



TC005405

Appeal number: TC/2016/00261

*VALUE ADDED TAX – default surcharge – whether default – yes –
whether reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAT SERVICES LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JANE BAILEY
MR IAN PERRY**

Sitting in public at Centre City Tower, Birmingham on 4 October 2016

**Mrs Caroline Borley, a director of the Appellant, sent in a written statement but
did not appear in person**

Mrs Karen Powell, presenting officer, for the Respondents

DECISION

Introduction

- 5 1. This appeal is against the imposition of a default surcharge in the sum of £2,392.80, calculated at 15% of the VAT due, imposed upon the Appellant by the Respondents under Section 59 of the Value Added Tax Act 1994 (“VATA 1994”) for the late payment of the VAT due for the period ended 07/15.

Appellant’s statement

- 10 2. Mrs Caroline Borley, a director of the Appellant, informed the Tribunal in advance of the hearing that she would not be able to attend due to unavoidable circumstances but that she wished to draw the Tribunal’s attention to a statement which she would have read out if she had attended. That statement sets out very eloquently the difficulties which small businesses have faced since 2008.

- 15 3. In her statement Mrs Borley explained that the Appellant had suffered a loss of over £150,000 from a debtor in 2008. This had resulted in a “hand to mouth” existence with all funds coming into the Appellant already accounted for. When a debtor had made late payment of the sum earmarked to pay the VAT due for 07/15, the Appellant had been unable to pay the VAT due in full and on time. The VAT had
20 subsequently been paid in full but a surcharge of £2,392.80 would impose a greater burden upon a struggling business.

4. We also had regard to the explanation given in Mrs Borley’s letter dated 26 February 2016 to the Respondents, as to why the Appellant had been unable to make payment by 7 September 2015.

25 Respondents’ submissions

5. The Respondents’ Statement of Case set out the Respondents’ submission that neither the Appellant’s reasons for its insufficiency of funds, nor an insufficiency of funds of itself, would constitute a reasonable excuse.

- 30 6. Mrs Powell submitted that once the Appellant had submitted its VAT return, then it would be aware of the amount which it needed to pay by the payment deadline. It was clear from the Appellant’s bank statements for this period that it had made other payments between 19 August and 7 September 2015. Mrs Powell also noted that £15,000 of the amount due from the defaulting debtor had been paid to the Appellant by 1 September 2015. Mrs Powell submitted it appeared that the Appellant
35 had chosen to prioritise other matters over payment of its VAT.

7. Mrs Powell noted that the basis of the Appellant’s appeal was that cash flow had prevented it from paying its VAT on time. Mrs Powell submitted that this amounted to an insufficiency of funds on the due date and that (in the absence of an

underlying cause which would provide a reasonable excuse) an insufficiency did not constitute a reasonable excuse.

Facts found

8. We heard no witness evidence. On the basis of the material in the bundles
5 before us we found the following facts:

- a) By letter dated 20 February 2010 the Appellant was mandated to make electronic submission of its VAT returns and to make electronic payment of the VAT due under those returns.

Summary history of the Appellant's financial difficulties

10 b) In 2008 the Appellant suffered a loss of £150,000 from a debtor. As a consequence of this initial bad debt and the recession, it has struggled over the succeeding eight years to meet its liabilities in full as they fall due.

15 c) On (at least) 20 April 2011, 9 December 2011, 18 September 2012, 26 February 2013, 1 March 2013, 6 June 2013, 5, 12 and 29 September 2013, 6 December 2013, 4 and 11 March 2014, 19 April 2014, 4 June 2014, 4 and 19 September 2014, Mrs Borley, or another employee of the Appellant, contacted the Respondents to seek a TTP arrangement in respect of its VAT liability. All of those requests were agreed.

20 d) On (at least) 19 December 2011, 2 May 2012, 5 and 29 September 2013, 11 March 2014, 19 April 2014 and 19 September 2014, Mrs Borley was told that the arrangement just agreed would be the final TTP arrangement which the Respondents would agree with the Appellant.

Summary of the default surcharges imposed

25 e) The Appellant entered the default surcharge regime when it was late in paying the VAT due for the period ended 07/13. It was served with a Surcharge Liability Notice on 13 September 2013.

30 f) In the next six successive periods, the Appellant filed its VAT return on time but was late in paying the VAT due under that return. For the periods ended 10/13 and 01/14 the surcharges imposed upon the Appellant (at 2% and 5%) were reduced to zero.

35 g) For the period ended 04/14, a default surcharge, calculated at 10% of the VAT due under the return, was imposed upon the Appellant for late payment. This surcharge was cancelled after the Appellant provided evidence that a TTP arrangement requested three days before the due date had been agreed shortly after the due date.

5 h) For the period ended 07/14, a default surcharge calculated at 10% of the VAT due under the return was imposed upon the Appellant for late payment. This surcharge was cancelled when, 16 days after the due date, the Respondents agreed to accept the Appellant's request for a TTP arrangement which had been put in writing three days before the due date.

10 i) For the period ended 10/14, a default surcharge calculated at 10% of the VAT due under the return was imposed upon the Appellant for late payment. The Appellant had, three days before the due date, requested a TTP arrangement but this request had been refused. The Appellant appealed but by letter dated 4 February 2015 this appeal was rejected by the Respondents.

15 j) For the period ended 01/15, a default surcharge calculated at 15% of the VAT due under the return was imposed upon the Appellant for late payment. The Appellant had written to seek a TTP arrangement 11 days before the due date but the Appellant's proposals were rejected shortly after the due date. A revised TTP arrangement was agreed a week later and the Appellant appealed to the Respondents against the imposition of the default surcharge. The Respondents agreed to cancel this default surcharge.

20 The background to the default surcharge under appeal

25 k) On 30 June 2015 the Appellant was expecting to receive payment of approximately £31,000 from a long-standing and usually reliable customer ("McKenna"). This payment was not received because (as it transpired) McKenna was itself suffering cash flow problems having been omitted from a payment run by one of its customers, a major contractor. On 24 July 2015 the Appellant was obliged to issue a letter before action to McKenna and, seven days later, a claim form was issued.

30 l) On 4 August 2015 the Appellant received £10,000 from McKenna. After receiving that payment the Appellant's overdraft stood at £43,142.57. At that point the Appellant's overdraft limit was £60,000.

m) On 19 August 2015 the Appellant filed its VAT return for the period ended 07/15. This showed that £15,958.69 was due to be paid. The deadline for payment of the VAT by electronic means was 7 September 2015. On 19 August 2015 the Appellant's overdraft stood at £65,441.38.

35 n) On 25 August 2015 the Appellant offered to settle its claim against McKenna on the basis that the amount agreed to be outstanding be paid in instalments of £5,000 per week with the first payment to be made within seven days. McKenna agreed to this proposal and on 29 August 2015 the Appellant received a further £5,000 from McKenna (although this does not appear to have been credited to the Appellant's account until 1
40 September 2015).

- 5 o) On 1 September 2015 the Appellant's overdraft limit was reduced from £60,000 to £50,000. The Appellant's overdraft stood at £67,296.17 at the beginning of 1 September 2015 but reduced as customer payments were received over the next few days. By 3 September 2015 the Appellant's overdraft stood at £38,341.07. In total payments of £69,603.19 were made out of the Appellant's account in the period 4 August to 4 September 2015; payments totalling £75,543.75 were received by the Appellant in the same period.
- 10 p) On 3 September 2015, four days before the due date, Mrs Borley faxed and posted a letter to the Respondents seeking more time to pay the VAT due. The Appellant's letter included a cheque in the sum of £5,958.69 which was received by the Respondents on 7 September 2015. This cheque cleared on 10 September 2015.
- 15 q) On 7 and 8 September two large cheques, totalling £18,451.39, cleared from the Appellant's bank account. We do not know to who these funds were paid.
- 20 r) On 15 September 2015 the Respondents wrote to the Appellant seeking the remainder of the VAT due for the period ended 07/15. The Appellant responded on 24 September 2015 referring to its letter of 3 September 2015 and reiterating that the remainder would be paid at the end of September 2015.
- s) On 29 September 2015 the Appellant sent the Respondents a cheque for £10,000, the remainder of the VAT due for the period ended 07/15. This cheque cleared on 13 October 2015.
- 25 The default surcharge under appeal
- 30 t) On 11 September 2015 the Respondents issued the Appellant with a surcharge in the sum of £2,393.80, for its late payment of the VAT due for the period ended 07/15. On 8 October 2015 the Appellant requested a review of the Respondents' decision to impose a default surcharge in respect of the period ended 07/15. On 30 October 2015 the Respondents confirmed the imposition of the default surcharge. The Respondents did not accept that the Appellant had a reasonable excuse for the late payment and no TTP arrangement had been agreed.
- 35 u) On 16 November 2015 the Appellant sought a further review, explaining that a TTP arrangement had been sought four days before the due date, the reason why extra time was required had been explained at that date and that extra time had been given to the Appellant on a previous occasion when the Appellant had advised the Respondents of its short term cash flow problem. Although the Appellant was not entitled to a second review, the Respondents reconsidered the matter. By letter dated 9
- 40 December 2015 the Respondents declined to cancel the surcharge. On 11

January 2016 the Tribunal received the Appellant's appeal against the default surcharge.

Decision

Preliminary point regarding the appeal being submitted out of time

5 9. The Appellant's appeal against the default surcharge was filed outside the 30 days permitted for appealing to this Tribunal, and so we had first to decide whether to admit this appeal out of time. The delay was three days.

10 10. The Respondents did not object to the Appellant's appeal being admitted out of time. The Appellant's explanation for the delay (set out in the Notice of Appeal) was that the decision of 9 December 2015 had been received a week later when the Appellant was shutting down for Christmas. The Appellant requested an appeal form from the Tribunal on 5 January 2016. This was posted on 8 January 2016 but was not received until 11 January 2016, outside the deadline. If the Appellant's appeal is not admitted then the Appellant would lose the opportunity to have its appeal heard.
15 There is no apparent prejudice to the Respondents if the appeal is admitted late as they have already prepared for the hearing. While deadlines should generally be respected, the delay here was negligible. Applying the principles in *Data Select v HMRC* [2012] UKUT 187 (TCC) we decided that the Appellant would be given permission to file its appeal to this Tribunal out of time.

20 Onus of proof in this appeal

11. In an appeal against the imposition of a default surcharge under Section 59 VATA 1994, the onus of proof is first upon the Respondents to establish that there was a default and that a surcharge may, on the face of it, be imposed on the Appellant. The onus then shifts to the Appellant to establish that it had a reasonable excuse
25 which comes within Subsection 59(7) VATA 1994 for its late payment of VAT.

Was there a default?

12. In this case the deadline for payment of the VAT due for the period ended 07/15 was 7 September 2015 if the Appellant paid electronically. The deadline for payment by any other means (such as by cheque) was 31 August 2015. The Appellant's
30 cheques for £5,958.69 and £10,000 cleared on 10 September 2015 and 13 October 2015 respectively.

13. On the basis of these payment dates, as set out in the Respondents' ledger, and given the Appellant's apparent acceptance that all of the VAT due for the period ended 07/15 was paid late, we are satisfied that the Respondents have established that
35 there was a default and that the surcharge is, on the face of it, due. We turn to consider whether the Appellant has a reasonable excuse for making late payment.

Is there a reasonable excuse for the Appellant's late payment?

14. Section 59(7) VATA 1994 provides as follows:

(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-

5 (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

10 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 on that default shall be deemed not to have been served).

15 15. Although there is no definition in the legislation of what is a reasonable excuse, certain matters are specifically excluded. Section 71 VATA 1994 provides:

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

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

(b) where reliance is placed upon 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.

25 16. In this case we understand the Appellant's argument to be that the circumstances which caused the late payment of the VAT, in particular the late payment by McKenna, constitute a reasonable excuse. Mrs Borley's statement argues that the Appellant's case is not one of insufficiency of funds but "the predicament of LATE funds".

30 17. Whether or not there is a reasonable excuse will always depend on the precise circumstances of the case. The Court of Appeal explained their understanding of "reasonable excuse" in *Customs & Excise Commissioners v Steptoe* [1992] STC 757. The Master of the Rolls, at page 770, expressed it as follows:

35 Nolan LJ, as I read his judgment explaining and expanding on his judgment in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would have become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have
40 overcome the insufficiency of funds.

18. We have considered what caused the Appellant's default. It is clear that there were insufficient funds on the day for the Appellant both to pay the Respondents and to meet other demands upon it. We can see, from the two cheques which cleared from the Appellant's bank account on 7 and 8 September 2015, from the salary payments to employees and from the large number of direct debits, that there were a number of other demands upon the Appellant. Mrs Borley's statement and the long history of TTP arrangements make it clear that the Appellant's ability to pay any debt, including VAT, as it became due has been impaired for a number of years. On this occasion, as Mrs Borley made clear, the funds due from McKenna were allocated to pay the VAT due to be paid electronically by 7 September 2015. When McKenna could not pay the Appellant in full, the Appellant did not pay the VAT due.

19. Mrs Powell's submission was that the Appellant chose to prioritise other payments over the VAT which was due, because there were insufficient funds for the Appellant to meet all of the demands upon it on time. Mrs Powell submits that this does not constitute a reasonable excuse.

20. We considered at length whether a taxpayer in the Appellant's position, exercising reasonable foresight and due diligence, and having a proper regard for the fact that VAT was due, could have avoided the insufficiency. The Appellant could not avoid McKenna's delayed payment but we have concluded that Mrs Powell is correct in her submission that the decision not to pay the VAT was a choice. The choices faced by the Appellant were no doubt difficult and, for a small business, it may well have seemed as though there was no realistic option but to pay suppliers and employees in priority to the Respondents. But that was, nevertheless, a choice. As has been said many times before, the VAT which is collected by the taxpayer is not the property of the taxpayer and it must be paid over to the Respondents by the due date. The Appellant was aware on 19 August 2015 (when it filed its VAT return) that it must pay £15,958.69 to the Respondents by 7 September 2015. The Appellant must have been aware by 31 July 2015 (when it issued proceedings against McKenna) that it was unlikely it would receive £31,000 from McKenna by 7 September 2015. The Appellant had, in fact, received £15,000 from McKenna by 1 September 2015 but this amount was used for purposes other than paying the Respondents the VAT due. We have reached the conclusion that the prioritisation of other debts is not having "a proper regard" for the fact that tax is due. Therefore we conclude that the Appellant does not have a reasonable excuse for its failure to pay the VAT due on time.

21. Although this was not put forward in the Appellant's Notice of Appeal or Mrs Borley's Statement, there was a suggestion in the Appellant's letter of 3 September 2015 that the Appellant expected no surcharge to be imposed, having explained to the Respondents before the due date for payment why the VAT would not be paid on time. Although a surcharge will not be imposed if a TTP arrangement has been agreed, the fact of having informed the Respondents in advance that VAT will be late is not a TTP arrangement and cannot, of itself, constitute a reasonable excuse for why that VAT is paid late.

22. We considered whether the Appellant might have had an expectation of being granted another TTP arrangement and whether this might be a reasonable excuse for

the delay. However, even allowing for the extraordinary number of TTP arrangements which had previously been agreed, and that two default surcharges had been cancelled on the basis of a request having been submitted (but not agreed) by the due date for payment, we do not consider that the Appellant was entitled to expect a TTP arrangement would be agreed. A TTP arrangement is a concession.

23. Finally we had regard to what the Appellant states, in its Notice of Appeal, was its main reason for bringing the appeal, namely that the default surcharge cannot be recovered from McKenna. That is a consequence of the Appellant having incurred a default surcharge but, unfortunately for the Appellant, it cannot be an excuse for it having made late payment.

Conclusion

24. Therefore, for the reasons set out above, we dismiss the Appellant’s appeal.

25. 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.

**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 10 OCTOBER 2016