



TC04814

Appeal number: TC/2015/02759

VAT DEFAULT SURCHARGE – whether reasonable excuse for failure to pay – No – surcharge upheld

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**RYEFELL LTD t/a
HAMBLEDON HAULAGE**

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: THOMAS SCOTT

The Tribunal determined the appeal on 4 December 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 9 April 2015 (with enclosures), the Appellant's Response to HMRC's initial Statement of Case, and HMRC's Amended Statement of Case submitted on 30 July 2015 (with enclosures).

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DECISION

Introduction

- 5 1. Ryefell Limited (trading as Hambledon Haulage) appealed against a default surcharge of £1562.49 for failure to pay VAT due for period 10/14.
2. Ryefell's appeal was on the basis that it had a reasonable excuse for the failure.

Legislation

- 10 3. Where a person is required to make a VAT return Regulation 40 of the Value Added Tax Regulations (SI 1995/2518) ("**the Regulations**") requires that person to pay such VAT as is payable for the period by the last day on which the return is due.
4. Under section 59 of the Value Added Tax Act 1994 ("**VATA**") failure to pay the VAT when due gives rise to a default.
- 15 5. Section 59 provides that HMRC may, on a default, serve a surcharge liability notice on the taxpayer. The relevant surcharge in this case is 2% of the VAT due for 10/14 by virtue of section 59(5)(a).
6. Section 59(7) provides that, in the case of a default which is material to the surcharge, the taxpayer is not liable to the surcharge if the tribunal is satisfied
20 that there is a reasonable excuse for the failure to pay.
7. Under section 83 VATA, the taxpayer may appeal to the tribunal against any liability to a surcharge under section 59.
8. Section 130 of the Finance Act 2008 applies where a person has both a credit
25 and a debit for VAT. It provides that, subject to certain restrictions, HMRC "may" set off the credit against the debit.
9. Paragraph 57 of the Regulations provides for an alternative basis of accounting for VAT termed "cash accounting". As its name suggests, this broadly provides for VAT to be due by reference to cash payments in respect of supplies. Eligibility for cash accounting is subject to various conditions and restrictions.
- 30 10. Under paragraph 64(1)(d) of the Regulations, a taxpayer's entitlement to operate cash accounting ceases where HMRC "consider it necessary for the protection of the revenue that he shall not be so entitled".

Facts

- 35 11. Although I was not presented with a statement of agreed facts, the following facts were not in dispute.

12. One of the directors of Ryefell was also a director of a sister company, RT Transport Holdings Limited (“**RT Transport**”) during the period relevant to the appeal.
- 5 13. In its VAT return to 31 October 2014, Ryefell showed VAT due which was higher than normal, as a result of transferring vehicles from Ryefell to RT Transport.
14. Ryefell had anticipated that its VAT liability for the period 10/14 would be matched, or offset, by a repayment of VAT to RT Transport on the vehicle transfer in respect of its return to 30 September 2014.
- 10 15. This expectation was based on the assumption that RT Transport would be entitled to use the cash accounting method for VAT.
16. RT Transport satisfied the basic conditions to qualify for cash accounting during the period in which the vehicle transfer took place. HMRC, however, withdrew RT Transport from the cash accounting scheme for that period on the basis of paragraph 64(1)(d) of the Regulations.
- 15 17. As a result of this withdrawal, RT Transport’s VAT liability, and subsequent VAT repayment, occurred at a later date than Ryefell had anticipated. Ryefell did not fully pay the VAT which it owed for 10/14 until eleven weeks after the due date. Ryefell acknowledged the default for that period.
- 20 18. Ryefell’s adviser, the chartered accountants Buckleys, stated as follows in a letter to HMRC of 8 December 2014:
- 25 “The transaction took place between both companies which would have resulted in a repayment to RT Transport Holdings Limited and an amount to be paid by Ryefell Limited. I understand that Customs declined to pay the repayment and this is not in accordance with legislation.
- I would further point out that Ryefell Limited’s Management Accounts clearly show that the company has dropped below the turnover limit which effectively means it is entitled to cash accounting.
- 30 I have therefore instructed the company, on commercial grounds, that it should not pay the VAT due on Ryefell Limited, since clearly this would put it in a disadvantageous cash flow position and seriously threaten the commerciality of the company.
- 35 I am quite happy to discuss this with you, but at the moment I am disturbed that decisions are being made by persons within Customs and Excise, clearly not in accordance with the law of the land.”
- 40 19. In its response to HMRC’s initial Statement of Case, Buckleys summarised Ryefell’s arguments as follows in a letter to the Tribunal of 15 July 2015:
- “● Ryefell Limited could not make payment on 7 December 2014 due to cash flow and commercial problems caused by non-receipt of VAT by RT Transport Limited on 7 November 2014.

- 5 • VAT email of 20 November 2014 [from HMRC] sought to impose retrospective action back to 1 August 2014. Repayment was withheld causing the surcharge problem. Furthermore repayment was made without any consultation prior to Christmas in contradiction to the email of 20 November 2014.

- VAT letter on 15 December 2014 [from HMRC] was not subject to discussions and rather than repay as previously stated would not happen could have been offset and no surcharge would have arisen.

- 10 • My letter of 8 December 2015 offered the opportunity to discuss matters, but obviously this was declined.”

The Appeal

20. Ryefell argued that its failure to pay for 10/14 arose as a result of HMRC’s withdrawal of the cash accounting basis for RT Transport. That withdrawal, which had the effect of postponing the anticipated VAT repayment, was incorrect and not in accordance with the legislation. HMRC could and should have set off RT Transport’s VAT repayment against Ryefell’s VAT liability. Ryefell therefore had a reasonable excuse for the failure to pay within section 59(7) VATA.

20 ***Discussion and Decision***

21. Ryefell’s argument, summarised in the preceding paragraph, was a simple one. HMRC acted unfairly and improperly in withdrawing RT Transport from the cash accounting basis, and this directly affected Ryefell’s ability to pay its VAT for 10/14 when due.

22. In relation to whether this afforded Ryefell with a reasonable excuse for failure to pay, section 71(1)(a) VATA provides that “an insufficiency of funds to pay any VAT due is not a reasonable excuse”. It is, however, well established that while such an insufficiency is not in itself a reasonable excuse, it is possible (depending entirely on the facts) that a reasonable excuse may exist when the insufficiency results from an event which is unexpected and outside the taxpayer’s control, provided that the taxpayer has taken all reasonable steps to anticipate and respond to the event.

23. HMRC’s decision to withdraw RT Transport from the cash accounting basis, to which it was otherwise entitled, was taken under paragraph 64 of the Regulations. The rationale was explained in a letter of 15 December 2014 from HMRC to Buckleys as follows:

 “Where there are associated companies and one company uses the cash accounting scheme and the other completes their VAT return on date of invoice there is the potential for one company effectively having a loan using public funds rather than on a commercial basis where the two companies are on different VAT staggers. It was on this basis that the repayment was withheld from RT Transport Holdings Ltd until it had been established that the relevant output tax had been declared by Ryefell Ltd. This was to ensure that there had been no commercial advantage gained by using public funds.”

24. HMRC's decision under paragraph 64, and the timing of its communication to Ryefell and its adviser Buckleys, may have constituted an event which, from Ryefell's perspective, was unexpected and outside its control. That event may in turn have contributed to Ryefell's inability to meet its VAT liability for 10/14 when due. However, even if this were to be the case, it was necessary then to consider how Ryefell, and its adviser Buckleys, responded to this outcome.
25. HMRC were under no obligation to set off any repayment due to RT Holdings against Ryefell's VAT liability. The power to offset which is afforded to HMRC by section 130 Finance Act 2008 is discretionary. In any event, it applies to debits and credits of the person in question, not a debit of one company and a credit of an associated company.
26. Ryefell did not respond to RT Transport's withdrawal from cash accounting by seeking "time to pay" from HMRC. This was not a result of Ryefell's unfamiliarity with time to pay arrangements since such arrangements had previously been agreed with HMRC in respect of several periods, up to and including 07/14.
27. Rather, it was clear from Buckleys letter to HMRC of 8 December 2014 that Ryefell reached a deliberate decision, on the advice of Buckleys, not to pay the VAT due for 10/14. Doubtless that decision was influenced by the unexpected delay of the VAT repayment to RT Holdings. Nevertheless, Ryefell chose not to meet its VAT liability when due, and did not seek from HMRC any further time to pay.
28. Ryefell therefore had no reasonable excuse for its failure to pay. It failed to take the steps which any reasonable, responsible taxpayer could have taken to respond to the delay of the anticipated repayment to RT Holdings. The default surcharge was therefore validly imposed.
29. For the reasons given, I therefore dismiss the appeal and confirm the default surcharge in the sum of £1562.49.

Right to Apply for Permission to Appeal

30. 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.

THOMAS SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 6 JANUARY 2016