



TC07696

Appeal Number: TC/2019/09587

VAT – Default Surcharge – Insufficiency of funds – VAT not calculated by due date – reasonable excuse – No – appeal dismissed.

REFLECTION INVESTMENT BUSINESS

Appellant

-and-

**THE COMMISSIONERS FOR HER
MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE DR K KHAN
MS GILL HUNTER, MEMBER**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on
3 March 2020.**

**Appellants were unrepresented and did not appear.
Ms Pembe Ramadan and Nikisha Davish, Presenting Officers represented HMRC.**

DECISION

Matter under Appeal

The Appellant is appealing against the Respondents' decision to uphold the issue of a VAT Default Surcharge under Section 59A Value Added Tax Act 1994 for period 05/19.

The Notice of Appeal is dated 26 December 2019.

Background

1. The Appellant entered the Default Surcharge regime from period 02/19.
2. The Appellant is a taxable person and has been registered for VAT with effect from 3 January 2016. The business activity is the sale of smartphones. The VAT Registration Number is 241 3598 11.
3. The business is an incorporated company registered in the Netherlands, operating from Kerikeri berweg 238, Luna arena, 1011CM Amsterdam, Netherlands. The business is VAT registered in the UK at TMF VAT Services Ltd, 107 Queensberry House, 3rd Floor, Brighton, BN1 3XF.
4. The company owner is Yu Fen Cheng. The appeal has been submitted by company director Alice Cheng.
5. The Appellant submits VAT Returns on a quarterly basis and the normal method of payment has been via CHAPS.
6. The Appellant was mandated under VAT Regulations 1995, SI 1995/2518, regulation 25A, to submit VAT returns electronically and make payment & returns under the Payment on Account Scheme (POA).
7. Under Section 28(2) of the VATA 1994 a trader may be required to pay on account any tax he may become liable to in respect of a prescribed accounting period under an order specifying both the amounts and due date of such payments. The Appellant was issued with a Payment on Account letter dated 28 November 2018.
8. All POA traders are required to render electronic payments and are specifically withdrawn from the concessionary seven calendar day extension (for paying electronically). The Payment on Account letter dated 28 November 2018 notified the Appellant that if the business was previously entitled to the 7-day extensions, this concession was withdrawn and any existing Direct Debits should be cancelled.
9. Default Surcharge notices in respect of POA traders are issued in accordance with VATA 1994 s.59A.

Payment background

10. The surcharge under appeal is shown below:

Date of Issue	Legislation	Description	Amount
15/07/19	s.59A VAT Act 1984	VAT Default Surcharge Assessment Period 05/19 at 2%	£4,700.00

11. For the period 02/19 the Appellant was required to submit payments on account and a balancing payment in accordance with the POA schedule issued on 28 November 2018.

12. The payments on account were due and paid as follows:

- i. The first payment on account £109,682.00 was due on 31 January 2019 and was received on 5 March 2019. This resulted in a default as payment was received 34 days after the due date.
- ii. The second payment on account £109,682.00 was due on 28 February 2019 and was received on 5 March 2019. This resulted in a default as payment was received 6 days after the due date.

13. The balancing payment and return were due on 29 March 2019. Both were received on 29 March 2019, resulting in no default.

14. As a result of the defaults in respect of the 02/19 Payments on Account, a Surcharge Liability Notice (V160POA) was issued on 3 May 2019.

15. For the appeal period 05/19 the Appellant was again required to submit payments on account and balancing payments in accordance with the POA schedule issued on 28 November 2018.

16. The first payment on account £109,682.00 was due on 30 April 2019 and was received on 29 April 2019, therefore no default.

17. The second payment on account £109,682.00 was due on 31 May 2019 and was received on 24 May 2019, therefore no default.

18. The balancing payment and return were due on 28 June 2019. The return was received on 28 June 2019 and payment was received in two parts.

19. The first of £278,000 on 28 June 2019 and the second of £235,030.96 on 1 July 2019 being 3 days after the due date, resulting in a default. The 05/19 Payment on Account Surcharge Liability Notice was issued on 15 July 2019 for £4,700 (as above).

Legislation

1. Section 28 VAT Act 1994 – Payments on account
2. Section 59 VAT Act 1994 – Default Surcharge
3. Section 59A VAT Act 1994 – Default Surcharge: Payments on account
4. Section 59B VAT Act 1994 – Relations between sections 59 and 59A
5. Section 71 VAT Act 1994 – Construction of Sections 59 to 70
6. Section 83 VAT Act 1994 – Appeals

Cases

1. The Clean Car Company v C&E Commissioners (1991) VATTR 234
2. Rowland v Revenue and Customs Commissioners (2006) STC (SCD) 536
3. Perrin v Revenue and Customs Commissioners (2018) UKUT 0156 (TCC)

Appellant's Contentions

20. The Appellant's Grounds of Appeal are as follows:

"According to the Default Surcharge-Review Conclusion Letter sent by HMRC "we will only cancel a default surcharge assessment if certain conditions apply ... the conditions are that ... there is a reasonable excuse for the payment and/or return being late". We indeed meet the condition that we do have a reasonable excuse for the payment and/or return being late that:

We didn't work out the accurate amount of VAT payable for Q2 until the due date. Due to insufficient cash flow of pounds, we can only pay £278,000 at the moment, the left amount of £235,040.53 was paid by Euro bank accounts at the same time, but the payment didn't reach HMRC's bank account on the same day, this is something we didn't expect and also beyond our reasonable control. Actually, we have done our utmost to meet our obligations. Please find the attached bank slips (see page 9-12) for your reference.

Please consider our reason above and cancel the decision as soon as possible. We could supply more information if necessary or helpful. Should you have any questions, please do not hesitate to let us know. Thank you for your attention in this matter".

HMRC'S Contentions

Penalties issued in accordance with legislation

21. The Respondents contend that by submitting payment of their VAT liability after the due date the Appellant did not comply with the VAT Act and Regulations.

Section 25 (1) VAT Act 1994 states:

1. *A taxable person shall –*
 - (a) *In respect of supplies made by him, and*
 - (b) *In respect of the acquisition by him from other member States of any goods, account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances".*

22. Under Section 29(2) of the VAT Act 1994 a trader may be required to pay on account any tax he may become liable to in respect of a prescribed accounting period.

23. The Appellant was notified that it had been included in the POA Scheme by a letter dated 28 November 2018 which included a schedule specifying both the amounts and due date of such payments.

24. The Respondents contend that there is a statutory obligation on a taxpayer required to make a return to pay the VAT to HMRC as per Regulation 40 VAT Regulations 1995.
25. The due date for the 05/19 return was 28 June 2019. The first payment on account of £109,682 was due on 30 April 2019, the second payment on account of £109,683 was due on 31 May 2019 and the balancing payment was due on 28 June 2019.
26. The return was received on 28 June 2019. The first payment on account was received on 29 April 2019, the second payment on account was received on 24 May 2019. The balancing payment was made in two parts. The first was received on 28 June 2019 the second on 1 July 2019, three days after the due date.
27. The legislation at sections 59A (2) and (3) VATA 1994 provides that a period of default continues for 12 months from the anniversary of the last day of the prescribed accounting period in which the default occurred. The Respondents contend that the penalty has been issued in line with the legislation.
28. A Surcharge Liability Notice was sent to the taxpayer informing that they were in the default cycle for a period of 12 months from the end of the VAT period. Any further default within the default cycle period would make the taxable person liable to surcharge at 2% for the first surcharge accounting period, 5% for the second surcharge period, 10% for the third period and 15% for subsequent periods.
29. A surcharge Liability Notice was issued to the Appellant on 3 May 2019.
30. As can be seen from the Schedule of Defaults the 05/19 period is classed as the first surcharge period as per section 59A (5) (a) VATA 1994, the outstanding liability at the due date was £235,030.96 and the applicable penalty percentage was 2% giving a Default Surcharge penalty of £4,700.00.
31. A Notice of Assessment of Surcharge and Surcharge Liability Notice Extension was issued on 15 July 2019.
32. In the absence of any statement from the Appellant to the contrary, the Respondents' position is that the notices have been served and they have been received by the Appellant.
33. The Respondents contend that the penalty for period 05/19 has been calculated in line with the legislation and the second balancing payment was received by HMRC three days after the due date.

Discussion

34. There are several issues which need to be covered in establishing if there is a reasonable excuse.

Reasonable expectation that the payment would be received by the due date

35. Section 59A (8) (a) of the Act 1994, provides that a surcharge does not arise in relation to a failure to submit payment by the due date if a taxpayer has satisfied HMRC (or on appeal, a Tribunal) that

“The payment on account of VAT 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 by the day on which it became due”.

36. The Appellant maintains in its grounds of appeal that payments of £278,000.00 and £235,040.53 were both made on the due date. Due to cash flow issues the £278,000.00 payment was made in pounds and the further payment of £235,040.53 was made from a euro account. The Appellant’s review request letter dated 3 October 2019 states – “The transfers are made from the Netherlands and were made in good time”.

37. To support taxpayers with their responsibility HMRC publishes information and advice about their obligation and how they can adhere to them. This information about Value Added Tax, the completion and filing of returns, the making of tax payments, the due date of tax payment dates and the penalties that are chargeable, is all within the public domain and widely available via the internet including HMRC’s website.

38. A taxable person, acting in a responsible manner to ensure that he adhered to his legal obligations, should make himself aware of such information and act accordingly.

39. On submission of a VAT return a customer also receives an online acknowledgement which advises *“before making an electronic payment please contact your bank or building society to check the services available to you, any daily value limits and the latest cut off times for making payments.”*

40. The Appellant has provided transaction details from its bank, BNP Paribas. For the first payment of £278,000 the details show the “book date” being 28 June 2019 and the “value date” also being 28 June 2019. HMRC received the payment on 28 June 2019.

41. The transaction details for the second payment of £235,040.53 however show the “book date” as 28 June 2019 but the “value date” as 1 July 2019. HRMC received the payment on 1 July 2019.

42. The document “Time Limits for Executing Transfers/Payment Order” issued by BNP Paribas states the “value date” on the account is the date when the Bank’s account maintained by a correspondent bank is credited/debited. The same document regarding outgoing international transfers also shows that transfers received by the bank after 3.00 pm will not be accepted for execution until the following business day.

43. The first payment of £278,000 was initiated before 3.00pm on 28 June 2019 and was received by HMRC on the same day, as confirmed by the “value date” of 28 June 2019. However, the second payment of £235,040.53 must have been initiated after the 3.00 pm deadline and therefore was not received by HMRC until the following business day which was 1 July 2019, again this is confirmed by the bank’s “value date” of 1 July 2019.

44. The Appellant claims that the payments were made in good time, however, the Respondents contend that the evidence provided shows that the payment was not made in good time or at a time that would result in the payment being received by the Commissioners by the due date.

45. The Appellant is a large international business that has been VAT registered from January 2016. Given the advice provided to the Appellant on the online VAT acknowledgement

available to the Appellant on HMRC's website and the information readily available from the Appellant's bank, a prudent person exercising reasonable foresight and due diligence, having proper regard for his responsibilities under the Tax Acts would have ensured he had sufficient funds to make the VAT payments on-time and made a simple check on his bank's cut off times. This should have been particularly important to the Appellant considering the substantial size of the balancing payment and the fact that the payment was being initiated on the due date.

Has Appellant demonstrated reasonable excuse?

46. Section 59A (7) of the VAT Act 1994 provides that a surcharge does not arise in relation to a failure to submit a return and/payment by the due date if the person satisfies HMRC (or on appeal, a Tribunal) that he had a reasonable excuse for the failure.

Section 59 (8) The VAT Act 1994 states:

(8) 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 –

(a) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1) (a) above –

- i. that the payment on account of VAT 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*
- ii. that there is a reasonable excuse for the payment not having been so despatched*

or

- c) In the case of a default that is material for the purposes of the surcharge and falls within subsection (1) (b) above, that the condition specified in section 59(7)(a) is satisfied as respects the default,*

47. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC (2006) STC (SCD) 536 at paragraph 18*).

48. The test as to whether the Appellant has a reasonable excuse is as set out by *Judge Medd QC in The Clean Car Company v C&E Commissioners (1991) VATTR 234*:

"The test of whether or not there is 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?"

49. The Respondents' view is that the actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having

proper regard for his responsibilities under the relevant legislation. The decision depends upon the particular circumstances in which the failure occurred, the particular circumstances and abilities of the person who failed to file his return or pay any tax due on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

50. The Appellant states “*We didn’t work out the accurate amount of VAT payable of Q2 until the due date*”.

51. In the tribunal’s view leaving the submission and payment until the last moment leaves little opportunity to make adjustments where they become necessary. Considering that the Appellant was notified that it had already entered the Default Surcharge regime in period 02/19 and in light of the substantial balancing payments normally due from the business, a prudent person exercising due diligence and reasonable foresight would have left ample time to ensure the return and payment were received by HMRC in time.

52. The Appellant chose to leave the calculation of the VAT return until the due date allowing little time for any unforeseen delays. The Appellant has not demonstrated any reasonable excuse that prevented compliance to its tax obligations.

Reasonable excuse – insufficient cash flow

Section 71 VAT Act 1994 specifies two situations that are not reasonable excuse:

“an insufficiency of funds to pay any VAT due is not a reasonable excuse”

and

“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”.

53. The Appellant maintains that on the due date they had insufficient cash flow in pounds so £235,040.53 had to be paid from a euro bank account.

54. Prior to the due date the Appellant would have been aware of the potential lack of funds in pounds and had the return been calculated earlier than the due date this would have left ample time for the payment from the euro account to be initiated in time to reach HMRC by the due date. The Appellant must accept the consequences of leaving the submission and payment to the last moment.

55. An insufficient cash flow in pounds does not constitute a reasonable excuse. The Appellant did have sufficient funds in the euro account but did not exercise reasonable foresight and failed to initiate the payment in time to reach HMRC by the due date.

56. In order for the appeal to succeed, the taxable person must demonstrate that a reasonable excuse existed which prevented him from meeting his tax obligations. In this case no reasonable excuse exists and the surcharge has been correctly charged in accordance with legislation.

57. In *Christine Perrin v HMRC (2018) UKUT 0156 (TCC)* (“*Christine Perrin v HMRC*”) the Upper Tribunal set out an approach that the First Tier Tribunal can take in considering a “reasonable excuse” defence (paragraph 81) (p167-187).

- 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.*
- 4) *Having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time. In doing so, the FTT should again decide the matter objectively, but taking 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.*

58. Having applied the four tests recommended in *Christine Perrin v HMRC*

1. The Appellant asserts that it calculated the 05/19 return on the due date. It had insufficient cash flow in pounds so paid £278,000.00 in pounds and a further payment of £235,040.53 from a euro account. Both payments were initiated on the due date.
2. The 05/19 return was received by HMRC on the due date. Evidence provided by the Appellant shows the payment of £278,000.00 had a “book date” and “value date” of 28 June 2019 and was received by HMRC on the due date. The payment of £235,040.53 had a “book date” of 28 June 2019 and “value date” of 1 July 2019 – the payment was received by HMRC on 1 July 2019. The BNP Paribas website states that payments initiated after 3pm will be executed the following business day.
3. The payment of £235,040.53 may have been initiated on the due date but was not received by HMRC until three days after the due date. Given the size of the business and the experience of the Appellant it would be reasonable for the Appellant to have followed HMRC’s advice and have checked the bank’s cut off times. The Appellant has provided no evidence of having done this. As per *Section 71 (1) (a) VATA 1994* insufficiency of funds is not a reasonable excuse. The Appellant has provided no evidence on the reason behind the insufficiency of funds that could constitute a reasonable excuse.
4. No reasonable excuse exists for period 05/19.

59. Having applied the recommendation in the Upper Tribunal in *Christine Perrin v HMRC*, the test is to consider what is a reasonable person, with an intention to comply with his tax obligations, would have done in the same circumstances and decide if the actions of the person met that standard.

60. The tribunal finds that the Appellant has not met that standard in its obligation to ensure payment of the VAT due for the period 05/19 was made on time.

Conclusion

61. The tribunal finds:

- a. The surcharge in respect of the tax period ending 05/19 has been correctly issued in accordance with s.59(4) VAT Act 1994 as the payment was received after the due date.
- b. The Appellant did not have a reasonable excuse for failing to pay the required tax by the due date.
- c. The appeal in respect of periods 05/19 be dismissed and the default surcharge issued in the sum of £4,700.00 be upheld.

62. For these reasons the Appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

TRIBUNAL JUDGE: DR KAMEEL KHAN

Release date: 05 MAY 2020