



TC03014

Appeal number: TC/2012/05119

*VAT default surcharge - insufficiency of funds - whether reasonable excuse
- no - whether part payment made on time - no - insufficiency of funds -
whether reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

W-T WINDOWSTORE LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 RAYNA DEAN**

**Sitting in public at Alexandra House, The Parsonage Manchester on 17 May
2013**

**Thomas Griffiths, director of the Appellant Company
Anne Sinclair, Officer of HM Revenue and Customs, for the Respondents**

DECISION

The Appeal

1. W-T Windowstore Limited (“the Appellant”) appeals against a default surcharge of £1,085.66, for its failure to submit, in respect of its VAT period ended 31 December 2011, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the amount due of £10,855.60.

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

10 Background

3. The Appellant’s principle business activity is the manufacture and installation of windows, conservatories and glazing products.

4. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act (“VATA”) 1994 requires a VAT return and payment of VAT by cheque due on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995]. The due date for the Appellant’s 12/11 period was 31 January 2012. The Appellant’s return was received late by HMRC on 3 February 2012. The amount due was £10,855.60. Payment was made in part by a cheque on 8 February 2012 for £6,855.60 and the balance of £4,000 by cheque on 15 February 2012.

5. The Appellant had previously defaulted on VAT payments by cheque in period 09/10 when a VAT Surcharge Liability Notice was issued, and again in periods 12/10 and 03/11. On each occasion the surcharge calculated was below £400, and so was not levied.

6. Section 59 VATA 1994 sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. The specified percentage rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default after the issues of a Surcharge Liability Notice the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

7. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59 (7) VATA 1994 sets out the relevant provisions : -

‘(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

5 (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

10 (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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 ..’

8. It is primarily s 59(7)(b) on which the Appellant seeks to rely. The burden falls
15 on the Appellant to establish that it has a reasonable excuse for the late payment in question.

9. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

20 ‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

10. Although an insufficiency of funds to pay any VAT due is not a reasonable
25 excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

11. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

30 Appellant’s Case

12. The Appellant does not dispute that its VAT payment for the period 12/11 was due on 31 January 2012 or that it was late making payment of the balance of £4,000. It is also agreed that the payment, if made by cheque, was due on 31 January 2012. The Appellant says that the payment for £6,855.60 was despatched to HMRC on
35 Friday 27 January 2012 and should have reached HMRC by the due date of 31 January 2012. The cheque was dated 3 February to make sure there were sufficient funds in the bank for the cheque to be honoured. The Appellant asserts that any penalty should therefore only be levied on the late payment of £4,000.

13. The Appellant’s other ground of appeal is that an insufficiency of funds was
40 created by circumstances outside its control, which impacted upon its ability to discharge VAT on time. Its problems were caused by a number of other factors.

Principally, that major customers had delayed making payments and one particularly large customer, representing 10% of his turnover, had gone into administration owing the Appellant over £32,000.

5 14. Mr Griffiths for the company said that the company had been trading for 24 years and never previously been penalised. The Appellant had not requested a time to pay arrangement because the proprietors did not always know until it is too late that its customers are unable to settle their debts on time. One of its major customers, United Utilities, were on 60 day terms and normally paid on time, but immediately prior to the default period was late settling its account, which contributed significantly to the company's cash flow problems.

15. Mr Griffiths said that the Appellant operated without an overdraft as it had never previously needed one. He hadn't sought overdraft facilities or endeavoured to raise funds elsewhere because the company did not expect to be late in making its VAT payment for December 2011.

15 HMRC's Case

16. Ms Sinclair for HMRC said that the Appellant's VAT Period 12/11 had a due date of 31 January 2012 for a non-electronic VAT payment. The amount due on the tax return was £10,855.60. The VAT payment was received by HMRC in two instalments, both of which were late.

20 17. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after the issue of the Surcharge Liability Notice for period 09/10 and further surcharge default notices for periods 12/10 and 03/11. The information contained on the reverse of each Notice states:

25 'Please remember your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.'

18. The requirements for submitting timely electronic payments can also be found -

- 30
- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
 - On the actual website www.hmrc.gov.uk
 - On the E-VAT return acknowledgement.

35 19. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VATA 1994 s 59(5).

20. Therefore, HMRC say that the surcharge has been correctly issued in accordance with the VATA 1994 s 59(4).

21. With regard to the Appellant's grounds of appeal, it is specifically stated in s 71(1) VATA 1994 that any insufficiency of funds to pay any VAT is not a reasonable excuse.

5 22. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. No request for a time to pay arrangement was received by HMRC from the Appellant prior to the default.

23. Payment by cheque is regarded as made when the cheque has cleared pursuant to Regulation 40 (2B) & 2C) of the VAT Regulations. Section 21.2.2 of Notice 700 The VAT Guide states:

10 'if you pay by cheque the payment is treated as received when cleared funds reach HMRC's bank account- not the date when the cheque is received.'

Section 3.1.2 of notice 700/50 default surcharge also states:

15 'if you send a cheque in the post your payment will be treated as received when the funds have cleared into HMRC's bank account not when we receive a cheque, cheques take three working days to clear. Working days do not include Saturdays Sundays and bank holidays'.

24. HMRC say that the Appellant was familiar with payments made by cheque and the latest date by which HMRC must receive cleared funds for that method of payment.

Conclusion

20 25. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

26. The surcharge was correctly issued in accordance with VATA 1994.

25 27. The Appellant says that the payment of £6,855 despatched on Friday, 27 January 2012 should have reached HMRC by the due date of Tuesday 31 January 2012. According to HMRC the cheque was not received and cleared until Wednesday 8 February 2012. There is no explanation as to why it apparently took twelve days for cleared funds to reach HMRC, but in any event if payment was made by cheque and for cleared funds to reach HMRC by Tuesday, 31 January 2012 the cheque should have been despatched to HMRC at least five working days prior to that date, that is no 30 later than 24 January 2012.

28. The Appellant's other ground of appeal is that it was suffering cash flow shortages caused by customers settling their accounts late, and because of a major customer going into administration owing the Appellant a substantial sum.

35 29. In *Customs & Excise Commissioners –v- Steptoe [1992] STC 757* the tax-payer argued that although the proximate cause of his default was insufficiency of funds, the underlying cause of that insufficiency, namely the unexpected failure by a major customer to pay him on time, amounted to a reasonable excuse. The Court determined on a majority that the statutory exclusion of insufficiency of funds as an excuse did

not preclude consideration of the underlying cause of insufficiency and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test had to be applied strictly.

30. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure, the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person's exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates, the tax-payer would not have avoided the insufficiency of funds which led to the failures.

31. Having considered the Appellant company's circumstances and the background facts and circumstances leading up to the default, the Tribunal finds that the underlying cause of the default was the cash flow shortage caused by a combination of events. However the possibility of the Appellant not having sufficient funds to discharge its VAT liability on time must have been apparent to the Appellant, but it did not ask for time to pay as it could have done. There was no attempt to raise funds by way of overdraft or otherwise in order to pay the VAT on time.

32. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal's view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 12/11 period.

33. The appeal is accordingly dismissed and the surcharge upheld.

34. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 25 October 2013