

[2017] UKFTT 590 (TC)



TC06032

Appeal number: TC/2016/03669

VAT – default surcharges – reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DH PROJECT & SUPPORT SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR NOEL BARRETT**

Sitting in public at Liverpool on 3 March 2017

Mr D Holland of the Appellant

Mrs S Carr for the Respondents

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DECISION

Introduction

1. This is an appeal against the imposition of default surcharges under s 59 of the Value Added Tax Act 1994 (“VATA”) for late payment of VAT for periods 08/14,
5 02/15, 05/15, 08/15 and 11/15.

Late appeal

2. The Appellant’s notice of appeal includes an application for permission to appeal outside the prescribed time limit for doing so. HMRC have indicated that they have no objection to the application, and the requested permission is granted.

10 The Appellant’s case

3. The grounds of appeal in the Appellant’s notice of appeal state as follows:

15 Up until the August 14 return, DH Projects had always made all payments on time and in full. At the time of the August 14 period, we had a very difficult time receiving monies in from our main customer. HMRC had been informed of these difficulties on numerous occasions. DH Projects always informed HMRC if a payment was going to be late, why it would be late and when the balance would be paid. DH Projects always adhered to these payment proposals, yet the surcharges have still been issued.

20 The last three surcharges are for substantial amounts, even though the payments were made before the surcharges for that period had been issued.

25 May 15 Surcharge £2349.43 – Paid by same day transfer 27.07.2016, HMRC had been notified payment would be late but it would be received by the end of July 15. A 15% surcharge was still issued.

Aug 15 Surcharge £3045.72 – Paid by same day transfer 09.10.2016, HMRC had been notified payment would be late due to not having access to the bank. A 15% surcharge was still issued even though payment was only 2 days late.

30 Nov 15 Surcharge £4099.31 – Paid half the balance on 08.01.2016, HMRC had been notified a part payment would be made. The surcharge was issued on 15.01.2016 at 15% of the FULL balance, although we had paid half.

- 35 4. At the hearing, Mr Holland said on behalf of the Appellant company amongst other matters as follows. For a period the Appellant’s accountant was on maternity leave. The Appellant accepted that if a payment was late, it was late. The Appellant had a lot of trouble with the allocation of payments by HMRC. Initially, there were small surcharges. When the Appellant then paid its VAT on the next occasion, part of the payment would be allocated to the prior surcharges, leaving a shortfall in the
40 current payment, leading to a further surcharge in respect of the current period at a higher rate. It took the Appellant months to get the schedule of payments allocated.

5 The Appellant always kept HMRC informed verbally of what was happening. A couple of payments were a day late. One payment was made by faster payment but took 2 days as anything over £20,000 takes 2 days. A payment made on a Friday was only received on the next Monday. The company has had a bad time for 2 years but is now getting up to date.

10 5. The company is on cash accounting. Most of its clients are in Germany or France. One client failed to pay a £24,000 debt which accrued in 2014 and which was written off in 2016. Another client made two payments late: a payment of £45,000 due in May or June 2014 was made only at the end of 2014, and a payment of £70,000 due in August or September 2014 was paid only in early 2015.

The HMRC case

15 6. Liability to VAT surcharge is governed by the VATA. Under the legislation, a trader is liable to a default surcharge even if payment is only a day late. With effect from period 1/13, the surcharge liability notice V160 advised a trader how the surcharges are calculated and the percentages used. The Appellant's first default was in 05/14, and the Appellant would therefore have been aware of the consequences of late VAT payments. With effect from period 04/14, each notice issued details on the reverse how surcharges are calculated and the percentages used. Furthermore, in a telephone call on 5 November 2014, the Appellant was "educated" about the default surcharge regime. Notices of all surcharges were sent to the Appellant at the registered address of the business.

20 7. HMRC has no record of the Appellant contacting HMRC on or before the due date regarding payments for the periods 08/14, 02/15, 05/15 and 08/15. In respect of period 08/15, the Appellant entered into a time to pay agreement only after the due date, so s 108 of the Finance Act 2009 does not apply. For period 11/15, the Appellant's request for a time to pay agreement was refused.

30 8. The onus of proof is on HMRC to demonstrate that a penalty is due. Once that is established, the onus is on the Appellant to show a reasonable excuse for the late payment. The standard of proof is the balance of probability. Insufficiency of funds is not a reasonable excuse (s 71(1)(a) VATA).

The relevant legislation

9. Section 59 of VATA states in relevant part as follows:

35 (1) ... if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

...

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

...

5 (2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

10 (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

...

15 (4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

20 (b) has outstanding VAT for that prescribed accounting period, he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

25 (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

30 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

35 (c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

...

40 (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,

5 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
10 not to have been served).

...

10. Section 71(1) VATA states in relevant part as follows:

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

- 15 (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
20 reasonable excuse.

11. The effect of s 108 of the Finance Act 2009 is that a person will not be liable to a penalty for failing to pay VAT by the due date if the person requests a time to pay agreement before the due date, if the request is granted, and if the person complies with the terms of the agreement.

25 **The Tribunal's findings**

12. It is clear that liability to default surcharges is governed by legislation. Under the terms of the VATA, a surcharge calculated as a percentage of the VAT due will apply even if payment of the VAT is only a single day late. The percentage of the VAT that will be payable as a surcharge will depend on the number of previous
30 defaults. With each successive default, the percentage of the surcharge increases, up to a maximum of 15%. The precise percentages are also clearly prescribed by the legislation.

13. HMRC accept that the onus of proof is on HMRC to demonstrate that a surcharge is due. That is to say that, HMRC must establish that VAT was paid late in each relevant period, and must establish the amount of VAT that was paid late in each
35 relevant period, so that the amount of the surcharges for each relevant period can be determined by application of the legislation.

14. A schedule of defaults prepared by HMRC is set out in the hearing bundle at pages 52 to 54A.

40 15. As to the amount of VAT due in each relevant period, the Appellant's VAT declarations for these periods have been included in the bundle. The Appellant's

grounds of appeal do not seek to dispute the amount of the VAT liability in respect of each of the periods in question.

16. As to payments made by the Appellant and their allocation, these are indicated in a ledger printout from the HMRC computer system, which has been included in the bundle. The Appellant has not taken issue with the details of dates and amounts of payments contained in this ledger. Furthermore, at page 27 of the bundle is a schedule prepared by the Appellant itself showing due dates for payment and dates of payment, and this confirms that all payments for the periods under appeal were made late.

17. The Appellant has suggested that problems arose because part of one or more VAT payments would be allocated to prior surcharges, leaving a shortfall in the current payment, leading to a further surcharge. The Tribunal is not persuaded that this was a cause of late payments in this case, since according to the schedule of defaults, none of the VAT was paid by the due date for any of the periods subject to the present appeal. In any event, HMRC is entitled to allocate payments to debts in accordance with the age of the debts in the absence of any prior allocation by the Appellant up to the time of payment. The Appellant has not established that it requested any other allocation prior to payment.

18. The Appellant says that “DH Projects always informed HMRC if a payment was going to be late, why it would be late and when the balance would be paid”. However, merely notifying HMRC that payments will be late is not sufficient to avoid liability to a surcharge. Liability to a surcharge will be avoided only if HMRC agrees, prior to the due date for payment, that payment can be deferred. There is no evidence of any such agreement by HMRC in relation to any of the periods subject to appeal in this case.

19. The Appellant’s grounds of appeal state that in respect of period 11/15, the surcharge was issued at 15% of the whole amount due for that period, rather than 15% of the amount that was paid late. This argument was not developed at the hearing. In fact, the Appellant’s VAT declaration for period 11/15 (page 61 of the bundle) shows that the net VAT payable by the Appellant for that period was £27,328.75. The schedule prepared by the Appellant at page 27 of the bundle acknowledges that as at 8 February 2016, only £13,664.75 of that amount had been paid, and that this was paid a day late. This is consistent with what is stated in the HMRC schedule of defaults.

20. The Tribunal finds that the default surcharges have been issued in accordance with the applicable legislation.

21. The Tribunal has considered the Appellant’s arguments that there is a reasonable excuse for the late payment.

22. In general, insufficiency of funds is not a reasonable excuse for late payment: see s 71(1)(a) VATA. The fact that the company has had a bad couple of years is not of itself a reasonable excuse.

23. The fact that a taxpayer advises HMRC that payments will be late, and when payment is expected to be made, is not a reasonable excuse for late payment.

24. It was said on behalf of the Appellant that for a period the Appellant's accountant was on maternity leave. Very little detail was provided of this, and the Tribunal is not persuaded that this constitutes a reasonable excuse.

25. The Appellant said that one or more payments were made by faster payment but took 2 days to arrive because they were over a specified amount. It is established case law that the burden is on the trader to know the various methods by which VAT is paid, and how long payment takes to arrive by each of these methods, and to ensure that payment is made in time for it to be received by HMRC by the due date.

26. However, there may be a reasonable excuse where lack of funds is due to unforeseen circumstances or events beyond the Appellant's control (compare *Customs and Excise Commissioners v Steptoe* [1992] STC 757). In such cases the burden of proof is on the Appellant to establish the existence of such unforeseen circumstances and events, and to establish that these circumstances and events were the cause of the insufficiency of funds, and that the exercise of reasonable foresight and due diligence would not have avoided the insufficiency of funds.

27. The Tribunal has considered the evidence given on behalf of the Appellant that one client failed to pay a £24,000 debt which accrued in 2014 and another client made two payments late. The evidence provided of these matters was not particularly detailed. On the basis of all the evidence that has been provided by the Appellant, the Tribunal is not persuaded on a balance of probability that the amount of these debts, or the timing of their non-payment or of the late payment, was such as to provide a reasonable excuse for the late payment in any of the VAT periods under appeal in this case.

Conclusion

28. For the reasons above, this appeal is dismissed.

29. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 31 JULY 2017