



TC05362

Appeal number: TC/2016/00525

*VALUE ADDED TAX – Default Surcharge – whether reasonable excuse –
no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AFC TELFORD UNITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE K KHAN
 NIGEL COLLARD**

Sitting in public at Birmingham on 5 May 2016

Ian Tyrer, Finance Director, for the Appellant

**Mr A J O’Grady, Presenting Officer, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

- 5 1. This matter is an appeal against two default surcharges imposed by HMRC for the late payment of Value Added Tax for the two quarters 05/15 and 08/15.
2. The Appellant first entered the VAT Default Surcharge Regime for the quarter 11/14.
- 10 3. For the quarter 05/15 which is the first quarter under appeal, the VAT due was £29,175.11 which was paid by two Faster Payments on 9 July 2015 and 6 August 2015. The actual due date for this quarter in respect of electronic payments was 7 July 2015. Consequently all of the VAT was paid late and a 5% surcharge was imposed in the sum of £1,458.75, the de Minimis limit for the 5% surcharge having been breached.
- 15 4. For the quarter 08/15, which is the second quarter under appeal, the VAT due was £11,313.78 which was paid by Faster Payment on 21 October 2015. The actual due date for this quarter in respect of electronic payments was 7 October 2015. Consequently the VAT was paid late and a 10% surcharge was imposed in the sum of £1,131.37.
- 20 5. The Appellant appealed against the two surcharges of £1458.75 (now paid) and £1131.37.
6. At the initial hearing, the Tribunal offered Mr Tyrer further time to prepare his case. He was given until 6 June 2016. HMRC were given three weeks from that date being 30 June 2016 to reply to the representations made by the Appellant.
- 25 The Tribunal has had the representations of HMRC as well as written representations from the Appellant.

The Law

- 30 7. The Default Surcharge is provided for by Section 59 VATA 1994 (VATA). If a VAT Return is received late and VAT is paid late the Trader enters the Default Surcharge Regime under Section 59 (2) VATA. The surcharge period runs for twelve months from the date upon which the tax should have been paid. Under Section 59(3) VATA, in the event of further defaults, the surcharge period may be extended beyond the initial twelve month period prescribed for the initial surcharge. Under Section 35 59(5) VATA the rate of surcharge is set out as being 2% for the first default, 5% for the second default, 10% for the third default and 15% for the fourth and subsequent defaults.
8. Under Section 59 (7) VATA, where a person has a reasonable excuse for the late payment or submission of the VAT Return, that person would be treated both as

not liable to the Default Surcharge and not in default. However, under Section 71 VATA, an insufficiency of funds to pay any VAT is not a reasonable excuse and, where reliance is placed on any third party, then the fact of such reliance does not provide a reasonable excuse.

5 9. Under Section 108 Finance Act 2009, a Default Surcharge may be avoided provided a request for time to pay the VAT is made by the Trader before the due date. In practice, even if HMRC agree to the time to pay proposal after the due date then a surcharge will not be levied, providing the request was made by the Trader before the due date.

10 In the case of *Customs and Excise Commissioners v Steptoe* (1992) STC 757 the Court of Appeal held that while an insufficiency of funds to pay the VAT on time could never of itself constitute a reasonable excuse, the cause of that insufficiency, the underlying cause of the Taxpayer's default, might do so. The Court made clear that the circumstances in which the cause of the insufficiency of funds arose would have
15 to be an exceptional situation in order to constitute a reasonable excuse. This would be helpful to Taxpayers where there is a cash shortfall which is unexpected and has caused a genuine problem for the Taxpayer.

Appellant's submissions

20 The Appellant provided the following grounds of appeal.

10. The Appellant, a football club, had insufficient funds to pay the VAT liability for the May 2015 quarter. The club contacted HMRC to seek a time to pay scheme and a time to pay scheme was agreed by HMRC in an email of 9 July. The Appellant contends that in contacting HMRC and obtaining a Time to Pay Scheme, no penalty
25 should apply.

11. The Appellant says that the VAT liability was partly paid by the due date and no penalty should apply on the portion of the VAT liability paid by the due date.

12. The club is in the process of bringing in new finance to resolve the short-term cash flow issues and the penalties impose enormous financial strain on the club. The
30 penalty can lead to a winding up of the club and closure of the business and a loss of 90 direct jobs and a further 10 employees or organisations associated with the club.

13. The Appellant says that the Surcharge Notices should be cancelled since the liability in the surcharge issued on 17 July (£9700) was paid by the due date.

14. At the hearing the Appellant made further representations as follows;

35 A considerable amount of the club's revenues derives from the sponsorship of corporate boxes. Two of the seven boxes were not renewed resulting in the loss of £11,100 which impacted on the club's ability to pay the 05/15 VAT liability.

5 The club had a drop in supporters attending matches as well as a decrease in sponsorship which has resulted in cash flow difficulties, which in turn has resulted in the late payment of VAT. The club has had to defend two High Court winding up Orders which placed undue financial hardship on the club in the period when the VAT was payable.

15. The Appellant made further written representations on 6 June 2016 as follows:

(i) “The underlying reason for insufficient funds to pay the surcharge 05/15 is sufficient to amount to a reasonable excuse.”

10 (ii) Section 108 FA 2009 does not impose any time constraints on when the Appellant should contact HMRC in order to request a Time to Pay arrangement. Therefore, as the Appellant contacted HMRC on 9 July 2015 and a Time to Pay arrangement was agreed it met the requirement of Section 108 FA 2009 Act.

15 (iii) A proportion of the VAT was paid by the 9th July 2015 and resulted in no loss of revenue to HMRC.

iv) The surcharge raised on the VAT quarter 08/15 was unfair, as a Time to Pay arrangement was requested on the due date of payment.

20 **HMRC’s submissions**

16. HMRC made the following submissions.

25 While there was a request for time to pay in respect of the VAT due for the 05/15 quarter, the request was made on the morning of 9 July 2015. This request was granted but the arrangement was made after the default had occurred and for this reason the surcharge cannot be avoided.

The Appellant suggested that of the total VAT of £29,175.11 due for 05/15, some £9,700.00 was paid on time which is to say on or before Tuesday 7 July 2015. The payments were made in a two stages, the first of which was actually made late on 9 July 2015.

30 With regard to the Appellant’s argument that it was experiencing cash flow difficulties, HMRC say that this does not provide a reasonable excuse and the Appellant does not come within the Steptoe argument, which is to say that cash shortfalls were not unexpected and unforeseeable.

35 17. The Appellant says that it paid £9,700.00 by Direct Debit on 9 July 2015 and that the payment was on time coming within the three days from the submission of the return on 7 July 2015. While it is correct to say that a Trader would be allowed an

extra three days over and above the usual seven day extension for electronic payment, if payment is made by Direct Debit, the Appellant actually paid using Faster Payment and not Direct Debit so the concessionary extension does not apply.

5 18. For the period 08/15, there was no dispute that the VAT was paid late, by Faster Payment, on 21 October 2015, and there was no evidence that the Appellant applied for a Time to Pay arrangement.

19. For these reasons, the Respondents believe that the surcharges should be upheld.

10 Conclusion

20. This matter is largely concerned with the cash flow difficulties of the Appellant and its inability to pay by virtue of a reduction in the income of the club. An insufficiency of funds does not per se constitute a reasonable excuse. The reason for the insufficiency might do so but the reason must amount to something more than that
15 the business of the Taxpayer had been carried on unprofitably or that conditions of trade produced cash flow problems. All businesses at some point may pay their bills late but the Taxpayer must make arrangements to finance cash flows in that knowledge. If a Taxpayer cannot afford to pay its bills and seeks to rely on an
20 insufficiency of funds or a shortage of funds as an excuse for non-payment, there will be no reasonable excuse. If, however, the event giving rise to the insufficiency of funds was outside of the normal course of the Taxpayer's business then that may well produce a reasonable excuse.

21. In the *Steptoe case* there was a late payment by the Company's main client. This was neither anticipated nor predictable and the Court of Appeal held that there was a
25 reasonable excuse. The Tribunal must therefore look to see whether the circumstances were unforeseeable.

22. The Appellant said that the withdrawal of sponsorship caused cash flow difficulties in respect of the 05/15 VAT period and that this withdrawal of sponsorship qualifies as a reasonable excuse by virtue of the *Steptoe* test. The
30 Tribunal does not agree. The cancellation of two boxes out of seven cannot be described as a considerable amount of the Appellant's revenue. The club clearly had a cash flow problem before the cancellation of the boxes and in any event the funds which had been received from the two cancelled boxes would not have been enough to pay the 05/15 VAT on time. The cancellation of sponsorship boxes at a football
35 club can be described as an event which is reasonably foreseeable and the club should have in place measures to ensure that there were sufficient funds available to pay the VAT. The *Steptoe* test is not a panacea for businesses who suffer cash flow difficulties but rather it arose where the cash flow problem was caused by something truly unforeseeable. It seems that the Appellant's problems were compounded by the
40 loss of sponsorship of two boxes. The Tribunal had sympathy with that situation. The Appellant also had to deal with the costs of the winding up orders which would also

have augmented their financial difficulties. However, action brought by a creditor against a company for a debt owed by the company is not something which is out of the ordinary. It is part of normal business life.

23. With regard to the Time to Pay arrangements, it is clear that these were granted on 9 July 2015 and the Appellant could have achieved the same result by asking for time to pay on or before 7 July 2015 which, if in place, would have provided a defence for the Default Surcharge Penalty. The Appellant would not be liable for the penalty if the Time to Pay arrangement had been made on or before the due date for payment of the VAT. Where the date of the request of the Time to Pay arrangement is made after the due date then the penalty would already have attached. The VAT was not paid by Direct Debit as suggested by the Appellant but by the Faster Payment System. Therefore, there were no further grace days for a late payment and the penalty had already crystallised.

24. With regard to the second surcharge of 08/15 there has been no *Steptoe* argument with respect to this period. As stated previously, an insufficiency of funds cannot be a reasonable excuse. The Appellant claims that for 08/15 a Time to Pay arrangement was requested by the due date. HMRC say they have no record of such a request being made nor do they have a record of their acceptance by HMRC of any such request. In the absence of any evidence showing that a Time to Pay arrangement was requested or agreed the Tribunal accepts that there was no Time to Pay arrangement in place.

25. The Appellant draws reference to Section 108 FA 2009 and states that section “does not give HMRC power to impose that a time to pay request is made before the due date of the payment”. This is not correct. For a time to pay arrangement to be in place, the following conditions must be satisfied:

- (1) the taxpayer must approach HMRC before becoming liable to the penalty.
- (2) HMRC must agree the time to pay arrangement, and
- (3) the taxpayer must adhere and comply with the conditions of the agreement.

In this case conditions (1) and (2) were not complied with.

26. The Tribunal should draw to the Appellant’s attention that, as HMRC have granted a Time to Pay arrangement, albeit after the due date, for the 05/15 period, it is likely that a request for the 08/15 period would also have been accepted, provided the Appellant complied fully with the terms of the earlier arrangement. This may well give the Appellant some breathing space in dealing with their finances.

27. The Tribunal therefore confirms the surcharge of £1458.75 charged for the 05/15 period and the surcharge of £1,131.37 charge for the 08/15 period and dismisses the appeals in respect of these two surcharges.

28. 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 K KHAN
TRIBUNAL JUDGE**

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RELEASE DATE: 6 JANUARY 2017