



TC03013

Appeal number: TC/2012/05180

VAT default surcharge - VAT paid late due to “restrictions on internet banking” - whether reasonable excuse - no – insufficiency of funds - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ARTISAN FURNISHINGS 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**

**The Appellant did not attend and was not represented.
Anne Sinclair, Officer of HM Revenue and Customs, for the Respondents**

DECISION

The Appeal

5 1. Artisan Furnishings Limited (“the Appellant”) appeals against a default surcharge of £8,378.16, for its failure to submit, in respect of its VAT period ended 31 December 2010, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the amount due of £55,854.44.

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

10 3. The Appellant did not attend the hearing and was not represented. The Tribunal was however satisfied that the Appellant had been notified of the date, time and venue of the hearing and that it was in the interests of justice to proceed.

Background

15 4. The Appellant’s principle business activity is the manufacture and retailing of curtains.

5. Section 59 of the VAT Act 1994 (“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].

20 6. The Appellant paid VAT on a quarterly basis and usually paid by direct debit. HMRC may allow additional time for payment when made by electronic means, and pursuant to Regulation 40(4) of the VAT Regulations 1995 allow 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 25 the due date defaults to the last previous working day.

7. The Appellant had previously defaulted on VAT payments in period 03/08 when a VAT Surcharge Liability Notice was issued. Further Surcharge Liability Noticed had been issued thereafter.

30 8. The Appellant submitted its 12/10 VAT return electronically on 7 February 2011 and HMRC automatically attempted to collect payment of £55,854.44 by direct debit three days later on 10 February 2011. The direct debit failed due to there being insufficient funds in the Appellant’s bank account.

35 9. Section 59 VATA 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
5 after the issue 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.

10. A Surcharge Liability Notice at 15% was issued for £8,378.16 on 11 February 2011.

11. Payment of VAT for period 12/10 was remitted by the Appellant by BACS in three instalments; £20,000 was paid on 21 February 2011, £20,000 on 22 February 2011 and £15,854.44 on 23 February 2011.

12. HMRC contend that the Appellant should have been aware of the potential financial consequences of making late payments, having been in the default surcharge regime from 03/08 and having defaulted on seven previous occasions.

15 13. 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 : -

20 ‘(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 –

25 (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

30 (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 ..’

14. 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
35 standard of proof is the ordinary civil standard on a balance of probabilities.

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

40 ‘(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.’

16. 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

5 17. No one from the Appellant company attended the hearing, but copy correspondence between the Appellant and HMRC indicated that the Appellant was suffering cash flow shortages at the time of the default. Mr Nadat, the company accountant, said that they had previously had a time to pay arrangement and that they had only just finished paying overdue balances when the default occurred.

10 18. Mr Nadat said that the full amount was not paid in one go because of payment restrictions on internet banking.

19. Mr Nadat also complains in correspondence with HMRC that the Appellant had not received a default surcharge notice at the time of the default and therefore was not aware that a penalty had been levied until some considerable time afterwards

15 HMRC's Case

20. Ms Sinclair for HMRC said that a surcharge liability notice was issued in March 2008 and extension notices in September 2008, December 2008, June 2009, December 2009 and March 2010.

20 21. The potential financial consequences attached to the risk of further defaults would therefore have been known to the Appellant after issue of the Surcharge Liability Notice and subsequent default extension notices. 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.'

22. 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 23. 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).

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

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

5 26. HMRC may allow additional time for payment if requested. However, 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 prior to the default for the period 12/10.

Conclusion

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

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

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

15 30. 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
20 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.

25 31. 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
30 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.

32. The Tribunal accepts that the underlying cause of the default may have been cash flow shortage. However the Appellant has not provided any background
35 information which may assist the Tribunal, and in particular no reasons have been given as to why a time to pay arrangement was not requested by the Appellant.

33. 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 12/10 period.

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

5 35. 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)"
10 which accompanies and forms part of this decision notice.

MICHAEL S CONNELL

TRIBUNAL JUDGE

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RELEASE DATE: 25 October 2013