



TC05240

Appeal number: TC/2015/06355

VAT – default surcharge – delay in bank loan being processed – whether reasonable excuse; no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUN HILL RACING LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
MR IAN SHEARER**

**Sitting in public at Eagle Building, 215 Bothwell Street, Glasgow on 29 January
2016**

No representation nor attendance by the Appellant

**Mrs Clare Robertson, presenting officer of HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

- 5 1. The appeal is against the default surcharge imposed of £5,410.49 at 10% in relation to the VAT period 11/12.
2. The return for the period was submitted on 17 December, before the due date of 31 December 2012. The VAT liability for the period of £54,104.90 was settled after the due date of 7 January 2013 for electronic payment, and was met by five part-payments between 13 February 2013 and 5 April 2013.
- 10 3. The Notice of Appeal was lodged late but no objection to this was taken. We allow the appeal to proceed, it being in the interests of justice to do so in view of the course of communications between the parties, which gave rise to the belief by the appellant that the surcharge had been cancelled. The date on the Notice is 4 November 2015, nearly three years after the VAT period of 11/12 to which it relates.
- 15 4. There was no appearance of the appellant or its representative (Charles Chartered Accountants) on the day of the hearing. The Tribunals Service was informed by the representative that the hearing should proceed in the appellant's absence, and it was explained to the representative that the matter under appeal would be determined in the appellant's absence in accordance with Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('The Tribunal Rules').
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Legal framework

- 25 5. The legislative framework for the default surcharge regime is provided under sections 59-59A (on default surcharge), 70-71 (on mitigation of penalties), 83 (on appeal) of the Value Added Tax Act 1994 ('VATA'), and under regulations 25, 25A and 40 of VAT Regulations 1995 in relation to the accounting, payment and the making of returns for VAT purposes.
- 30 6. In respect of the Tribunal's jurisdiction, under section 59(7)(b), it is provided that if *there is a reasonable excuse for the return or VAT not having been so despatched* (that is submitted or paid on time), then the taxpayer *shall not be liable to the surcharge ... and shall be treated as not having been in default in respect of the prescribed accounting period in question*.
- 35 7. 'Reasonable excuse' cannot be considered at large, and is circumscribed by statute and precedent. The relevant statutory exclusion for this case comes under section 71(1)(a) of VATA 1994, which provides that for the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct, *an insufficiency of funds to pay any VAT due is not a reasonable excuse*.

Factual background

8. The appellant's business is the training of racehorses and was registered for VAT at first as a sole-trader until the business incorporated in August 2011. Ms Ann Duffield was the sole proprietor, and is the director of the business on incorporation.
5 The appellant's customers include individuals, families and horse partnerships, being owners of racehorses that are trained by the appellant.

Default surcharge for period 11/12

9. In the period 11/12, there was a 'spike' in the quarterly turnover due to the sale of racehorses, and this resulted in a VAT liability of £54,104.90 which was payable in
10 full by 7 January 2013. The full liability was met by five part-payments and the timing and sums of each are as follows:

- (1) £967.91 on 13 February 2013
- (2) £1,000 on 15 February 2013
- (3) £1,500 on 2 March 2013
- 15 (4) £40,729.20 on 19 March 2013
- (5) £9,907.79 on 5 April 2013.

10. The appellant was in default for every quarter in 2012, and the default under appeal represents the fourth in the year. The history of defaults as summarised by HMRC's schedule is as follows ('FD' stands for first default):

Period	Amount late	Payment made	Rate	Surcharge
02/12	£16,999.52	5 instalments from 14/5/12 to 30/7/12	0% (FD)	0.00
05/12	£20,365.95	4 instalments from 30/7/12 to 17/12/12	2%	407.31
08/12	£26,166.62	8 instalments from 17/12/12 to 13/2/13	5%	£1,308.33
11/12	£54,104.90	5 instalments from 13/2/13 to 5/4/13	10%	£5,410.49

20 11. By letter dated 28 January 2013, the representative wrote to appeal against the surcharge notice issued on 18 January 2013. The letter states:

25 'Our client remains in the process of obtaining additional bank funding for the business since November 2012 to enable the VAT return to be paid in full and on time by 7 January 2013. However, bank administration has caused delays in the funding becoming available. Our client has still not received confirmation of the loan to enable the VAT to be paid but we anticipate receipt of the funds soon. Once funds have been received, the VAT liability will be paid in full.'

30 12. By letter dated 18 February 2013, HMRC replied after considering the contents of the representative's letter, and confirmed that the lack of funds is specifically

excluded under s71(1)(a) of VATA as a reasonable excuse for late payment. Furthermore, there had been no contact from the appellant to discuss a ‘time-to-pay’ arrangement before the due date.

13. Some three months after HMRC’s February reply, the representative wrote on
5 29 May 2013, enclosing a letter from Ms Duffield dated 19 May 2013. Ms Duffield
referred to the ‘huge financial strain’ the business had been under, and that she had to
re-mortgage her home ‘to raise the necessary funds to keep the business afloat’, to
settle the VAT liability as quickly as she could and pay all her creditors; that ‘lengthy
delays’ were caused by the further land searches required in the re-mortgaging
10 process which were out of her control; that as well as clearing old debts, she had set
up a new ‘VAT’ bank account to ensure the future VAT payments would be on time.

Default surcharge for period 05/13

14. By letter dated 26 July 2013, the representative wrote to appeal against the
15 default surcharge notice of 12 July 2013 relating to the period 05/13 (ending 31 May
2013) in the sum of £2,765. The reason given was that miscommunication between
the new and old book-keeper in the changeover had caused the VAT payment to be
missed and it was eventually ‘sent’ on 8 July 2013; that the funds were in place and
the payment being late by one day was an administration error.

15. On 6 August 2013, HMRC officer Mrs Chamber wrote to request further
20 information to enable a full review to be carried out – such as details of the usual
credit terms allowed for customers plus a breakdown of bad debts; whether the
business accounted for VAT by cash accounting or invoice accounting. The letter
also asked for a reply by 14 August 2013, and in the absence of a reply by that date,
the case would be closed and the surcharge upheld.

25 16. The 6 August 2013 letter has its headings as the appellant’s VAT registration
number, and ‘Default Surcharge Period: 11/12’. However, the first paragraph refers
to the appellant’s request for a review for a ‘Surcharge Notice imposed on the 03/13
period’; the reference to the period 03/13 is an error and would seem to have been
intended to be 05/13. In terms of the timing of the letter, it would seem to be a reply
30 to the appellant’s letter of 26 July 2013, appealing against the surcharge imposed for
the period 05/13. This letter would seem to have conflated the surcharges in relation
to periods 11/12 and 05/13, and while intending to deal with the period 05/13 (as the
reference to period 03/13, albeit wrong, seemed to suggest) ended up dealing only
with period 11/12.

35 17. On 16 August 2013, Mrs Chamber wrote again, stating: ‘I regret that as no
response has been received our review action has been cancelled’, and ‘the surcharge
for the period 11/12 will therefore remain in force.’ She made reference to the default
for period 05/13, and advised that the appellant’s Surcharge Liability Notice period
would therefore be extended to 30 May 2014. No reference was made in respect of
40 the appeal against period 05/13 notified by letter dated 26 July 2013.

Appellant's reply on 2 October 2013

18. By letter dated 2 October 2013, the appellant's representative replied to Mrs Chamber's letter of 6 August 2013 and provided the information requested. The reply was clearly directed at the appeal against the surcharge imposed on period 11/12. The following details are relevant to the appeal:

- (1) The appellant accounts for VAT on a cash accounting basis;
- (2) Usual credit terms are 30 days, but some customers take 3-4 months to settle their invoices;
- (3) Four invoices with a net total of £9,360 were written off in the period;
- 10 (4) That the director had introduced personal funds to help with cashflow; that she had been in the process of obtaining a persona mortgage to fund the business since November 2012, and that the bank was confident it would be approved very quickly, but the administration delay lasted well into January 2013.
- 15 (5) The enclosed email from Woolwich Mortgage dated 27 September 2013 to Ms Duffy confirmed that the delay in the release of the mortgage funds was 'caused by [Ms Duffy's] solicitor receiving incorrect information from the Woolwich ... that searches were not required ... and it was at this late stage that the Woolwich confirmed they did need searches after all'.
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19. Mrs Chamber replied on 29 November 2013, stating that she had made an exception by looking at the information (after her letter of 16 August 2013 cancelling the review action) 'in case it would allow us to reach an agreement'. She confirmed that the surcharge would not be cancelled and advised of the right to appeal to the Tribunal; she also advised that an application to make an appeal out of time would need to be made at the same time.

20. The appellant did not lodge an appeal soon after Mrs Chambers' November 2013 reply. The appeal was eventually lodged two years later in November 2015.

21. It should be noted that all HMRC's letters were addressed to the appellant's business address, even though the appellant's correspondence had come direct from its representative. It is not the standard practice for indirect taxes, such as VAT, to have the authorisation procedure common to direct taxes whereby a taxpayer can mandate for HMRC to correspond directly with the representative.

Appellant's letter of 12 August 2015

22. There would seem to be no further communications between HMRC and the appellant until the middle of 2015 in relation to the two default surcharges for periods 11/12 and 05/13.

23. Prompted by debt management actions, the appellant's representative wrote on 12 August 2015, stating that no reply had been received to the letters dated 2 October 2013 and 26 July 2013 for surcharge periods 11/12 and 05/13 respectively. It would

seem that the non-receipt of a reply was ‘understood’ as meaning that ‘the appeals were successful and that the surcharges had been removed from the client’s account’.

24. The letter also stated that ‘the procedures at HMRC, both in the appeals department and the debt management department, have failed our client on a number of occasions and in relation to these two appeals.’

25. It would seem from the contents of the August 2015 letter that for whatever reasons, neither the appellant nor its agent had registered the contents of Mrs Chamber’s letter of 29 November 2013, which had acknowledged the receipt of ‘further information’ from the agent, had stated that HMRC were unable to cancel the default surcharge for period 11/12, and had invited the appellant to appeal to the Tribunal if dissatisfied with the decision.

HMRC’s reply of 17 September 2015

26. HMRC officer Mrs Lynham replied to the appellant directly on 17 September 2015, acknowledging that it was in response of the agent’s letter of 12 August 2015. In relation to the appeal against the period 05/13, HMRC apologised for the fact that the letter of 26 July 2013 to appeal the surcharge seemed to have been overlooked. It was confirmed that the surcharge of 05/13 would be cancelled.

27. As regards the surcharge for period 11/12, the appeal was rejected and the reason given was that a lack of funds is specifically excluded in law from being a reasonable excuse for the late payment of VAT. The appellant was advised of a right to appeal to the Tribunal within 30 days from the date of the letter.

The grounds of appeal

28. The appeal is against ‘the decision made on the period 11/12 surcharge’. The first ground of appeal relates to the ‘lengthy delay in getting this issue resolved’; that the delay was recognised by officer Lynham; that it was ‘due to errors in HMRC’s procedures’; that the appellant had ‘replied to all HMRC letters within the timescales given, but [the appellant’s] letters have been overlooked’.

29. The second ground of appeal states as follows:

‘We believe that the officer has misunderstood the details given in the original appeal letters dated 19/5/2013 and 2/10/2013. This appeal was rejected as “lack of funds is specifically excluded in law from being a reasonable excuse for late payment”, however this was not the reason put forward by us. Funds were available at the date the vat was due. There were [*sic* was] no lack of funds.... The reason for the payment being delayed, by one day, was due to errors in the bank’s procedures. This was a matter completely outwith our client’s control. We forwarded the email from the bank, along with our appeal letter, in which they confirmed that the late payment was a result of errors in their procedures, not our clients.’

Discussion

30. The Tribunal's jurisdiction in respect of a default surcharge is to confirm its imposition, or to cancel that surcharge on the ground of reasonable excuse. Whether there is a reasonable excuse is in relation to the late payment of VAT that has given rise to the default. As such, the first ground of appeal is invalid. The 'lengthy delay in getting this issue resolved' cannot be construed in any manner or form as having a bearing on why the VAT came to be paid late for period 11/12; the delay concerned the appeal process and not the payment; the delay post-dated the due date for payment of the VAT and had nothing to do with the reason for paying the VAT late.

31. The Tribunal notes that it has not been the case that the appellant had 'replied to all HMRC letters within the timescales given'. For instance, HMRC's letter of 6 August 2013 requested further information, to be received by 14 August 2013; the appellant did not respond to the request in the first instance, and only did so on 2 October 2013 in response of HMRC's letter of 16 August 2013. The letter of 16 August 2013 intimated that HMRC's review had been cancelled due to the absence of response; nevertheless, a review process did take place on receipt of the further information in October 2013.

32. Furthermore, HMRC's letter of 29 November 2013 clearly stated that the 11/12 default surcharge would be upheld, and invited the appellant to appeal to the Tribunal at that stage if dissatisfied with the decision. That the appellant did nothing at that point would appear to be an oversight. The communications log of telephone exchanges also indicates that the appellant had been advised during 2014 that the surcharge for period 11/12 remained valid. On the evidence before the Tribunal, whilst some aspects of HMRC's procedures may appear unsatisfactory, there would seem to be a material oversight on the part of the appellant in not registering the reply from HMRC by letter dated 29 November 2013.

33. In respect of the second ground of appeal, the appellant's representative seemed to have conflated to some extent the facts for the appeal against the surcharge for period 05/13 with those for period 11/12:

(1) The letter of 19 May 2013 written by Ms Ann Duffield was enclosed with the covering letter from Sharles dated 29 May 2013, and was in relation to the appeal against the surcharge for period 11/12;

(2) The letter of 2 October 2013 was in response to officer Chambers' letter of 6 August 2013 requesting information for addressing the appeal for period 11/12;

(3) The reason for the late payment of VAT for 05/13 (as given in the letter of 26 July 2013) was the funds were in place and the payment being *late by one day* was an administration error;

(4) The reason for the late payment of VAT for period 11/12 as given in Ms Duffield's letter of 19 May 2013 was the 'lengthy delays' caused by the further land searches required in the re-mortgaging process, which were out of her control. This was explained further in the Sharles letter of 2 October 2013, which enclosed the email from the mortgage provider.

34. The appellant was not present for certain aspects of the second ground of appeal to be clarified. We draw inference from the fact that the second ground of appeal refers to the delay being by one day only, which plainly is not the case as regards period 11/12. The one-day delay pertains to the default for period 05/13, and was
5 originally stated in the letter of 26 July 2013 as due to the administrative error caused by the changeover of book-keeper.

35. The following facts evidenced from the documents are of particular relevance to our decision in respect of the default for the period 11/12:

- (1) That the appellant accounts for VAT on the cash accounting basis;
- 10 (2) That the bank statements included in the documents cover the business current account with the balance being at £53,259.77 on 4 January 2013;
- (3) On 7 January 2013 when the VAT of £54,109.40 was due, two bill payments totalling £26,497.61 were made, and the end balance for the day stood at £33,813.81 after credits from deposits;
- 15 (4) That the VAT payment for period 11/12 was met in 5 instalments over a 7-week period, and the last two instalments accounted for over 93% of the total due: £40,729.20 (on 19/3/2013) and £9,907.79 (on 5/4/2013).
- (5) That the appellant was in habitual default in the year from 1 December 2011 to 30 November 2012.

20 36. The well-established authority from *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 sets out the test for reasonable excuse in the following terms:

25 ‘... whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered.’

30 37. The reason given initially for the late payment of VAT for 11/12 was the delay caused by the re-mortgaging process and that the loan was made available later than expected. HMRC were entitled to interpret the reason given as a pleading that there had been a lack of funds. On appeal to the Tribunal, the reason given was that the payment was late only by one day and due to the bank’s procedural errors.

35 38. A payment of VAT is late until the *full* liability for the period is met. We have pointed out that the payment for period 11/12 was late by some 7 weeks and not by one day as per the second ground of appeal. The stated reason on appeal to the Tribunal is clearly wrong in terms of fact, and is to be disregarded. However, we do agree with the representative’s statement that there had not been a lack of funds, as evidenced by the bank balance on 4 January 2013. That the appellant had chosen not
40 to settle its VAT liability by 7 January 2013, and had instead deployed some of the funds in paying other suppliers, is a fact of itself enough to dismiss the appeal – the

appellant has fallen below the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer.

39. Furthermore, the appellant was in habitual default during the period 11/12 and was (or should be) well aware of the implications of a further default. The appellant
5 was on cash accounting for returning its VAT liabilities, and therefore has a cashflow advantage over those traders who account for VAT by reference to invoice date. The output VAT the appellant has collected on its sales represents 'money destined for the Exchequer' for which the appellant is 'the temporary custodian' (*Customs and Excise Commisioners v Salevon Ltd* [1989] STC 907 at 911). The appellant had the cashflow
10 advantage from holding the output VAT for the duration of one to four months before returning it to the exchequer; there can be no reasonable excuse for the return of VAT being late by one day, let alone seven weeks as was in this case.

40. There were references in the correspondence to time-to-pay arrangements being discussed for previous periods in 2012, indicating that the appellant and its agent were
15 aware of the provisions under s108 of the Finance Act 2009, whereby penalties can be suspended if a taxpayer has entered into a 'time-to-pay' agreement with HMRC prior to the due date of the tax payment. However, no such request seemed to have been made in respect of period 11/12.

41. The excuse repeatedly presented by the appellant was the delay by the mortgage
20 provider, which is to be interpreted as the underlying cause for the lack of funds to meet the VAT liability for the period 11/12 on time. The authority of *Customs and Excise Commissioners v Steptoe* [1992] STC 757 ('*Steptoe*') distinguishes the direct or proximate cause for a lack of funds from the underlying cause. The insufficiency of funds was the immediate cause of the trader's default in *Steptoe*, which is specifically
25 excluded by statute as being a reasonable excuse. The only relevant question as regards 'reasonable excuse' is to ask whether the underlying cause for the shortage of funds was reasonably foreseeable or reasonably avoidable.

42. There is no note in the correspondence giving the precise date when the process
30 of mortgage application commenced. There was a reference in Sharles' letter of 28 January 2013 that the appellant remained 'in the process of obtaining additional bank funding for the business since November 2012', and in Ms Duffy's letter of 19 May 2013, of her hope and reliance to re-mortgage her home 'as quickly as she could to pay all [her] creditors'. However, if the re-mortgaging process only commenced in
35 November 2012, and with the Christmas and New Year holidays falling closely in December, normal business sense would caution against such optimism that the mortgage would be released within such a tight timescale to enable the VAT payment to be made on time by 7 January 2013.

43. In any event, that any mortgaging or re-mortgaging process can take longer than
40 anticipated is reasonably foreseeable. A reasonable taxpayer with a responsible attitude to his duties as a taxpayer would have allowed for buffer time in the processing of the mortgage application in view of the festive seasons falling in December, and of the likelihood of any complications from procedural matters such as the requirement for additional searches. The repeated references by the appellant to

5 the 'delay' by the mortgage provider, given as the excuse for the default, was measured not so much against an objective yardstick, but against the expectations and the anticipated timescale of the appellant, and cannot provide the basis for a reasonable excuse. The appellant has not proven, on the balance of probabilities, that it had a reasonable excuse for the default in relation to period 11/12.

Decision

44. For the reasons stated, the default surcharge of £5,410.49 for the period 11/12 is confirmed. The appeal is dismissed.

10 45. 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)" 15 which accompanies and forms part of this decision notice.

**DR HEIDI POON
TRIBUNAL JUDGE**

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RELEASE DATE: 12 JULY 2016