



TC03034

Appeal number: TC/2012/03679

VAT default surcharge - full amount of VAT not paid on time due to 'restrictions on internet banking' and insufficiency of funds - whether reasonable excuse – no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAVENFIELD LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 PETER WHITEHEAD**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 22 May
2013**

Mr Patel of the Appellant company and Mr Pathan for the Appellant

Mr B Haley Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. Ravenfield Limited (“the Appellant”) appeals against a default surcharge of £3,351.27 imposed for its failure to submit, in respect of its VAT period ended 08/11, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the amount due of £22,341.82.

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

10 Background

3. The Appellant company was established in 1999. It is a claims management company with its main business activity being vehicle credit hire. The company operates with a fleet of vehicles providing ‘*mobility solutions to non fault drivers, ensuring that they remain on the road until their own vehicle is repaired or until they receive payment for the value of their vehicle. The company has a specialist department and fleet of vehicles dedicated to taxi and private hire drivers*’

4. The Appellant had previously defaulted on VAT payments in period 08/04 when a VAT surcharge liability notice was issued and had defaulted a further twenty times between 2004 and August 2011.

5. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Section 59 of the VATA requires a VAT return and payment of VAT due on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].

6. The Appellant paid VAT on a quarterly basis and usually paid its VAT by BACS. HMRC may allow additional time for payment when made by electronic means and pursuant to Regulation 40 (4) of the VAT Regulations 1995 allows an additional seven days after the end of the calendar month when payment would normally fall due (together with a further three days when the VAT is collected by direct debit). Limitations apply if the due date falls on a weekend or a bank holiday in which event the due date defaults to the last previous working day. The Appellant’s VAT return and payment were due no later than 7 October 2011.

7. The Appellant submitted its 08/11 VAT return electronically on 3 October 2011 and was therefore on time. Payment was made in three instalments on 12 October 2011, 13 October 2011 and 14 October 2011 all by BACS. The VAT payment was therefore late.

8. 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 the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

9. A surcharge liability notice was issued for £3,351.27 on 14 October 2011.

10. HMRC contend that the Appellant should have been aware of the potential financial consequences of a default, having been in the default surcharge regime from 08/04 and having defaulted on twenty-one previous occasions.

11. 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 –

(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 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 ..’

12. 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.

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

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

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

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

Appellant's Case

15. The stated grounds of appeal in the Appellant's letter to HMRC of 29 February 2012 were:

5 "Times are very tough and adding a surcharge on top is a real burden to the business. Mr Patel did everything in his control to pay the VAT on time but due to some receipts not clearing in time along with the day limit of £10,000 (on Internet banking) there was a delay in paying the VAT. If the VAT had been paid several weeks late Mr Patel would accept your decision, but to penalise someone for being a few days late is too harsh if you imposed a lower surcharge Mr Patel may even consider accepting it but not £3351.27. Also when Mr Patel spoke to someone
10 when the initial surcharge notice came, one of the officers agreed to waive the penalty when Mr Patel spoke to another officer they reversed the previous officer's decision and asked for the appeal to be sent in writing"

16. Mr Pathan for the Appellant said the Appellant trades in the credit car hire business. If a motorist is involved in an accident the Appellant company provides a
15 hire car but very often is not paid until such time as liability for the accident is determined and the insurance company decides whether to pay out to the motorist. If insurance companies failed to pay the company within a reasonable period serious cash flow difficulties were inevitable. It can often be many months, or even up to two years, before payment is received. Despite the company's best efforts and the use of
20 debt recovery agents, the Appellant was unable to recover debts due to the company with sufficient efficiency to maintain reasonable cash flow levels.

17. The Appellant was also suffering severe cash flow shortages due to the recession. Although its turnover exceeds £1 million the current debt level is £1.2 million. In fact, said Mr Pathan, it could be described as being 'out of control'. Mr
25 Patel, the company proprietor, tried to put the money on one side to pay VAT but the financial constraints were often impossible to deal with. Some of the debts owed to the company were over two years old.

18. Mr Patel the company proprietor had been unable to inject the capital monies into the company and in fact at one stage had considered putting the company into
30 liquidation.

19. The Appellant was also paying back arrears of VAT at £10,000 per month and this was adding to the company's financial burden. The company had done everything it could to ease the burden. It was already on a cash accounting basis and at the limit of its overdraft facilities and its bank was even suggesting reviewing the facility
35 downwards. Most of its customers were small businesses or individuals. No particular customer made up an unduly large proportion of the Appellant's debtors.

20. Following the last default the Appellant had enjoyed an improvement in its business and cash flow. VAT was therefore now being paid on time. It had also
40 arranged a CHAPS facility with its bank that allows payments to be made without a £10,000 limit.

HMRC's Case

21. Mr Haley for HMRC said that the company had been in financial difficulties since 2004 having been issued with twenty-one previous default notices. They would therefore have been aware of the legal obligation to submit returns payments on time and aware of the consequences of failing to do so.
- 5 22. Mr Haley added that the Appellant had been sending payments by BACS since November 2007. The fact that payments had always been for £10,000 or less indicated that the Appellant was aware of a £10,000 limit on such payments. Mr Haley said that arrangements should have been made to ensure that payments by instalments were sent early enough so as to be received by HMRC by the due date.
- 10 23. Mr Haley argued that the Appellant's accounts show that it was a reasonably successful company that was simply undercapitalised. It could be seen that at various stages the company was using the VAT due to HMRC to fund the business. In particular, because the Appellant was on a cash accounting basis there was no excuse for the late payments. It could not be said that the Appellant's cash flow shortages
15 was due to unforeseen or unexpected events
24. Mr Haley said that the potential financial consequences attached to the risk of a default would have been known to the Appellant after issue of the Surcharge Liability Notice and the numerous subsequent surcharge default extension notices. The information contained on the reverse of each Notice states:
- 20 '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.'
- 25 25. The requirements for submitting timely electronic payments can also be found -
- 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.
- 30 26. 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 VAT Act 1994 s 59(5).
27. Therefore, HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).
- 35 28. With regard to the Appellant's grounds of appeal, it is specifically stated in s71(1) VATA 1994 that any insufficiency of funds to pay any VAT is not reasonable excuse.

29. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellant did not make any request for a time to pay arrangement.

Conclusion

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

31. The Appellant's first ground of appeal is that it was suffering cash flow shortages at the time of the default.

10 32. 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
15 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.

20 33. 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
25 dates, those factors would not have avoided the insufficiency of funds which led to the failures.

34. The Appellant could have requested a time to pay arrangement with HMRC but did not do so. The cash flow difficulties were not due to unforeseen or unavoidable circumstances.

30 35. The Tribunal accepts that one of the underlying causes of the default may have been cash flow shortages, but the fact that the VAT was paid only a matter of days late, albeit because the company remitted funds to HMRC by BACS payments of £10,000 or less, indicates that insufficiency of funds was not the main reason payment was made late. It could have arranged, as it has done now, CHAPS facilities through
35 its bank so as to make payment of VAT in the full amount due without a £10,000 restriction.

36. 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
40 burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 08/11 period.

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

38. 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.

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MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 8 November 2013

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