



Neutral Citation: [2024] UKFTT 00895 (TC)

Case Number: TC09312

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2024/00313

*VAT – late submission and payment penalties under FA 2021 – reasonable excuse – special circumstances – appeal allowed*

**Heard on:** 28 August 2024

**Judgment date:** 7 October 2024

**Before**

**TRIBUNAL JUDGE NIGEL POPPLEWELL  
MS GILL HUNTER**

**Between**

**SANDRA KRYWALD**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: In person

For the Respondents: Miss Hifsa Shabir litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This is a VAT case which concerns penalties for failing to submit timely VAT returns, and to pay VAT on a timely basis for the VAT periods 5/23, 8/23 and 11/23 (“**the relevant periods**”).

2. But it must be seen against the backdrop that the appellant has been subject to the default surcharge regime for quarterly VAT periods between January 2021 and February 2023.

3. For the reasons set out below she failed to submit timely VAT returns. Accordingly, HMRC have issued central assessments for the VAT which they consider is due for each of these periods. And they have calculated the surcharges as a percentage of those estimated amounts.

4. A taxpayer has no right of appeal against a central assessment. All that a taxpayer can do is submit a VAT return for the periods covered by that assessment. HMRC will then process that return and adjust the assessment accordingly. This, of course, will have a knock-on effect on the surcharges.

5. As far as the surcharges are concerned, therefore, although we were apprised of them, we simply noted the position set out above. They were not dealt with, or resolved, as part of the hearing. Once the appellant has submitted the appropriate returns, that might be the opportunity for her to make a valid appeal against any surcharges which arise thereafter.

6. The focus of the appeal was on the application of the new penalty regime which was introduced by the Finance Act 2021 (“**FA 21**”). Under schedule 24 FA 21, a new points system was introduced for penalties for failing to submit returns on time. Under schedule 26 FA 21, a new regime was introduced for penalties for failing to pay VAT on time. This new regime applies to returns and payments due after 1 January 2023.

7. Whilst the late submission regime is a points-based regime and ultimately results in a fixed £200 penalty, the late payment regime, like the default surcharge regime, imposes a financial penalty which is geared to the amount of tax outstanding on certain days.

8. We are only considering three VAT periods namely 05/23, 08/23, and 11/23. HMRC have imposed late submission penalty points for each of these periods and have also charged the appellant first late payment penalties for each of these periods.

9. Because the appellant had failed to submit VAT returns, HMRC centrally assessed her to VAT under the new late payment penalty regime. So, the penalties were based on HMRC’s estimate of the VAT due for the relevant periods. That amount was declared to be £16,171.92 in HMRC’s statement of reasons. This looked to us to be an arithmetic error given that the amounts in question appeared to add up to £8,085.96. But we were told that at the time of the hearing, the penalties were £3,227.64.

10. The reason for this was that since the date on which that statement was prepared, the appellant has submitted VAT returns. This has allowed her to bring appeals against the late payment penalties and late filing penalties and has also enabled HMRC to calculate the late payment penalties based on real rather than estimated figures.

11. Given that this is a financially moving feast, we agreed that we would make a decision in principle as to whether (given that there was no dispute about the application of the relevant regime nor that the appellant had been late in filing and paying VAT) she had a reasonable excuse or that there were special circumstances which might alleviate any liability to these penalties. That decision in principle (which applies only to the relevant periods) could then be applied to the final amount of penalties which are ultimately due once the amount of VAT due from the appellant for the relevant periods has been finally resolved.

## **THE LAW**

12. There was no dispute about the relevant law which we, therefore, summarise below:

### ***Late submission penalties***

13. Under schedule 24 FA 21 where a person is late in submitting the VAT return they become liable to be awarded penalty points. Personally liable to one penalty point for each failure up to the maximum which, in the case of this appellant, is 4 points.

14. A late submission penalty of £200 is chargeable when a person is late in submitting their VAT return and the maximum number of penalty points is reached.

### ***Late payment penalties***

15. A taxpayer is liable to a first late payment penalty if any VAT remains unpaid after day 15 following the payment due date and no application has been made for a time to pay agreement. The penalties are set at 2% of the tax outstanding on day 15.

16. If any of the VAT is still unpaid after day 30 (and no time to pay application has been made) the penalty is calculated at 2% of the VAT outstanding after day 15 plus 2% of the VAT outstanding on day 30.

17. A second late payment penalty arises if the VAT remains unpaid on day 31. It is assessed at a rate of 4% on the amount outstanding and accrues on a daily basis.

### ***Reasonable excuse***

18. A taxpayer is not liable to either penalty points or a financial penalty for late submission, or for a late payment penalty, if they can establish that they had a reasonable excuse for their failure and put that failure right without unreasonable delay after the excuse has ended.

19. It is statutorily provided that neither an insufficiency of funds (unless attributable to events outside the taxpayer's control), or reliance on another person to do anything (unless the person took reasonable care to avoid the failure) is a reasonable excuse.

### ***Special reduction***

20. HMRC may reduce a late payment penalty if they think it right to do so because of special circumstances. Special circumstances is not defined but does not include, amongst other things, the ability to pay.

## THE EVIDENCE AND FINDINGS OF FACT

21. We were provided with a bundle of documents. The appellant gave oral evidence. From this evidence we find the following:

- (1) The appellant has been awarded a late submission penalty point for each of the periods ending 05/23, 08/23 and 11/23.
- (2) The appellant has been assessed to first late payment penalties for the same periods.
- (3) The amounts assessed are, respectively, £2,705.40, £2,705.40, and £2,675.16.
- (4) The appellant accepted that the returns for these periods were late but told us (and this was not disputed) that the returns for the periods 08/23 and 11/23 were submitted on 21 June 2024, and that for the period 5/23 was submitted on 10 July 2024.
- (5) The appellant is a solicitor who is the principal of a firm of solicitors. She employs two solicitors and some support staff.
- (6) Prior to the Covid pandemic she had outsourced her bookkeeping services to a bookkeeping firm (“**the firm**”) who supplied the appellant’s business with a bookkeeper (“**bookkeeper 1**”).
- (7) Bookkeeper 1 would provide the appellant with the figures required to enable the appellant to complete and submit her VAT return.
- (8) Bookkeeper 1 was classified as a vulnerable person and thus unable to attend the appellant’s premises following the onset of the Covid pandemic. She therefore worked remotely, but this resulted in the relevant figures being produced late.
- (9) It also came to the appellant’s attention that these figures may well have been wrong. She was reluctant to sign a VAT return in the circumstances given that it requires a declaration that the figures are correct. However, she made monthly payments on account of the VAT.
- (10) Bookkeeper 1 was then made redundant by her employer who then supplied the appellant with a second bookkeeper (“**bookkeeper 2**”). Bookkeeper 2 was the principal of the firm.
- (11) Bookkeeper 2 did not appear to attempt to resolve the position with any enthusiasm or alacrity, ultimately informing the appellant that he could not be satisfied that the figures supplied by bookkeeper 1 for VAT purposes were correct.
- (12) The appellant had spoken to HMRC over the telephone sometime in late 2022/early 2023. Her evidence was that she had been told by the HMRC helpline person that in order to submit a VAT return she needed to have “opening balances”. In their statement of reasons, HMRC accept that this was indeed what the appellant was told.
- (13) Given that the financial information was uncertain, she was not able to submit a return because she could not be confident in the veracity of the numbers and could not therefore have an accurate closing balance at the end of a quarter and a correspondingly accurate opening balance at the beginning of the next.

(14) The appellant was very stretched during the Covid pandemic. Not only was she having to keep her solicitors practice going, but she was also on the board of a company which supplied personnel to give presentations in the corporate financial sector. She effectively had to keep this business going, almost single-handed, at the same time.

(15) She did not, therefore, have the time to go back and check all the figures necessary to submit the VAT returns which had been provided by bookkeepers. In the appellant's view the problems had been caused by these bookkeepers. She asked the firm to undertake a verification exercise, but they ultimately resigned in June 2023 when the appellant indicated that she held them responsible for the failure to provide accurate and timely data.

(16) The firm also reported the appellant to the Solicitors Regulatory Authority for breaching the relevant accounting financial regulations.

(17) The appellant's evidence, which was supported by contemporary documentation, was that during 2023 she continually pressed the firm to review and correct the errors made by bookkeeper 1 as, frankly, in her view, the failings by bookkeeper 1 were the responsibility of the firm. In her view they were best placed to spot the errors and correct them.

(18) Having spoken to a VAT specialist in the Spring of 2024, who told her that HMRC's information about requiring an opening balance, was incorrect, and that VAT returns could be submitted based on the turnover in each period, she engaged a new bookkeeping company. The result of that is that returns are now being submitted on a quarterly basis, and returns for past periods are also being compiled and submitted.

(19) The appellant has made regular payments of VAT on account. She has asked for a time to pay agreement but has not been able to enter into one because she has not submitted her VAT returns.

(20) The appellant's evidence, which we accept, was that this saga has caused her considerable stress and has exacerbated a number of health issues. She has worked herself to the bone and has not taken a holiday for years.

(21) Following receipt of the notices for the late submission penalty points and the late payment penalties, the appellant requested a review of the decision. The review conclusion letter dated 18 December 2023 upheld the penalties, and on 17 January 2024 the appellant appealed against the decisions to issue the late submission points and the late payment penalties.

## **DISCUSSION**

### ***Burden of proof***

22. The burden of establishing that they have issued and served on the appellant valid in time notices of assessment for the late payment penalties and the issue of the penalty points for late submission, rests with HMRC. The standard of proof is the balance of probabilities or "more likely than not".

23. As evidence of such issue and service, HMRC have provided copies of their electronic records together with specimen notices.

24. This is not particularly strong evidence of such issue or service. However, in light of the fact that the appellant has mounted no challenge to HMRC's assertion that she was sent

and received valid notices, we are prepared to accept it. We therefore find as a fact that HMRC did serve valid notices on the appellant on or around the date specified in their records.

25. The burden of establishing that the appellant had a reasonable excuse or that she should benefit from a special reduction because of special circumstances lies with the appellant. She must establish these on the balance of probabilities.

### ***Submissions***

26. In summary the appellant submitted as follows:

- (1) The circumstances which she has described in evidence were extraordinary.
- (2) She was entitled to, and did, rely on the firm to supply her with competent staff which they failed to do. She did not realise this at the time. Once she realised that bookkeeper 1 had not provided accurate figures, she made every effort to resolve the situation with the firm who reported her to the SRA and resigned when she made it clear that in her view it was that firm's failings which had caused all the problems.
- (3) Bookkeeper 1 had proved to be reliable before the onset of the Covid pandemic. The problem arose because she had to work remotely and for some reason this meant that the accuracy and timeliness of the figures which she produced were suspect. This was not foreseeable.
- (4) Once she realised that she did not need to have an opening balance to submit a VAT return, she instructed a firm to assist her to reconstitute her VAT returns. She is now submitting catch up returns, and those in respect of the relevant periods were submitted earlier this summer.
- (5) She is conscious of her responsibility towards the VAT system. She has always kept in touch with HMRC and telephoned them to tell them what has been going on. She has also made sure that the VAT position of the associated company has been kept up to date with returns and payments being made on a timely basis.
- (6) She has made regular payments of VAT on account of her liability.
- (7) She has both a reasonable excuse, and there are special circumstances which warrant a special reduction.

27. In summary HMRC submitted as follows:

- (1) In essence the appellant's case is that she relied on the firm. This is statutorily prohibited from being a reasonable excuse. She should bring action against them if she thinks that the failure to provide accurate and timely information for inclusion in her VAT return was the fault of the firm.
- (2) Ultimately it was the appellant's responsibility to ensure that timely returns and payments of VAT were submitted to HMRC. It is incumbent on a taxpayer to ensure that provisions are in place to enable them to comply with their statutory obligations. The appellant has provided no evidence of any checks and controls to ensure timely submission

and payment of VAT. This is the case notwithstanding the Covid pandemic when it is clear that the appellant was able to continue to run her firm.

(3) They accept that she had contacted HMRC and was advised that she would need opening and closing balances to submit VAT returns. However, the appellant has not demonstrated that she took reasonable steps to ensure that she submitted the returns.

(4) Even if the appellant did have a reasonable excuse, she did not remedy the failure without unreasonable delay. Submission of the relevant returns and payments of the correct amount of VAT pursuant thereto has not been made within a reasonable time of that excuse ceasing.

(5) There are no special circumstances which justify a special reduction.

### ***Our view***

#### *Reasonable excuse*

28. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

"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?"

29. The essence of the appellant's case is that she relied on the firm to provide competent staff in order to provide the figures necessary to enable her to submit an accurate VAT return for the relevant periods. Bookkeeper 1 who had proved reliable in the past, proved unreliable once furloughed. Bookkeeper 2, as principal of the firm, recognised that it was bookkeeper 1's failings that led to the appellant's inability to complete and submit the returns, but then failed to rectify the position and ultimately reported her to the SRA. She had been told in 2022/early 2023 by HMRC that she needed opening and closing balances, and it was not until she consulted an expert in early 2024 that she discovered that this was incorrect. She then promptly instructed another firm of bookkeepers who submitted returns for the relevant periods in June and July 2024.

30. It is clear that reliance on another person to do anything cannot be a reasonable excuse. That is enshrined in statute. But it can be a reasonable excuse if, in this case, the appellant took reasonable care to avoid the failures by the firm, and by HMRC, and then remedied the failings without unreasonable delay once the excuse ceased.

31. In our view it was entirely reasonable for the appellant to rely on the services of the firm, and of bookkeeper 1. Any failings by bookkeeper 1 were unexpected and attributable to Covid, something which could not have been foreseen.

32. Once the failings by bookkeeper 1 became apparent, she approached the firm and was entitled to rely on the representations given by bookkeeper 2 that he would resolve the position. In our view this is taking reasonable care to avoid the original failings by the firm through the agency of bookkeeper 1.

33. However, the appellant was badly let down by the firm, and in particular bookkeeper 2, who in September 2023 told her that he was not prepared to carry out any further work on her VAT returns.

34. By then the appellant had spoken to an HMRC representative, over the phone, and been told that she needed opening and closing balances. This appears to be incorrect information. Again, reliance on this information is statutorily barred from being a reasonable excuse, but it provides the context as to why the appellant asked bookkeeper 2 to provide more than just turnover figures. It is clear that providing these balances was the reason why it was not possible to simply correct the inaccurate figures provided by bookkeeper 1, and why the firm, through bookkeeper 2, decided that it was going to be too much like hard work and thus were not prepared to deal with it.

35. The appellant's oral evidence was that she then, in early 2024 consulted a VAT expert. This appears to have taken place after the SRA inspection in March 2024. She was told by the VAT expert that HMRC's advice was incorrect and there was no need for opening and closing balances. Taking this advice is in our view taking reasonable care to avoid HMRC's failings.

36. She therefore had a reasonable excuse, even though she relied on the firm and HMRC, because she took reasonable care to avoid the failings of both.

37. Furthermore, she had no indication that neither the firm nor HMRC were incompetent, or unable to provide accurate advice.

38. So she had a reasonable excuse right up to the time when she consulted the VAT expert who told her that she did not need the opening and closing balances.

39. We were told at the hearing, and this was not gainsaid by Miss Shabir, that the three returns for the relevant periods were submitted in June and July 2024. Given that the appellant was running a busy practice and has suffered considerable mental and physical stress from the fallout from Covid and her interactions with HMRC, we do not think that the time period between receiving the advice from the VAT expert after March 2024, and instructing a new firm of bookkeepers who then submitted the returns in June and July 2024, is an unreasonable length of time. In our view the failure to submit the returns was remedied without unreasonable delay.

40. We therefore find that she had a reasonable excuse for failing to submit the returns for the relevant periods, on time.

#### *Special reduction*

41. While "special circumstances" are not defined, the following extract from the Upper Tribunal decision in *Edwards* sets out the correct test.

"73. The FTT then said this at [101] and [102]:

"101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.



102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty".

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration".

42. In our view the combination of circumstances set out above do comprise special circumstances. The onset of Covid followed by the furlough of bookkeeper 1, and her consequential failing to provide timely and accurate figures is not in itself special. But the fact that rectification required, according to HMRC, the provision of opening and closing balances, which information was incorrect, meant that the work that she asked the firm to carry out through bookkeeper 2 was far more complicated than was necessary.

43. This allowed the firm to prevaricate and ultimately reject the appellant as a client. So, had HMRC given accurate advice, it is in our view likely that the appellant would have been able to submit the returns earlier, since the firm would have been able to carry out a rectification exercise without the need to provide opening and closing balances.

44. The question arises therefore as to whether the decision not to reduce the penalties by dint of special circumstances is flawed. This means flawed in the judicial review sense. Has a decision maker taken into account irrelevant factors, not taken into account relevant ones? Was it a reasonable decision on the evidence?

45. In our view the decision is flawed. HMRC accept that they gave advice to the appellant that in order to submit accurate VAT returns, she needed opening and closing balances for each quarter. This was clearly wrong. This should have been given considerable weight.

46. HMRC have not said where they have considered special circumstances other than in their statement of reasons which was produced in March 2024 for the hearing. It was certainly not considered in the review conclusion letter of 18 December 2023 where special circumstances were not mentioned.

47. It is not clear therefore what the "decision maker" (and it is equally not clear to us who HMRC say was a decision maker in these circumstances – presumably the reviewing officer) took into account. And it is certainly the case that neither the review conclusion letter nor the statement of reasons give any reasons as to why HMRC does not consider the appellant's circumstances not to be special. They simply state that as a fact.

48. Failure to give any reasons at all for coming to a decision can of itself amount to a flawed decision. And that is exacerbated in this case by failing to give sufficient weight, or indeed any apparent weight at all, to HMRC's failure to give correct advice regarding opening and closing balances.

49. We therefore find HMRC’s decision not to reduce the penalties to zero by virtue of special circumstances is a decision which is flawed in the judicial review sense. This enables us to substitute for HMRC’s decision with another which HMRC had power to make. HMRC had power to reduce the penalties to zero, and we have the same. If we had not found that the appellant had a reasonable excuse, we would reduce the penalties to zero by virtue of special circumstances.

## **DECISION**

50. For the foregoing reasons we allow the appeal.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

51. 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: 07<sup>th</sup> OCTOBER 2024**