[2015] UKFTT 0385 (TC)

TC04567

Appeal number: TC/2015/00885

VAT – Default Surcharge – Surcharges assessed for two periods – reasonable excuse – honest and reasonable belief that tax not due – no reasonable excuse – errors made by book-keeper – no reasonable excuse – electronic payment by Faster Payments on a Friday – deemed receipt on a weekend – reasonable excuse – appeal dismissed for one period and allowed for the other

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIFIELDS MECHANICAL AND ELECTRICAL SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR JOHN COLES

Sitting in public at Exeter on 24 June 2015

Mr Peter Collier for the Appellant

Mrs Jane Ashworth, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a VAT case. It concerns the default surcharge. The appellant has been assessed to surcharges for two VAT periods. It has appealed against both. The appeals have been brought out of time. The respondents have raised no objections to such late appeals. We are content that they are not prejudiced, and have therefore decided to hear the appeals.

2. We have been greatly assisted by the representations made by each party's representatives. In particular, Mrs Ashworth has presented HMRC's case clearly and with admirable objectivity. She has, in particular, pointed out to the appellant that it may have a reasonable excuse for the first period under appeal, notwithstanding that the appellant had initially submitted that it has no such excuse. We deal with this point in more detail later.

The Default Surcharge regime

3. In order to understand the appellant's position, it is necessary to set out (in brief at this stage) a description of the basic default surcharge regime.

4. Judge Bishopp has given such a description in his decision in *Enersys Holdings* [2010] UKFTT 20 TC0335

> *"The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence."*

5. It is worth adding here that service of a second (and subsequent) surcharge liability notice has a secondary effect of extending the surcharge liability period for a further year with effect from the end of the period in respect of which the second (or subsequent) notice was served.

6. In the appellant's case, the first default arose in the period ending 04/13. A surcharge liability notice was given to the appellant for that period, but no surcharge was levied.

7. The appellant then defaulted in the period ending 07/13. A surcharge of 2% in an amount ultimately determined of £717.79 was assessed on the appellant.

8. Within 12 months of the period extended by the second surcharge liability notice, the appellant defaulted again. This was in the period 07/14. A surcharge of £1,843.39 was assessed on the appellant.

9. There appear, therefore, to be three relevant periods in this appeal. i.e., those ending 04/13, 07/13, and 07/14.

10. However, the period ending 01/13 is also relevant since the appellant's VAT position in that period affects those which follow it.

11. One further aspect of the default surcharge regime should also be mentioned at this stage.

12. Where a taxpayer has a reasonable excuse for the default under appeal, or for a default which is material to the surcharge under appeal, he is not liable to the surcharge under appeal (which is itself a material default), nor is he treated as having been in default in respect of the default which is material to the surcharge under appeal.

Background

13. The appellant's case can be simply stated as follows.

> (1) It has a reasonable excuse for failing to pay the full amount of duty for the period 04/13 because, inter alia, of matters which took place in respect of the period 01/13. And so the surcharge liability notice for the period 04/13 should be disregarded.
>
> (2) The surcharge liability notice for the period 07/13 is thus the first valid surcharge liability notice; no liability arises under it. Mr Collier had initially accepted that there was no reasonable excuse in respect of this notice, but we believe that he wished us to consider the matters raised at paragraph 74 below which had been suggested by Mrs Ashworth.
>
> (3) But on the appellant’s original case, the surcharge liability notice for the period 07/14 is the first period under which liability arises, and thus the liability must be at 2% and not 5%. The appellant’s case is that, in any case it has a reasonable excuse for that period. And so no liability.

14. The respondents adopted at the hearing the position that was reflected in correspondence prior to the hearing. There was no reasonable excuse for the period 04/13, nor were there reasonable excuses for the two successive periods in respect of which surcharge liability notices had been served.

15. It will be appreciated from the foregoing that both parties (and they explicitly stated this at the hearing) considered that the periods 04/13 and 07/13 were material to subsequent defaults. The period 04/13 was material in respect of the period 07/13 and 07/14. The period 07/13 was material to the period 07/14.

16. The legislation dealing with defaults which are material is set out at paragraph 19 below. A discussion of that legislation and relevant case law is set out at paragraphs 37 to 56 below. But at this stage we would simply observe that notwithstanding the position of the parties, it is not open for them to confer a jurisdiction on this tribunal which it does not have. Hence the reason for the discussion below.

17. It will be appreciated from the foregoing, therefore, that the legal issues which are relevant to this appeal, over and above the basic default surcharge regime set out above, are:

> (1) what defaults are material to the surcharges under appeal; and
>
> (2) whether the appellant has a reasonable excuse in respect of either the surcharges under appeal, or the defaults which are material to those surcharges.

18. We now turn to consider the legislation relevant to these provisions.

Reasonable excuse and material defaults

19. The relevant legislation is in Sections 59(7) and (8) and Section 71 of the Value Added Tax Act 1994 ("VAT Act 1994"). These provisions are set out below:

> (7) 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 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,
> >
> > 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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).
>
> (8) For the purposes of subsection 7 above, a default is material to a surcharge if—
>
> > (a) it is the default which, by virtue of subsection 7 above, gives rise to the surcharge; or
> >
> > (b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the

person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

71 Construction of Sections 59 to 70

(1) For the purpose of any provision of Sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) 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.

(2) In relation to a prescribed accounting period, any reference in Sections 59 to 69 to credit for input tax includes a reference to any sum which, in a return for that period, is claimed as a deduction from VAT due.

20. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the appellant to demonstrate that there was a material default and that there was a reasonable excuse. The standard of proof in each case is on the balance of probabilities.

The evidence

21. The evidence comprised a bundle of documents. In addition to the bundle produced at the start of the hearing, additional documents were handed up during its course.

22. Neither party called any witnesses. However, Mr Collier, representing the appellant, in addition to making submissions, gave oral evidence. He provides accountancy and commercial advice to the appellant, and its associated companies, and has provided such advice as and when requested by the directors of the relevant entity. We find that his involvement with the appellant was sufficiently close that he was competent to give evidence of fact for the appellant.

23. For example, when Mr Collier said that the reason for cancelling the direct debit in June 2013 was because the appellant had been fearful that HMRC would unilaterally take, from its bank account, the VAT which at that stage the respondents said that the appellant was unable to recover, we find that that was indeed the reason for such cancellation. When giving evidence, we found him to be a straightforward and honest witness.

Findings of fact

24. We make the following findings of fact.

(1) The appellant was registered for VAT with effect from 1 October 2012.

(2) It was formed out of a restructuring of Fifield Ltd. Fifield Ltd continue to provide construction services, but the appellant, as its name suggests, was set up to provide mechanical and electrical services.

(3) The lady responsible for keeping the books of Fifield Ltd, Sandra Yeats ("Sandra"), assumed responsibility for keeping the books of the appellant. This included VAT compliance. She had coped with doing both until queries were raised in respect of the 01/13 return, and the subsequent correspondence with HMRC about that return. This caused her considerable stress and materially affected her ability to do her job.

(4) The first VAT return was for the period ended 01/13 and was received on time on 1/3/13. This return indicated that a large repayment was due to the appellant. The amount reclaimed was £45,053.14. The reason for this repayment was because the appellant had incurred considerable costs yet made few outputs.

(5) In March 2013, HMRC declined to make the requested repayment and selected the return for a pre-repayment credibility check. An officer of HMRC, David Drew, in a telephone conversation with Sandra on 19 March 2013 asked Sandra to send him copies of the appellant's Sage VAT data, and the five largest purchase invoices for the 01/13 period.

(6) Following an email from Sandra on 27 March 2013, Mr Drew confirmed the request made over the telephone, by way of email dated 4 April 2013, in which he says "*may I please have sight of the records requested during my conversation with Mr Rice*"(Mr Rice had been party to the telephone conversation of 19 March).

(7) Mr Drew made further requests for the Sage VAT data and the purchase invoices by emails in May 2013, but in the absence of the production of such information, on 30 May 2013, HMRC issued an assessment reducing the input tax for the return to nil.

(8) During a telephone conversation with Mr Drew on 26 June 2013, Sandra indicated that she would now supply copies of the Sage VAT report and the largest purchase invoices.

(9) By September 2013, Sandra had left the employment of the appellant, and the matter was in the hands firstly of Daniel Fifield and subsequently with Mr Collier. By 25 September 2013 the Sage VAT records and the purchase invoices had been submitted to HMRC who, in a call to Daniel Fifield on 26 September 2013, arranged to visit the appellant on 17 October 2013 to verify the claim.

(10) The visit took place, as arranged, on 17 October 2013. Four days later on 21 October 2013, HMRC verified the original claim for the return 01/13. This was to be set off against VAT due from the appellant to HMRC, outstanding at that time.

(11) The VAT return for the period ending 04/13 was submitted on 7 June 2013. Of the tax expressed be due on the return of £42,304.53, only £5,074.75 was paid. The balance of £37,229.78 was not paid on its due date. Mr Collier explained that there were two reasons for this. The first was that it was the appellant's view that this amount was not owing since it reflected what, in the appellant's eyes, constituted a valid credit for the period ending 01/13. Secondly, the appellant would have been in significant financial difficulties had it made that payment.

(12) The appellant had originally set up a direct debit to pay VAT to HMRC, but this direct debit was cancelled on 7 June 2013. The reason for this was that the appellant was fearful that the respondents would take, from its bank account, the £37,229.78 mentioned above.

(13) The return for the period 07/13, was submitted on 17 September 2013. This was late. Payment was not made until 23 September 2013. Tax was originally assessed in an amount of £47,093. A surcharge liability notice for this period was issued on 13 September 2013 in amount of £941.86. The appellant's return identified that £35,889.93 was in fact due in respect of that period, and so the surcharge notice was amended, on 18 September 2013, and the surcharge was reassessed at £717.79. This is 2% of the tax on the return and is the amount which is under appeal for that period.

(14) Since Sandra's departure in the summer of 2013, a new bookkeeper has been employed. There were no VAT defaults until period 07/14. The return for this period was submitted early (on 29 August 2014 i.e. two days before its due date).

(15) Following cancellation of the direct debit in June 2013, VAT payments for the period 07/13, and thereafter, were made by Faster Payments.

(16) Payment for the period 07/14 was due on 7 September 2014. Instructions had been given to the appellant's bank to make the payment, by Faster Payment, on 5 September 2014 at 16.04. But payment was not received by the respondents until 8 September 2014 i.e. one day late. 5 September 2014 was a Friday.

(17) The appellant, through the agency of its bookkeeper, made no request of HMRC for information as to whether giving instructions for a Faster Payment on a Friday would have an impact on the due date for receipt by HMRC.

(18) A surcharge liability notice was issued on 12 September 2014 for this period, in an amount of £1,843.39, i.e. 5% of the due amount as identified in the return. This is the second amount which is under appeal.

(19) The appellant requested a review of the default surcharge issued for the period 07/14. In a letter dated 21 November 2014, HMRC indicated to the appellant that the outcome of such review was that they did not believe the appellant to have a reasonable excuse for the default for the period and upheld the surcharge for the period 07/14.

(20) The appellant then made an appeal in respect of the surcharges for the periods 07/13 and 07/14 by way of a notice of appeal dated 14 January 2015.

Payment dates

25. Section 58 of and schedule 11 to the VAT Act 1994 govern the general administrative provisions relating to VAT. Schedule 11 provides for regulations to be made pursuant to it.

26. The regulations referred to in schedule 11 are the VAT Regulations 1995 (SI 1995/2518, as amended)

27. The general rule concerning the making of VAT returns to HMRC is contained in regulation 25. The return must be made to HMRC not later than the last day of the month next following the end of the period to which it relates.

28. Regulation 25A deals with electronic returns. The appellant is obliged to, and did, submit electronic returns.

29. Regulation 40(2) provides that *"any person required to make a return shall pay to the Controller such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return."*

30. So the basic rule for payment of VAT is that it must be paid to HMRC, at the latest, on the last day of the month next following the end of the period to which it relates.

31. However, regulation 40(3) provides that, inter alia, the requirement of regulation 40(2) shall not apply where the Commissioners allow or direct otherwise.

32. Regulation 40(4) adds that a direction under regulation 40(3) may in particular allow additional time for a payment mentioned in regulation 40(2) where the trader submits an electronic return.

33. HMRC, it was agreed by the parties, have directed that "*where payment is made electronically the due date for payment is extended to seven days after the statutory due date. If the extended due date falls on a bank holiday or weekend payment must clear HMRC's bank account before then (except for Faster Payments which can be received on bank holidays and weekends).*" (Emphasis added)

34. The italicised sentence in the foregoing paragraph is derived from the schedule of defaults prepared by HMRC for this hearing, at page 12 of the bundle. The relevance of the emphasised text will become apparent later.

35. So, for an accounting period ending on 31 March 2015, the electronic return must be submitted on or before 30 April 2015, but electronic payment need only be made on or before 7 May 2015.

36. Where a taxpayer has arranged to pay by way of a direct debit, HMRC do not request payment from the taxpayer's bank account until the seventh day. Since the direct debit is administered through the Bacs regime, and Bacs payments usually take three working days, a taxpayer paying by direct debit may find that the payment has only left his account on day ten rather than day seven. But this is a consequence of the way in which the direct debit system operates, and is not a general extension to the seven day concession.

Discussion

Material default

37. As mentioned at paragraph 16 above, the parties' view was that we are able to consider the defaults in the period 04/13 in respect of the appeal against the surcharge in period 07/13, and the defaults in periods 04/13 and 07/13 for the appeal against the surcharge in period 07/14.

38. The relevant legislation is in Sections 59(7) and 59(8) VAT Act 1994 and the question is whether defaults in the periods 04/13 and 07/13 are defaults which are material to the 07/14 surcharge under appeal, and whether the default in 04/13 is material to the 07/13 default under appeal.

39. Section 59(8)(b) describes the criteria which must be met for a default (other than that under appeal) to be material.

> "It is a default which is taken into account in the service of a surcharge liability notice upon which the surcharge depends and the person concerned had not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice".

40. There are three questions posed by this:

(1) Was it a default which was taken into account?

(2) Was the person concerned previously liable to a surcharge in respect of a prescribed accounting period?

(3) Did that prescribed accounting period end within the surcharge period specified in or extended by "that" notice?

Period 04/13

41. The default in this period is material to the surcharges in 07/13 and 07/14. In each case, it was taken into account. It was the first surcharge liability notice, and the percentage at which the surcharges were computed for the periods 07/13 and 07/14 depended on it being the first notice. Surcharges of 2% for 07/13 and 5% for 07/14 only arose because the 04/13 was taken into account. We say this on the basis of basic statutory interpretation, but are comforted by the decision by Judge Hellier in *Aardvark Excavations Limited v Commissioners for Her Majesty's Revenue & Customs [2007] VAT decision 20468 ("Aardvark")* in which he stated, at paragraph 58:

> "We conclude that the Tribunal is entitled to have regard in the application of Section 59(7) to a prima facie default other than that directly giving rise to the surcharge under appeal for the purpose of determining whether such a default whose existence may affect the amount or existence of the default under appeal, may be ignored".

Period 07/13

42. When considering its relevance to the 07/13 period under appeal the situation is clear. There was no liability in respect of the default for the period 04/13, so the criteria in paragraphs 40(2) and (3) above have also been met. The first notice, of course, brings with it no liability. It is simply a "quarantine" period in which a second default does attract a liability.

43. So the period 04/13 is material to the surcharge visited on the appellant for the period 07/13.

Period 07/14

44. For the reasons given above, the default in 04/13 was taken into account in respect of the surcharge liability notice served for the period 07/14.

45. So too was the default in 07/13 since the percentage of 5% payable for 07/14 was based on the fact that there was a 2% charge in 07/13.

46. There was no liability for the period 04/13, so the default for that period satisfies the criteria in paragraphs 40(2) and (3) above in relation to the 07/14 period, just as it did for 07/13.

47. The question then is whether the default for the period 07/13 satisfies the criteria in 40(2) and (3) above. There is certainly a liability alleged to be due by HMRC at 2%. They have assessed it at that; but is this conclusive? Can we consider whether there is a reasonable excuse for the default in 07/13; and, if we decide there is, we can go on to disregard that default and the notice serviced pursuant to it? Or is the prima facie position, alleged by HMRC (ie. that there is a liability) conclusive, with the

consequence that the 07/13 default cannot be material and thus we cannot consider it when reviewing the 07/14 position?

48. As a preliminary point we consider that the liability did arise in respect of the prescribed accounting period ending "within the surcharge period specified in or extended by that notice" (see paragraph 40(3) above).

49. "That notice" in this case means the surcharge liability notice served for the default which took place in the period ended 07/13. Although we were not given a copy of it, we believe that the effect of that notice was to extend the default period from 30 April 2014 to 31 July 2014 and so the default in 07/13 did result in a prima facie liability for the period ending 07/13 which was within the period extended by that notice.

50. This then leads to a consideration of the "prima facie" position mentioned at paragraph 47 above. Are we unable to consider the default in 07/13 as being material simply because HMRC have assessed it for a penalty at 2%? Or are we able to consider reasonable excuse in the context of this period, and if reasonable excuse is established, disregard it as we are directed to do in accordance with the tail piece in Section 59(7)(b)?

51. We believe that the correct position is the latter. The issue was considered at length in *Aardvark*. Judge Hellier endorsed a broad interpretation of Section 59(7).

> "44. The Tribunal can consider the effect of that Section on a default occasioning a surcharge which is not under appeal if the effect of so doing is to impinge on the surcharge under appeal.
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> 45. On this approach, the Tribunal is free on appeal against one surcharge to apply the Section in relation to any other default so long as that default is material to some surcharge. On this approach, the Tribunal consider the 10/04 default, apply Section 59(7) in relation to it (by applying that Section in by virtue of any surcharge to which it is material), and if it concludes that there is an appropriate excuse for that default, apply the second exculpatory effect of that subsection to treat that default as not having occurred in relation to the assessment of the amount of the surcharge under appeal".

52. He then concludes that this wider approach is appropriate and formulates the principle mentioned at paragraph 41 above.

53. We are fortified in adopting this approach too by the Judgment of Judge Mosedale in *Ideal Shopping Direct Plc v The Commissioners for HMRC* [2009] UKFTT 136 (TC) where she says at paragraphs 25 and 26:

> "25 The Tribunal in *Dow Chemical* itself suggested that there was a right to amend a later assessment where reasonable excuse for an earlier assessment was shown: The Tribunal in *SSR Group Services Limited* extended that right to amend to a case where the due dispatch defence

was established for an earlier default as that defence is also contained in Section 59(7)

26 It must be right that assessments can be amended when information not known to HMRC at the time of they made the assessment comes to light such as a taxpayer later establishing a defence of reasonable excuse to a default which counted towards the specified percentage…"

54. We would respectfully agree. It cannot, equally, be right that if, erroneously, (as might subsequently be shown by dint of a reasonable excuse) HMRC assess a surcharge, that surcharge is still considered to be a previous liability for the purposes of Section 59(8)(b) and thus embargoed from being a material default.

55. Indeed, in this appeal, we are asked to consider the appellant's liability for the 2% surcharge levied for the period 07/13. If we were to find that the appellant has a reasonable excuse for this period (and so has no liability for the surcharge), we do not believe that the legislation requires us to take that into account when considering the 2% surcharge, but then disregard it when considering the 5% surcharge for the period 07/14.

56. We respectfully endorse the wider interpretation suggested by Judge Hellier that any default which results in a surcharge liability notice which impinges upon the surcharges under appeal may be "reopened" at that appeal. And if a reasonable excuse can be established for any such default, any liability notice served as a result of those defaults shall be deemed not to have been served.

Reasonable excuse

57. The main issue in this case is whether the appellant has a reasonable excuse in respect of the material defaults. We consider that this is an objective test with subjective elements, and adopt, with gratitude, the principles promulgated by Judge Brannan in the case of *Stuart Coales -v- The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT (477)" ("*Coales*"), set out below:

Meaning of "reasonable excuse"

25. Under Section 59C(9)(a) I can, however, set aside the surcharge determination if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax. The onus is on the appellant to satisfy me that there was a reasonable excuse. The statute provides (Section 59C(10)) that inability to pay the tax shall not be regarded as a reasonable excuse.

26. In this context, I consider the reasonable excuse exception to be an objective test applied the individual facts and circumstances of the appellant in question.

27. In *Bancroft and another v Crutchfield (HMIT)* [2002] STC (SCD) 347 in relation to Section 59C (9)(a) the learned Special Commissioner (Dr John Avery Jones CBE) stated:

> "A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue…"

28. The concept of "reasonable excuse" appears throughout VAT and direct tax legislation in respect of the imposition of surcharges on penalties. There is a considerable amount of case law in this tribunal as well as its predecessors (the VAT and Duties Tribunal and the Special and General Commissioners). It is not possible to do justice to all these decisions but I think that helpful guidance can be obtained from the decision of the VAT Tribunal in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 and I can do no better than quote from the passage where the Tribunal (HH Judge Medd OBE QC) said:

> "So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, "that which a person puts forward as a reason why he should be excused".
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> A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.
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> In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that 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 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? 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 himself, 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 his 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 his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his 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 he did, he acted reasonably and so had a reasonable excuse. Such a way of interpreting a statue which requires a court to decide an issue by judging the standards of the reasonable man is not without precedent of the highest authority, though in a very different field of the law. (See *DPP v Camplin* ([1978] 2 All ER 168)."
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> 29. I agree with the Tribunal's views. In my view, this decision clearly explains that the test is an objective one: it involves considering the actual circumstances of the taxpayer in question but applying an objective analysis of those circumstances.

58. Judge Brannan then reviewed the decision in *Chichester v HMRC Commissioners* and having done so went on:

> 31. The starting point for any analysis of the concept of "reasonable excuse" must always be the statute. In this case Section 59C (9)(a) TMA provides that I may set aside the surcharge if the taxpayer has a reasonable excuse for not paying the tax. Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must be a reasonable one. The word "reasonable" imports the concept of objectivity, whilst the words "the taxpayer" recognise that the objective test should be applied to the circumstances of the actual (rather than some hypothetical) taxpayer.
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> 32. The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse. It is true that the absence of a genuine and honest belief would usually indicate that the excuse could not reasonable, but its presence does not mean that the excuse is necessarily reasonable.
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> 33. Moreover, the concept of reasonable excuse is not confined to tax law and is to be found in many other statutory contexts, particularly in the criminal law.
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> 34. In *R v G* [2009] UKHL 13 the defendant had been charged with the offence of having control of a record (which included a photographic or electronic record) which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism, contrary to Section 58 (1) of the Terrorism Act 2000. Under Section 58 (3) it was a defence to this charge if the defendant could show that he had a reasonable excuse for possessing the record in question. The Court of Appeal, in the earlier case of *R v K* [2008] 2 WLR 1026, had held that in order to establish the defence of reasonable excuse it was sufficient for

the defendant to show that the record was possessed for a purpose other than to assist in the commission or preparation of an act of terrorism and that it did not matter that that other purpose may infringe some other provision of the criminal or civil law. The House of Lords rejected the Court of Appeal's interpretation of reasonable excuse. Lord Rodger delivering the judgment of the Judicial Committee said [76 – 77]:

> "A defence in terms of reasonable excuse is to be found in a whole range of provisions under the 2000 Act. And it is, of course, a familiar feature of many other offences, such as possession of an offensive weapon under Section 1(1) of the Prevention of Crime Act 1953 and Section 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, and failure to provide a specimen of blood or urine under Section 7(6) of the Road Traffic 1988. The Court of Appeal's decision in *R v K* [2008] 2 WLR 1026, 1031, para 15, singles out this particular use of the defence in Section 58(3) and imposes on it a construction which is utterly different from the construction which has been put on the equivalent defence in other statutes.
>
> *More than that, however, the Court of Appeal's construction robs the adjective "reasonable" in Section 58(3) of all substance. Neither the judge nor the jury is left with any room to consider whether the excuse tendered by the accused for, say, his possession of the document or record is actually reasonable.* Provided only that he proves that his purpose was not connected with the commission etc of an act of terrorism, the Court of Appeal give him a defence under subsection (3). Indeed they expressly affirm that it matters not that the defendant's purpose may infringe some other provision of the criminal or civil law. Suppose, for example, that the accused had a document containing information about the security system protecting the Home Secretary's residence. The interpretation adopted by the Court of Appeal means that, if the defendant proved that he had this document because he was planning to burgle the Home Secretary's house and steal her jewellery, this would, by definition, be a reasonable excuse since the defendant's purpose would not be connected with the commission etc of an act of terrorism. The same would apply if the defendant's purpose was to murder the Home Secretary for purely personal motives. *Even if the jury rightly considered that these "excuses" were outrageous rather than reasonable, in each case the judge would have to direct them that the defendant's purpose amounted to a reasonable excuse in terms of Section 58(3) and that they would have to acquit him. In our view, Parliament could not have intended Section 58(3) to be interpreted or applied in that way.*" (Emphasis added)

35. Lord Rodger added [81]:

> "Similarly, the circumstances which may give rise to a Section 58(1)offence are many and various. So it is impossible to envisage everything that could amount to a reasonable excuse for doing what it

> prohibits. Ultimately, in this middle range of cases, whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case."

> 36. Obviously the context of this decision is very different from that of this appeal. But tax law is not an island detached from the other laws of this country. In my view there is nothing which justifies the words "reasonable excuse" being given a materially different interpretation in a tax context where the imposition of penalties is concerned. It is plain that the House of Lords is interpreting reasonable excuse in substantially the same manner as Judge Medd QC in *The Clean Car Company Limited* in the passage which I have cited. The excuse must be objectively reasonable and that test must be applied to the facts of the individual case."

Application of these principles to the facts

Period 04/13

59. Mr Collier put forward two excuses which he claims are reasonable ones for this period. The first was that he considered that the repayment of £37,229.78 for period 01/13 was properly due to the appellant and so it had, in essence, not defaulted (or as Mr Collier put it "had not done anything wrong") when it failed to return that amount on its return for period 04/13.

60. Mr Collier's second excuse was that the appellant could not have afforded to pay the amount, since it would have had an impact on the financial position of the appellant. Mr Collier was unable to explain precisely what that impact might be (he did not, for example, go so far as saying it would have put the appellant into an insolvency condition). But he indicated that he thought the appellant might not have financially survived had it been obliged to pay that amount.

61. Taking these in turn.

£37,229.78 not due

62. An honestly held and reasonable belief that the amount was not due cannot, of itself, comprise a reasonable excuse (see the extract from the *Clean Car Company* recited at paragraph 28 of *Coales*):

> "*… can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself, provide him with a reasonable excuse. In my view it cannot.*
>
> *…. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader 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?*"

63. We have no doubt, since Mr Collier was an honest and straightforward witness, that the appellant had an honestly held and reasonable belief that it was entitled to repayment of the £37,229.78 in respect of the period 01/13, and, in its mind it did not "owe" it to the respondents.

64. But there are other factors which must be considered. These are:

> (1) The appellant was aware, following the email of 4 April 2013, that the repayment for 01/13 was not agreed (nor had it been applied to its VAT account).
>
> (2) The assessment reducing the appellant's credit to nil was sent by way of letter dated 30 May 2013.
>
> (3) At the time that the return for the period 04/13 was due (31 May 2013) and payment was to be made (some seven days later on 7 June 2013), the appellant had not provided the information required by HMRC to verify the repayment claim for the period 01/13. It appears that it was not until 26 July 2013 that Sandra started to send this information, requested by Mr Drew, to HMRC, and not until 23 September 2013 that all the information requested by Mr Drew was sent.
>
> This is similar to the situation in *Ian Jones v Customs and Excise Commissioners (2000) VAT Decision 16862* in which the tribunal held that there was no reasonable excuse for a default surcharge where the appellant had withheld sums from HMRC on the basis that it claimed it was entitled to a repayment. In that case (like this) the appellant had provided no documentary evidence required by the Commissioners to justify the claim for repayment at the time of the relevant default.

65. We also remind ourselves that the onus of proving reasonable excuse is on the appellant and the standard is the balance of probabilities.

66. And so applying the test of reasonable excuse set out in *Coales*, we do not consider that the honestly held and reasonable belief of the appellant is sufficient to discharge the burden of proving that it has a reasonable excuse. In our judgment, a reasonable taxpayer would not have thought that at the time the 04/13 return had to be made and tax paid, that HMRC had agreed that it was entitled to the repayment. The reasonable taxpayer would have considered that the output tax due for that period was the tax due on outputs for that period; and it was not proper to set off against it a repayment for an earlier period which HMRC had not agreed to pay/credit.

67. We say this notwithstanding that the repayment or credit claimed for the period 01/13 was, following the meeting in October 2013, promptly made by HMRC.

68. Had the appellant provided the documents requested by Mr Drew, promptly, it seems likely that the meeting needed to verify the repayment claim would have been held prior to June 2013 (when the return for the period 04/13 and payment in respect thereof was to be made). As will be seen at paragraphs 74 to 78 below, we do not believe that Sandra's inability to cope with the VAT system is a reasonable excuse for

the failure to submit the VAT return and pay the appropriate tax for the period 07/13. We find too that it cannot comprise a reasonable excuse for the failure to submit the documents that HMRC requested for the period 04/13, with the benefits that might have brought.

Financial Consequences

69. Mr Collier's second excuse was that the company could not have afforded to pay the amount since it would have had an impact on its financial position. We can deal with this relatively shortly. Although Mr Collier couched his submission in terms of the financial effect on the company, it is clear that the cause of this effect is lack of funds. Had the appellant sufficient funds to pay the VAT, payment would not have jeopardised its financial position.

70. By virtue of Section 71 VAT Act 1994, we are directed that "*an insufficiency of funds to pay any VAT due is not a reasonable excuse ...*".

71. And so, in relation to the period 04/13, we find that the appellant has no reasonable excuse for the default, and thus the default surcharge notice served for that period was valid and effective.

Period 07/13

72. The effect of having found that there is no reasonable excuse for the period 04/13 is that the default surcharge notice for that period is unaffected.

73. This means that the second default surcharge notice brings with it a surcharge of 2%, ie £717.79 unless Mr Collier is able to establish that there was a reasonable excuse for the default identified in that notice.

74. Mr Collier's original case was that there was no reasonable excuse for the period. Following Mrs Ashworth's observations that in certain circumstances failure by an employee can comprise reasonable excuse, Mr Collier submitted that the appellant did have a reasonable excuse for this period. This submission is based on the fact that Sandra Yeats was not "up to the job" following the challenge to the VAT return for the period 01/13, and the impact this had on her book keeping generally and on her ability to submit timeous VAT returns in particular.

75. It is instructive that in HMRC's records of contact with the trader, David Drew, records, in respect of a telephone call with "traders secretary" (we presume this to be Sandra) on 20 June 2013 that "*she didn't seem to know what had happened to the claim and was totally confused when I said that as the trader had not responded to our attempts to verify the tax declared we had zero'd the claim….. the office function at trader's seems to be in complete chaos…*".

76. We do not, however, consider that this comprises a reasonable excuse. Mr Collier's evidence was that Sandra's ability to cope was apparent well before the return for 07/13 needed to be returned (at the end of August 2013). There is some doubt, anyway, on the evidence, as to whether Sandra was still employed by the

appellant on that date. The queries surrounding the period 01/13, and the repayment in respect of that period was something that was clearly important to the appellant and the financial impact evidenced by the cancellation of the direct debt, was said by Mr Collier likely to be significant.

77. So VAT compliance was something that the appellant could reasonably be expected to take seriously. And its misgivings about Sandra's ability to cope, apparent well before the due date of the 07/13 return, should have been acted upon more promptly. In colloquial terms, the appellant should have summoned the book keeping cavalry before it did. Since doing so there have been no defaults save that in respect of 07/14 which we discuss below.

78. So we find there was no reasonable excuse for the default in 07/13 and thus the surcharge for this period, as assessed by HMRC in the sum of £717.79 is due and payable.

Period 07/14

79. Mr Collier's submission that the appellant had a reasonable excuse for this period was based on the fact that instructions were given to the appellant's bank to make the payment for the period 07/14 (due on 7 September 2014) on Friday 5 September 2014 at 16.04. This payment was to be made by Faster Payment.

80. As set out at paragraph 33 above, HMRC accept that Faster Payments "can be received on bank holidays and weekends".

81. It is not clear to us whether this principle, which is culled from a document compiled for the hearing at page 12 of the bundle, was in the public domain.

82. However, at the time of the hearing there was a document on HMRC's website providing information to taxpayers about paying a VAT bill. There is a similar sentiment expressed in that document.

> "*How long it takes*
>
> *Payments made by Faster Payments (online or telephone banking) will usually reach HMRC on the same or next day, including weekends and Bank Holidays.*"

83. We refer to paragraph 57 above and the extract from *Coales*, and in particular paragraph 27 of that decision, where an extract from the case of *Bancroft*, decided by Dr John Avery Jones, is set out:

> "*A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue …*"

84. Mrs Ashworth made no submissions that the information set out at paragraph 82 above was not available to the taxpayer in September 2014 when the payment for the

period 07/14 was due, and we find as a fact that that information was in the public domain at that time.

85. If the appellant as a reasonable taxpayer had read the literature (the website information), it would have thought that payment by Faster Payments initiated on a Friday would reach HMRC on Saturday or Sunday.

86. Accordingly, we find that the appellant does have a reasonable excuse for the default for the period 07/14 in that it was reasonable for it to rely on HMRC's stated policy that the Faster Payments would usually reach HMRC on the same or next day; and this is true whether the next day was a week day or a weekend or a Bank Holiday (and in the case of the appellant's payment, the instructions were made Friday).

87. It was therefore reasonable for the appellant to take the view that payment would reach HMRC on 6 or 7 September 2014, ie the day before, or on, the due date for payment which was 7 September 2014.

Decision

88. In light of the foregoing, our decision is as follows:

> (1) The appellant has no reasonable excuse for the default in the period 07/13, and accordingly its appeal against HMRC's assessment for the surcharge in that period of £717.79 is dismissed.
>
> (2) The appellant does have a reasonable excuse for the default in the period 07/14, and accordingly its appeal against HMRC's assessment for the surcharge in that period of £1,843.39 succeeds.

89. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 3 AUGUST 2015