



TC05608

Appeal number: TC/2016/05678

VAT –default surcharge; arrangement to pay made after due date for payment; whether default surcharge notice valid and effective; yes reasonable excuse; general evidence of debtors’ delay in payment; whether reasonable excuse; No; appeal dismissed -

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HORTUS BLACKHEATH LTD

Appellant

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC FCI Arb

The Tribunal determined the appeal on 11 January 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure, (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper case) having first read the Notice of Appeal dated 18 October 2016, HMRC’s Statement of Case dated 14 November 2016, (with enclosures) acknowledged by the Tribunal on the same date and sundry correspondence provided by the parties including the appellant’s letters dated 24 May and 25 July 2016

DECISION

Introduction

5 1. This is a default surcharge appeal. While not entirely clear, the essential basis
of the appeal appears to be that there was (i) an arrangement made about payment a
few days after the *due date* for payment of the VAT in question (here, agreed to be
Saturday 7 May 2016), and (ii) a reasonable excuse for paying later than the due date
because of late payment by contractors to the appellant. These and other issues are
10 discussed below. Neither party requested a hearing in this appeal which has been
allocated to the default paper case category.

The default surcharge regime

2. For present purposes, a trader must submit his quarterly returns and pay the
VAT declared to be due thereon by the due date, which is one month and seven days
15 after the end of the prescribed accounting period in question. Failure to do so, absent
a reasonable excuse, will lead to the service of a surcharge liability notice and may
lead to payment of a surcharge based on a proportion of the VAT declared to be due
in the return. The statutory background is to be found primarily in VATA 1994 ss59
and 71, various statutory regulations and statutory notices such as the VAT
20 Regulations 1995 (SI 1995/2518) paragraph 40.

3. Here, there is no dispute about this basic background and it need not be
discussed in any detail.

4. Liability to pay a surcharge may be avoided where the failure timeously to
despatch the return or make payment of the VAT declared to be due is attributable to
25 a *reasonable excuse* (VATA s59(7)(b)). An insufficiency of funds to pay any VAT
due is not a reasonable excuse, although some underlying cause of the insufficiency
may be. Generally, too, reliance on a third party is not a reasonable excuse (s71(1)).

5. Finally, it should be noted that the amount of the penalty levied is not affected
by the extent of the default. Thus, a payment in default by one day attracts the same
30 penalty as a payment 100 days late.

Factual Background

6. The appellant was registered for VAT in 2002 and carries on business as
designers of *inter alia* family gardens, courtyards etc. It also has a retail shop which
sells goods such as variety of household goods, garden furniture, gifts, and books.

7. The appellant has been in the default surcharge regime since about May 2015
when a surcharge liability notice was issued. Because of a further late payment later
in that year, a surcharge liability notice extension was issued but, as it was for less
than £400, HMRC did not impose a penalty. The Tribunal is prepared to assume that
35 the appellant has a reasonably good VAT record.

8. The VAT payment (£14,214.74) for the period ending 31 March 2016 (due to be paid not later than 7 May 2016) was late. The return itself was submitted electronically on 28 April 2016. It appears that a director of the appellant, Julia Keen, contacted HMRC by phone on 10 May 2016. It was arranged that £7000 should be paid that day; that was done. It was also arranged that the balance of £7,214.74 should be paid on 24 May 2016. This, too, was done. Both were paid by Telephone Payment Service transactions ie by debit or credit card. Precisely what was said or agreed is not clear, but from HMRC's records, it is clear that such telephone conversations on 10 and 24 May 2016 did take place as described. From the notes produced, it appears that the question of surcharge was also discussed. The note of 24 May 2016 records that (*Cust*)[ie the appellant] *is going to appeal the surcharge*. The earlier note dated 10/5/16 records that there was a warning of legal action and surcharge given (*WLAS*). The telephone conversations were not recorded, so there are no transcripts available.

9. A VAT notice of assessment of surcharge and a surcharge liability extension notice was issued, on or about 13 May 2016. This extended the surcharge period to 31 March 2017. The appellant appealed the surcharge by letter dated 24 May 2016 on the basis that an arrangement had been put in place on 10 May 2016. The amount payable was £710.73 based on the return submitted on or about 28 April declaring VAT in the sum of £14,214.74 to be due.

10. By letter dated 13 July 2016, HMRC declined to cancel the default surcharge, noting *inter alia* that a time to pay request had not been agreed before the due date for payment, and there was no reasonable excuse for the lateness of the VAT.

11. By letter dated 25 July 2016 to HMRC, the appellant sought, in effect a further statutory review, citing *waiting for funds to clear,...struggling with our cash flow. We have had several contracts put on hold since the Brexit vote*. This was refused by HMRC by letter dated 5 October 2016.

Notice of Appeal dated 18 October 2016

12. In summary, the appellant asserts that agreement was reached with HMRC whereby it would pay half that day and the balance in two weeks' time. The appellant asserts that it was also told that a surcharge might be automatically issued but if so, it should *write in* and advise of the agreement and HMRC notes would *back that up*.

13. The Notice of Appeal also raised the question of ADR, but did not mention the question of reasonable excuse.

HMRCs Case

14. HMRC, in summary, say that (i) that the requirements for submitting timely electronic payments are well documented on HMRC's website and Notice 700, which represents their understanding of the law, (ii) the question of reasonable excuse is a question of fact, (iii) a genuine mistake is not a reasonable excuse and there was no reasonable excuse here (iv) the appellant could have but failed to contact HMRC before the due date for payment, (v) HMRC have demonstrated that a penalty is due

and there is no reasonable excuse here, and (vi) ADR is not available; and there is no power to mitigate.

Discussion and Decision

5 15. The grounds stated in the Notice of Appeal contain no dates but it is clear that the discussions on 10 and 24 May are being referred to. It is also clear that payment was made on 10 and 24 May 2016 in accordance with those discussions. By 10 May 2016, the sum of £14,214.74 was overdue and the appellant was not doing anything he was not already obliged to do.

10 16. Overall, the documentary evidence is unclear as to what was agreed. The HMRC records refer to the question of default surcharge being discussed. What is clear is that, whatever was discussed or agreed, no such discussion or arrangement took place or was made until after the due date for payment. In those circumstances, any agreement about deferral of payment of VAT would not have effect (Finance Act
15 2009 s108) as HMRC submitted (see *ETB* referred below at paragraph 19 and *BW Hills Southbank Ltd v HMRC* TC2015/05798 16/6/16 paragraphs 54-78). There is nothing before the Tribunal that any request for deferral was made before the due date for payment. The grounds specified in the Notice of Appeal must therefore fail.

Reasonable excuse

20 17. The question of reasonable excuse is largely determined by what the Tribunal considers how a reasonably prudent businessman or taxpayer would have conducted himself, circumstanced as the appellant was at the material time, and whether the late payment could reasonably have been avoided. A wide range of circumstances may be taken into account and given appropriate weight in order to reach a sound decision.
25 Much depends upon the information placed before the Tribunal. A reasonably prudent businessman or taxpayer would have been aware or could readily have made himself aware of (a) the wealth of literature issued by HMRC, and (b) the Business Payment Support Service referred to in that literature stressing the importance of paying the amount declared to be payable in a quarterly return, or as much as
30 possible, no later than the due date for payment or by securing or at least instituting arrangements in advance of the due date to defer payment (Time to Pay). No attempt appears to have been made to do so.

18. Here, that date was 7 May 2016 and this is not disputed. If existing contractors were anticipated to pay the appellant late, the appellant could and should as a
35 reasonably prudent taxpayer and businessman have made or endeavoured to have made alternative arrangements to ensure there was no insufficiency of funds on the due date. One obvious possibility would have been to make the arrangement of deferred payment *before* the due date. Unfortunately, that was not done (or at least there is no evidence of it having been done), and making an arrangement after the due
40 date does not have the effect of having the surcharge withdrawn or provide a reasonable excuse for late payment. In short it has not been demonstrated, the onus of

proof lying on the appellant, that the underlying cause of the insufficiency of funds was not reasonably avoidable.

19. The material before the Tribunal is such that it is not possible to conclude whether any insufficiency of funds was reasonably avoidable (*ETB 2014 Ltd v HMRC* 5 2016 UKUT 424 (TCC) paragraph 15).

20. While the late payment of contractors might, in certain circumstances constitute an underlying cause give rise to a reasonable excuse for failure to pay on the due date, there is no evidence in the papers to enable such a finding to be made. The reference to *Brexit* in the letter dated 25 July 2016 does not assist the appellant as this must 10 have arisen about six weeks after the due date. The vague reference to late paying contractors is not enough to set up such an excuse.

21. The Tribunal cannot, on the material before, it reach any conclusion as to the underlying reason for the late payment. In particular, the Tribunal cannot form any view on whether the underlying cause was attributable to unforeseen events, or events 15 beyond the appellant's control. The circumstances leading up to the default are not discussed in detail in the papers although it is reasonable to infer, given the appellant's VAT history that insufficiency of funds was the reason. The underlying cause of the insufficiency is unknown and the circumstances leading up to the default and whether they were reasonably avoidable cannot be determined.

20 22. Accordingly, insofar as the appeal is based on *reasonable excuse* it must also fail.

ADR

23. The question of ADR, mentioned in the Notice of Appeal, was not pursued by either party.

25 **Disposal**

24. The appeal is dismissed.

25. 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 30 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.

35 **J GORDON REID QC FCIArb**
TRIBUNAL JUDGE

RELEASE DATE: 18 JANUARY 2017