant had a reasonable excuse for the failures in respect of which the default surcharges had been charged. The reasons put forward by way of reasonable excuse were principally that the failures arose from defaults by the Appellant's former accountant. In addition it was asserted that Mr Adeniyi, the director of the Appellant, had suffered stress and other health issues; had suffered from a family bereavement; and his father had been very ill during the relevant period. It was argued that these factors had prevented timely submission of the VAT returns. While we were very sympathetic to Mr Adeniyi, we did not find that these reasons amounted to a reasonable excuse within the meaning of s.59 VATA, in particular because s.71VATA precludes reliance upon a third party as amounting to a reasonable excuse. Accordingly, had we been determining the substantive appeal, we would have dismissed it.

FACTS

7. We found the following facts which were not disputed:

(1) The Appellant is a taxable person registered for the purpose of VAT and actively trading at the relevant times;

(2) John Adeniyi is the director of the Appellant;

(3) VAT returns were not made on time and VAT was not paid on time in respect of periods 07/21, 10/21, 01/22, 04/22, 07/22 and 10/22 and accordingly HMRC issued surcharge liability notices in respect of those defaults;

(4) These notices were received by the Appellant and the calculation of penalties shown in the notices is accepted as correct by the Appellant;

(5) The Appellant had entrusted preparation of its VAT returns for the relevant periods to an agent but, for whatever reason, the agent did not submit the returns in a timely manner;

(6) In July 2023, the Appellant appointed a new firm of accountants to assist with its VAT compliance;

(7) On 15 September 2023, the Appellant requested a review of the decision to issue the surcharges for the relevant periods;

(8) On 17 November 2023, HMRC issued a Review Conclusion Letter (the "Review Conclusion Letter") upholding the surcharges – that was the date of the document notifying the decision to which this appeal relates. That letter was sent to AACSL Accountants, the agent acting for the Appellant in this appeal;

(9) On 17 April 2024, the Appellant requested a further review of the decision to issue the relevant periods;

(10) On 03 May 2024, HMRC issued a letter upholding the surcharges;

(11) On 03 June 2024, the Appellant submitted a notice of appeal in respect of the surcharges.

APPLICATION OF THE LAW - LATE APPEAL

8. Section 83G VATA sets out a statutory time limit for bringing appeals in respect of VAT penalties and surcharges of the kind in question in this case. An appeal is to be made to the tribunal before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates. Section 83G(6) provides that an appeal may be made after the expiry of the statutory period if the tribunal gives permission. In deciding whether or not to give permission allow the late appeal, we applied the three-stage test set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"), which is as follows:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason or reasons why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission, and in doing so take into account "the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected".

9. Applying those tests, we found as follows:

(1) the delay in making the appeals was from 17 December 2023 (i.e 30 days after 17 November 2023 that being the date of the HMRC Review Conclusion Letter) to 3 June 2024 when the appeals were made. That is a delay of over 5 months which, given a

statutory period of 30 days, was plainly relatively serious and significant. In reaching this conclusion we had regard to the UT decision in *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) ("*Romasave*"), where it was held at [96] that In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.

(2) The delay occurred because of the Appellant's failure to make the appeals by the statutory time limits.

(3) The reasons given for the delay (failure by the previous accountant engaged by the Appellant, a bereavement and stress/health issues) could not be said logically to have occasioned the delay. In particular, we found as a fact that in July 2023 the Appellant appointed a new firm of accountants to assist with its VAT compliance. The delay in making the appeal occurred several months after that time so cannot be said to be the result of failures by the previous accountant. Indeed the Review Conclusion Letter was sent to the new agent. No evidence of stress and health issues in the period after November 2023 was advanced so we did not have evidence making it arguable that stress and health issues gave rise to delays in making an appeal.

(4) Although the consequence of refusing permission is that the Appellant cannot challenge the penalties at the Tribunal, the circumstances of the case were in favour of refusing permission. This was essentially because:

(a) significant weight must be given to the failure to respect statutory time limits;

(b) there was no good reason for the delay;

(c) allowing cases to proceed when the appeal has been made out of time prejudices both HMRC and other taxpayers; and

(d) the merits of the appeal appeared to be weak (see further below in relation to our analysis of this issue).

10. We considered if the HMRC letter of 3 May 2024 was relevant to the question of whether permission should be given for the appeals to be brought out of time. We concluded that that later letter was not relevant. We reached that conclusion on the basis that the decision in respect of which the appeals were being brought was the Review Conclusion Letter of November 2023. The 3 May letter stated in terms that the appeal date was 30 days after the date of the Review Conclusion Letter and did not raise any expectation that a further period of appeal was being granted by HMRC. It appeared to us that the later letter was in substance merely a courtesy reply explaining that HMRC's review process only allows for one review of a decision and that, although HMRC had considered the additional information supplied by the Appellant, the original decision stood. Accordingly we did not consider that this later letter was relevant.

11. For those reasons we refused permission to appeal out of time.

APPLICATION OF THE LAW – SUBSTANTIVE APPEAL

12. We also heard submissions in relation to the substantive issues raised in the appeal.

13. The substantive appeal was against HMRC's issue of VAT Default Surcharges under s.59(1) VATA for periods 07/21, 10/21, 01/22, 04/22, 07/22 and 10/22 in a total amount of £5969.81. Section 59 provides that a where a taxable person is required to furnish a return for a prescribed accounting period and HMRC have not received that return or the VAT due, the taxable person is to be regarded as in default. Section 59 goes on to set out the penalties due in these circumstances. On behalf of the Appellant, it was accepted that the returns had not

been made and the VAT had not been paid and, accordingly, the penalties were due unless the Appellant could put forward a reasonable excuse for the purposes of s.59(7)(b).

14. Section 59(7)(b) provides that a taxpayer may avoid a penalty if they have a reasonable excuse. There is no statutory definition of a "reasonable excuse". Whether or not a person has a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Commrs* (2006) Sp C 548 ("*Rowland*"), at [19].

15. We approached the question of a reasonable excuse in line with the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) ("*Perrin*"). At [75], the Upper Tribunal concluded that the FTT in that case had correctly stated that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account." The Upper Tribunal set out helpful guidance as to how the FTT should approach the issue of reasonable excuse at [81] of Perrin as follows:

> "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 [themselves] 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?"

16. We also considered the decision of the VAT Tribunal in *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234. In that case, HH Judge Medd QC held:

> "… the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with [their] obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found [themselves] in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found [themselves], 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 [their] 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 [their] duties in regard to tax and would conscientiously seek to ensure that [their] returns were accurate and made timeously, [their] age and experience, [their] 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 [they] did, [they] acted reasonably and so had a reasonable excuse."

17. The burden of proof was on the Appellant to demonstrate there is a reasonable excuse on the balance of probabilities.

18. Applying the approach of *Perrin*, we sought to (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. In relation to (3) we considered the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found themselves at the relevant time. We asked ourselves whether what the taxpayer did (or omitted to do or believed) was objectively reasonable for this taxpayer in those circumstances?

19. The facts relied upon by the Appellant are set out above but in summary were that:

(1) The Appellant had appointed an external accountant to file the relevant VAT returns and that accountant had failed to perform the task;

(2) Mr Adeniyi had suffered from stress and health issues partly brought on by Covid;

(3) Mr Adeniyi suffered a bereavement of a close family member and his father had a stroke.

20. We found as a fact that the Appellant had appointed an external accountant to file the relevant VAT returns and that accountant had failed to perform the task. We were not presented with much evidence of Mr Adeniyi's stress and health issues, his bereavement or his father's health issues, but these assertions were not challenged by HMRC so we accepted that they should be treated as proven. So we then considered if those facts amounted to a reasonable excuse.

21. We are extremely sympathetic to Mr Adeniyi and his family's health difficulties and can well understand that they played a part in his life at the time. However, we did not consider that they were the reason for the VAT defaults. If they were, then judged objectively, we do not consider that these problems amounted to a reasonable excuse for the defaults. We noted in this context that (a) the Appellant did not provide us with evidence that Mr Adeniyi's stress, health issues and bereavement had in fact interfered with the Appellant's ability to submit VAT returns on time, (b) the Appellant had continued to actively trade during the periods in question. We inferred from this that priority had been given to trading rather than VAT compliance. We considered that it was not objectively reasonable for a taxpayer in the situation the Appellant was in not to have given greater attention to VAT compliance.

22. Instead, from the evidence we heard and the assertions made to us on behalf of the Appellant, it was clear that Mr Adeniyi had relied on his external accountant to deal with VAT matters and the overwhelming reason for the defaults was the failure by the external accountant.

23. In that context, we considered s.71 VATA which specifies among other things 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. There was no evidence Mr Adeniyi had taken reasonable steps to check that the third party accountant was fulfilling the necessary duties – rather the impression we were given was that Mr Adeniji had completely delegated responsibility for VAT matters to the third party

24. Accordingly, we concluded that the Appellant did not have a reasonable excuse for the failure.

25. Our attention was drawn to HMRC guidance at https://www.gov.uk/tax-appeals/reasonable-excuses. Under the heading "What may count as a reasonable excuse", there is wording reading "A reasonable excuse is something that stopped you meeting a tax obligation for a valid reason, for example: […] you relied on someone else to send your return, and they did not". It was argued that this showed that reliance on a third party in the Appellant's circumstances should be treated as a reasonable excuse. We concluded that his argument was not correct. We reached this conclusion because:

(1) The heading of the guidance states "what ***may*** count as a reasonable excuse" (emphasis added) which suggests that the list of examples are merely indicative of things that are capable of being a reasonable excuse depending on the circumstances, rather than being a list of things that will in all cases be a reasonable excuse;

(2) That interpretation is consistent with s71 VATA in the sense that the effect of s.71 is that a taxpayer who places reliance on a third party will not have a reasonable excuse unless they can show they took reasonable care to try to ensure the third party fulfils the necessary obligations (as noted above there was no evidence Mr Adeniyi had taken reasonable steps to check that the third party accountant was fulfilling the necessary duties);

(3) The wording in the guidance in relation to reliance on a third party contains a link to a page of HMRC guidance that states explicitly "You'll still be legally responsible for your own tax.".

26. Accordingly we did not consider that this HMRC guidance provided any significant support for the Appellant's contentions that they had a reasonable excuse. However, we did consider that the guidance could have been more clearly worded.

27. For the reasons given we concluded that, had we given permission to appeal out of time, we would have dismissed the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

Release date: 30th JANUARY 2025