



Neutral Citation: [2023] UKFTT 852 (TC)

Case Number: TC08953

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/14215

VAT – Default Surcharge – reasonable excuse – no - appeal dismissed

Heard on: 9 August 2023

Judgment date: 02 October 2023

Before

**TRIBUNAL JUDGE SUSAN TURNER
TRIBUNAL MEMBER DEREK ROBERTSON**

Between

JFS LONDON LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nancy Grover (Director) and Biruntha Krishnasamy (Accountant)

For the Respondents: Stuart Redpath, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal by JFS London Ltd (JFS) against VAT default surcharges imposed by HM Revenue and Customs (HMRC) in a total amount of £1,790.45 under s 59 Value Added Tax Act 1994 (VATA) for the periods 10/20 and 01/21.
2. A liability to a default surcharge arises under s 59 VATA if a person fails to file a VAT return or the amount of VAT shown on that return is not received by HMRC by the due date.
3. A surcharge liability notice is sent to the taxable person for a default which carries a warning that a liability to a surcharge will arise if there are any further defaults within the next 12 months (the surcharge period). A default surcharge is imposed at a rate of 2% of the outstanding VAT at the date of the surcharge for a first default within a surcharge period. A default surcharge is imposed at a rate of 5% of the outstanding VAT at the date of the surcharge in respect of a second default within a surcharge period. Upon each default, the surcharge period is extended by 12 months.
4. In respect of the period 10/20, a surcharge assessment at 2% was imposed under s 59(5)(a) VATA in an amount of £723.25. In respect of the period 01/21 a surcharge assessment at 5% was imposed under s 59(5)(b) VATA in an amount of £1,067.20. The surcharges for each of these periods are the subject of this appeal.
5. The form of the hearing was V (video) and all parties attended remotely using the Tribunal's remote video hearing system. We referred to a document bundle of 75 pages; a supplementary document bundle of 4 pages; a generic bundle of legislation and authorities; and a statement of reasons produced by HMRC of 12 pages.
6. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

THE FACTS

7. JFS is in the business of selling household articles including furniture and lighting equipment.
8. JFS has been registered for VAT with effect from 1 October 2007.
9. In respect of the period 07/20, a VAT notice of assessment of tax and surcharge liability notice was issued to JFS on or around 6 November 2020.
10. In respect of the period 10/20, a VAT notice of assessment and surcharge liability notice extension was issued to JFS on or around 17 December 2020 and a VAT notice of supplementary assessment of surcharge was issued to JFS on or around 7 July 2021 in an amount of £723.25.
11. In respect of the period 01/21, a VAT notice of assessment and surcharge liability notice extension was issued to JFS on or around 24 September 2021 and a VAT notice of supplementary assessment of surcharge was issued to JFS on or around 3 September 2021 in an amount of £1,067.20.
12. It is not disputed that JFS did not meet VAT return filing or payment obligations for the periods 07/20; 10/20; and 01/21.
13. JFS requested a review of the decision to issue default surcharges for the periods 10/20 and 01/21 on 25 January 2022.

14. HMRC issued a review conclusion letter confirming that the default surcharges would be upheld on 24 February 2022.
15. JFS requested a further review of the default surcharges for the periods 10/20 and 01/21 on 23 March 2022.
16. HMRC did consider the request for a second review and issued a letter to JFS on 12 May 2022 confirming their decision to uphold the default surcharges.
17. JFS filed a notice of appeal on 7 November 2022 (the Notice of Appeal).

THE LAW

18. VATA contains provisions relating to the submission of VAT returns and the payment of VAT.

19. Section 25 VATA provides that:

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

20. In accordance with Regulation 25(1) VAT Regulations 1995, a return must be submitted to HMRC by all VAT-registered persons not later than the last day of the month following the end of the period to which it relates.

21. Regulation 40 VAT Regulations 1995 provides that such amount of VAT as is payable by the person making the return in respect of the period to which the return relates should be paid to HMRC not later than the last day on which that person is required to make that return.

22. A liability to a default surcharge arises under s 59 VATA if a person fails to file a VAT return or the amount of VAT shown on that return is not received by HMRC by the due date.

23. A surcharge liability notice is sent to the taxable person for a default which carries a warning that a liability to a surcharge will arise if there are any further defaults within the next 12 months (the surcharge period). A default surcharge is imposed at a rate of 2% of the outstanding VAT at the date of the surcharge for a first default within a surcharge period. A default surcharge is imposed at a rate of 5% of the outstanding VAT at the date of the surcharge in respect of a second default within a surcharge period. Upon each default, the surcharge period is extended by 12 months.

24. Under s 59(7) VATA, a surcharge does not arise if a person has a “reasonable excuse” for the failure to submit a return or make a payment within the due date. Although there is not a definition of reasonable excuse in the legislation, it is “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]). However, insufficiency of funds or reliance on another person is not a reasonable excuse under s 71 VATA.

25. The Upper Tribunal set out how the Tribunal should consider the question of “reasonable excuse” in *Christine Perrin v HMRC* [2018] UKUT 137 (TCC) at [81]:

“When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'"

26. The onus of proof is on HMRC to show that the VAT default surcharge is due. The burden then moves to JFS to demonstrate that there is reasonable excuse for failure to submit the VAT return or make payment of the amount shown on that return by the due date.

27. The standard of proof is the ordinary civil standard which is the balance of probabilities.

DISCUSSION

28. During the hearing, Ms Grover explained that JFS had been running for around 20 years and had always met tax obligations on time. She gave evidence that, at the time of a fire at their premises around six years ago, JFS had continued to make tax filings on time. Ms Grover submitted that the directors took their responsibilities seriously, and their top priority was ensuring compliance with tax obligations.

29. Ms Grover submitted that the first time that JFS had not complied with tax obligations was during the pandemic lockdown. They were prevented from accessing their premises (with less than 24 hours' notice) and at this time some family members were ill. The Notice of Appeal submitted to the Tribunal by JFS also notes that JFS had limited IT infrastructure.

30. Ms Grover reported that, upon return to the office following the first lockdown, there was a backlog of work and it took time to work through that. The VAT return was filed and payment made as soon as possible following the return to work.

31. Ms Krishnasamy gave evidence that obligations relating to the earlier 04/20 period had been met made because JFS was trading normally up to the pandemic and the interruption to systems happened after this point because of furlough. While payment for the 04/20 period was made late, no penalty was charged because a call had been made to HMRC and a time to pay arrangement had been agreed.

32. The second pandemic lockdown in around November 2020 led to a further accumulation of the of backlog of work facing JFS. Ms Krishnasamy noted that she was on furlough from November 2020 to 12 April 2021, and that the VAT filing and payment deadlines for the periods 10/20 (30 November 2020) and 01/21 (28 February 2021) had passed by the time she returned to work.

33. Despite restricted access to JFS office premises, Ms Grover confirmed during the hearing that online sales had continued during the pandemic lockdowns and that these had been taken care of by a single member of staff (a director) working from home.

34. Though Ms Grover and Ms Krishnasamy reported to the Tribunal that a call had been made to HMRC by a Mr Hassan on behalf JFS and several other clients, they were unable to

provide firm details about when this second call had happened or what had been discussed. While they suggested this call took place around the time of the second lockdown (November 2020), HMRC had no record of this contact being made.

35. There was no dispute that JFS did not meet VAT return filing or payment obligations for the periods 07/20; 10/20; and 01/21 and therefore the Tribunal had to consider whether JFS had a reasonable excuse for failure to meet their VAT obligations.

36. We acknowledge the significant difficulties and challenges faced by businesses during the pandemic lockdowns. However, we are unable to find that the facts in this case, viewed objectively, can amount to a reasonable excuse. As JFS were in the default surcharge regime from the 07/20 period and had received a surcharge liability notice, they would have known the consequences of filing a late VAT return and making a late payment of VAT in periods 10/20 and 01/21. Further, JFS were able to continue to make sales during the pandemic lockdowns and should have had systems in place to meet VAT obligations during this time, or to contact HMRC to agree a time to pay arrangement. While Ms Grover and Ms Krishnasamy submit that a call was made to HMRC on behalf of JFS to explain the difficulties they were facing during the second lockdown, reliance on another person does not constitute a reasonable excuse under s 71 VATA.

DECISION

37. The VAT default surcharges for the periods 10/20 and 01/21 have been charged in accordance with legislation and no reasonable excuse has been shown for the failure of JFS to submit VAT returns or pay the required tax by the due date.

38. We dismiss the appeal of the Appellant and confirm the VAT default surcharges in a total amount of £1,790.45.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

**SUSAN TURNER
TRIBUNAL JUDGE**

Release date: 02nd October 2023