



**TC05670**

**Appeal number: TC/2015/06423 and TC/2016/00004**

*VAT – default surcharges – late payment – insufficient funds – refinancing  
and restructuring – difficult trading conditions – whether reasonable excuse  
- no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**FOGARTY (FILLED PRODUCTS) LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO  
MR DEREK ROBERTSON**

**Sitting in public at Nottingham on 20 July 2016**

**Mr Tawton, finance director of the Appellant**

**Mr Osborne, presenting officer of HM Revenue and Customs, for the  
Respondents**

## DECISION

### Introduction

- 5 1. These joined appeals relate to two default surcharges for the VAT periods 05/15 (TC/2015/06423) and 08/15 (TC/2016/00004), in respect of late payments in the amounts of £47,602.83 and £17,704.00 respectively.
2. The question to be resolved is whether the appellant has a reasonable excuse for the late payments.
- 10 3. The Tribunal has determined earlier appeals by the appellant in 2014 and in January 2016 in respect of default surcharges for the VAT periods 02/13, 08/13, 11/13, 02/14, 05/14, 08/14, 11/14, and 02/15. The decision of the Tribunal (Judge Connell and Mr Ratcliffe) issued on 7 October 2014 sets out the background to the appellant and its business.

### 15 Background

4. The appellant was required to make payments under the Payment On Account ('POA') regime, and payments for the 05/15 and 08/15 periods were as follows:

Tax period	Amount due	Due by	Paid on
05/15	£86,6698/00	30/4/15	30/06/15
	£86,6698/00	29/05/15	£38,302.00 – 30/06/15 £48,396.00 – 06/08/15
	£284,563.04	30/6/15	06/08/15
08/15	£59,015.00	31/7/15	30/09/15
	£59,015.00	28/8/15	30/09/15
	£391,658.45	30/9/15	30/09/15

- 20 5. For the 05/15 period, the two payments on account were paid late and the appellant had paid £125,000 by the due date. For the 08/15 period, the two payments on account were paid late.
6. Under s59(1) VATA 1994 a taxable person is regarded as being in default if (inter alia) that person fails to pay an amount of VAT by the due date. When a taxable person is in default, HMRC may serve a surcharge liability notice on that person

which brings the person into the default surcharge regime. Subsequent defaults within a specified period of time will give rise to an assessment for default surcharges. A default surcharge is a percentage of the relevant VAT, and the percentage increases with each default within the specified period to a maximum of 15%.

5 7. The appellant had been in the default surcharge regime from the 11/10 period onwards, such that the default surcharges for the periods 05/15 and 08/15 were set at 15%.

8. For the 05/15 period, therefore, the default surcharge was 15% of the payments made late, being the two payments on account of £86,998.00 each and £159,563.04 of  
10 the balancing payment. HMRC issued a default surcharge on 20 July 2015 which, following review, was reduced to £47,602.43 on 9 October 2015. The appellant appealed this default surcharge on 21 October 2015.

9. For the 08/15 period, the default surcharge was 15% of the two payments on account of £59,015.00 each. HMRC issued a default surcharge on 20 October 2015.  
15 The appellant requested a review of surcharge, the amount of which was upheld by HMRC on review on 2 December 2015. The appellant appealed this default surcharge on 23 December 2015.

#### **Appellant's evidence and submissions**

10. It was noted by Mr Tawton that, following the Tribunal Decision issued on 4  
20 February 2016, the appellant had withdrawn an initial contention in its notices of appeal that it had believed that payment of the payments on account by the due date for the balancing payment would be sufficient to avoid a default surcharge.

#### *05/15 period*

11. The appellant acknowledged that payments had been made late. The appellant  
25 had been experiencing financial difficulties for some time, as the retail sector had been under pressure for some years, leading to the company being in the default surcharge regime for a number of years.

12. In February 2015, the appellant's Board began a refinancing process in order to improve cashflow and working capital facilities, to enable the appellant to invest and  
30 grow in order to compete more effectively in its marketplace.

13. The appellant's funder at the time had been supportive during difficult trading conditions, so that the appellant's Board had thought that they would be able to renew their funding facilities on better terms.

14. However, by February 2015 the funder had begun to try to limit its exposure to  
35 the business and so had tightened the availability of funds to the business and planned to stop providing invoice discounting facilities. The arrangements with the previous funder expired on 29 March 2015 and then rolled forward on a month to month basis until the alternative funding was arranged.

15. An alternative funder was eventually found, but the refinancing process took several months to complete as the Board wanted to secure a good package for the business. Mr Tawton stated that he had hoped that the funding would be in place by 30 June 2015 but, in the end, the funding offer was eventually received on 7 July 2015 and the financing process completed on 6 August 2015. The overdue VAT was paid immediately on that date.

16. For the appellant, Mr Tawton stated that he had advised HMRC on 30 April 2015 and 29 May 2015 that the appellant would be unable to pay the VAT payments on account due on those dates. On both occasions he had explained that the refinancing process was underway and that funds would not be available until this process was completed.

17. Similarly in respect of the balancing payment, Mr Tawton had advised HMRC by fax on 17 June 2015 that the appellant would not be able to pay the full amount due.

18. The appellant had managed to obtain an unsecured loan of £125,000 in order to make part payment of the VAT due, and made this payment on 30 June 2015.

19. On 7 July 2015, when the funding offer was received, Mr Tawton advised HMRC that the funding had been secured and that payment would be made shortly thereafter. Mr Tawton noted that HMRC's response, dated 8 July, included the comment that "the company's offer to clear the debt with agreed funding at or around the end of July 2015 can be considered". He had had no further response from HMRC in respect of this.

20. Accordingly, in respect of the 05/15 period, Mr Tawton submitted that HMRC had been informed of the appellant's inability to pay the relevant amounts on the due dates. The decision to refinance the business had been taken well in advance of the relevant VAT due dates but, as the Board wanted to obtain the best possible funding package in difficult trading circumstances, the full refinancing offer was only obtained on 7 July 2015 and further delays in completing the necessary legal documentation meant that the new funding facilities were only made available on 6 August 2015. The late VAT payments were paid immediately funding was available.

21. HMRC's comment in their correspondence of 8 July 2015 that "the company's offer to clear the debt with agreed funding at or around the end of July 2015 can be considered" should be construed as agreed that HMRC would accept the VAT being settled immediately following the refinancing.

*08/15 period*

22. For the following period, Mr Tawton explained that the appellant had continued to face financial difficulties despite the refinancing arrangements concluded on 6 August 2015.

23. Although the refinancing had alleviated some of the cash pressures, it was not sufficient for the appellant to meet all ongoing liabilities and so the Board decided to undertake a restructuring exercise and entered into a sale and leaseback arrangement in respect of the 'Fogarty' brand, which is the main asset of the business. This sale and leaseback had been planned for some weeks, but completion did not take place until 22 September 2015, after the payment date for the second payment on account for this period.

*For both periods*

24. Mr Tawton further explained that he had advised HMRC on each due date that the payments on account would be late, and so he submitted that HMRC were informed of the appellant's inability to make the payments on account. The delay had been due firstly to the delays in putting in place the refinancing structure and secondly to the time taken to arrange the brand sale and leaseback.

25. Mr Tawton considered that the appellant had done all that they could to improve the cash position of the business, timing issues had arisen which prevented payment being made on time. Accordingly, he submitted that the appellant had a reasonable excuse for the late payments and had only failed to make the payment on time by weeks, not months, and so submitted that no default surcharge should be applied for either period.

26. Mr Tawton was asked why the appellant had not applied for a Time To Pay arrangement for any of the payments. Mr Tawton referred to his fax to HMRC of 17 June 2015, where he had asked to pay the amount over a number of weeks. He accepted that he had not formally requested a Time To Pay arrangement. He had thought the delay in finalising the funding would be shorter and so he did not consider that he needed a Time To Pay arrangement, just an agreement to pay the amount due in a matter of days.

**HMRC evidence and submissions**

27. For HMRC, Mr Osborne submitted that the appellant was very familiar with both the POA regime and the default surcharge regime, having been within the regime since the 11/10 period. The appellant was, therefore, well aware of the due dates for payments to be made and the consequences of not making payment.

*05/15 period*

28. The due dates for payment on account were 30 April 2015 and 29 May 2015, with the balancing payment due on 30 June 2015.

29. HMRC can waive a surcharge where time to pay is requested before the surcharge liability arises and HMRC agree to defer payment (s108(2)(b) Finance Act 2009).

30. The appellant had accepted that no formal Time To Pay arrangement had been requested but Mr Osborne noted that, in any case, the payment proposals made by the appellant were made on 7 July 2015, after the due date for payment and so no waiver of the default surcharge could be made. Earlier correspondence had advised that  
5 payments would be made late without making any particular payment proposals in respect of the late payments.

31. For HMRC, it was submitted that the refinancing process was in the control of the appellant and that a prudent taxpayer would have started the process of finding alternative funding before February 2015, given the expiry of existing arrangements at  
10 the end of March 2015 and the expectation that it would take several months to complete the refinancing.

32. The appellant therefore had no reasonable excuse for the delay in making payment and, in the absence of any Time To Pay arrangements, a default surcharge arose in respect of the late payments.

15 *08/15 period*

33. The due dates for payment on account were 31 July 2015 and 28 August 2015. The appellant had advised HMRC by fax on the due date of 31 July 2015 that payment would be delayed and asking for the default surcharge to be waived. HMRC had not agreed to that request.

20 34. As for the 05/15 period, it was submitted for HMRC that the restructuring and sale and leaseback process was within the company's control and that a prudent taxpayer would have recognised the possibility of a funding gap and would have initiated the process earlier.

25 35. For HMRC it was also noted that, although the sale and leaseback process had completed on 22 September 2015, the late payments on account were not paid until 30 September 2015.

*For both periods*

36. Further, Mr Osborne submitted that the appellant had stated that insufficient funds were available to make payment on the relevant due dates but had not provided  
30 any evidence as to the lack of funds with which to make payment, only that refinancing arrangements had not been completed in time in each case.

37. It was submitted that the difficult trading conditions referred to on behalf of the appellant were something that affected all businesses in their sector and so could not be a reasonable excuse for late payments.

35 **Relevant law**

38. S59A VATA 1994 provides for default surcharges for late payment of VAT liability by traders within the payment on account regime and, as the validity of the

issue of the surcharges themselves is not in question, is set out in the Annex to the decision of the Tribunal (Judge Kempster and Mrs Hands) issued on 4 February 2016.

39. s71 VATA 1994 sets out the construction of ‘reasonable excuse’ for the purposes of s59A VATA 1994:

- 5                                   71 Construction of sections 59 to 70
- (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—
- (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
- 10                                   (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.
- (2) In relation to a prescribed accounting period, any reference in sections 59 to 69 to credit for input tax includes a reference to any sum
- 15                                   which, in a return for that period, is claimed as a deduction from VAT due.

40. s108 Finance Act 2009 sets out, as relevant, the circumstances in which time to pay may be agreed between HMRC and a taxable person:

- 20                                   108 Suspension of penalties during currency of agreement for deferred payment
- (1) This section applies if—
- (a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,
- (b) P makes a request to an officer of Revenue and Customs that
- 25                                   payment of the amount of tax be deferred, and
- (c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”).
- (2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—
- 30                                   (a) the penalty falls within the Table, and
- (b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period ...

## Discussions

35 41. There is no dispute that the relevant payments were made late, nor has the appellants queried the level of the surcharges.

42. s71 VATA 1994 specifically provides that “an insufficiency of funds” is not a reasonable excuse for late payment of VAT. However, the reason behind the

insufficiency of funds may amount to a reasonable excuse (see, for example, *CEC v Steptoe* [1992] STC 757).

43. We note that the appellant has not provided any evidence that there was in fact any insufficiency of funds with which to pay HMRC.

5 44. The appellant's case is that there is a reasonable excuse for the delay in making payments in each case because the appellant was in the process of arranging additional funding, initially in a refinancing process and subsequently in a sale and leaseback arrangement.

45. Considering each period:

10 *05/15 period*

46. The due dates for payments on account for this period were 30 April 2015, 29 May 2015 and the balancing payment was due on 30 June 2015.

15 47. Mr Tawton stated that he had hoped that the refinancing process would be completed by the end of June 2015. In the event, a funding offer was not obtained until 7 July 2015 and funds were not received until 6 August 2015.

20 48. Although unexpected delays in obtaining financing can be a reasonable excuse for late payment of VAT, we consider that the 'hope' that a refinancing arrangement will be completed by the end of June cannot be a reasonable excuse for late payment of payments on account due on 30 April and 29 May 2015. The references to difficult trading conditions applying in the retail sector, if these were intended to be references to reasons why the payments were late, are not problems specific to the appellant and had, by the appellant's evidence, been ongoing for some time. Accordingly, the trading conditions in this context cannot be a reasonable excuse for late payment.

25 49. Similarly, we consider that a reasonable trader would have realised sometime before the end of June that the refinancing would not be completed in time to make the balancing payment on 30 June 2015 and, indeed, we note that the appellant took out an unsecured loan in order to pay £125,000 of the amount due on 30 June 2015. However, this was only a partial payment of the amount outstanding. Mr Tawton explained that the appellant could not obtain any additional funding.

30 50. We consider that in these circumstances a reasonable trader would have applied to HMRC for a Time To Pay arrangement; Mr Tawton accepts that he made no formal request for such an arrangement. He had advised HMRC that he "would look to pay ... over a number of weeks" on 17 June 2015 but made no specific proposals which HMRC could accept. A subsequent fax on 7 July 2015, after the due date for payment,  
35 is more specific in that it proposes making payment once the refinancing process has been completed. We note that it is accepted that the appellant made no formal time to pay request; in any case, we also note that this request would not be sufficient to suspend the penalty under a Time To Pay arrangement as the request was made after the liability to the surcharge had arisen and so s108 Finance Act 2009 cannot apply.



51. As the appellant made no application for a Time To Pay arrangement, nor any proposals prior to the default surcharge which could be so construed, we consider that the appellant does not have a reasonable excuse for the late payment of the balancing payment due on 30 June 2015.

5 *08/15 period*

52. The due dates for payments on account for this period were 31 July 2015, 28 August 2015 and 30 September 2015.

53. The reason given for these late payments was continuing trading difficulties and delays in completing the refinancing process together with further delays as the appellant sought further funding from a restructuring arrangement which resulted in the sale and leaseback of the appellant's brand.

54. Again, we note that no evidence was produced to support the contention that there was any insufficiency of funds.

55. No request for a time to pay arrangement was made for either payment on account. The appellant's fax of 31 July 2015 advises that the payment on account will be made late, and asks for a waiver of the surcharge, which was not agreed by HMRC. That fax refers to the refinancing process enabling payment of the payment on account, and states that completion of the process had been delayed by a week.

56. The appellant completed its refinancing process on 6 August 2015, but no payments were made in result of the 08/15 period until 30 September 2015. Accordingly, the late payment for the payment on account due on 31 July 2015 cannot be regarded as having arisen from any delays in completing that refinancing process, otherwise we consider that amount would have been paid when that refinancing was completed and not almost two months later. We do not consider, therefore, that the appellant has a reasonable excuse for the late payment of the first payment on account.

57. With regard to the second late payment on account, we make the same point as above: a reasonable trader would have recognised that the restructuring arrangements would not be completed in time to made the second payment on account and would have sought a time to pay arrangement.

58. The sale and leaseback was not completed until 22 September 2015 and there was no evidence presented that the appellant had any expectation that it would complete before the end of August. The appellant advised HMRC on 28 August 2015, the due date for the payment on account, that it would not be able to make the payment due to the continuing difficult trading environment and advising that the payments would be made by the end of September.

59. As noted above, the difficult trading conditions cannot be a reasonable excuse for late payment as they are not problems specific to the appellant and had been ongoing for some time.

60. Accordingly, as the appellant did not seek any time to pay arrangement, we consider that the appellant had no reasonable excuse for the late payment of the second payment in advance.

### **Summary of discussion**

5 61. As stated above, we consider that the appellant had no reasonable excuse for the late payments on account and the late balancing payment for the 05/15 period, nor for the late payments on account for the 08/15 period. The difficult trading conditions in the sector, whilst undoubtedly challenging, were not sudden or unforeseeable as they had persisted for some time and were also not specific to the appellant.

10 62. The time taken to complete the refinancing process and the restructuring arrangements was, similarly, foreseeable in advance of the due dates for payment in general. The appellant could have chosen to request time to pay but did not choose to do so; the reason given, that the expected delay was only in the order of weeks and not months, does not give the appellant a reasonable excuse for late payment. A trader  
15 cannot expect HMRC to provide short-term financing by allowing late payment of VAT due.

63. Whilst the delay in completing the refinancing process could have formed a reasonable excuse for late payment of the payment on account due on 31 July 2015, as there were unexpected delays in completing the legal documentation such that funds  
20 were not received until 6 August 2015, the appellant did not make any payment in respect of that payment on account until 30 September 2015. Accordingly, we consider that any delays in finalising the refinancing process cannot be a reasonable excuse for that late payment.

### **Decision**

25 64. The appeals related to VAT periods 05/15 and 08/15 are dismissed.

65. 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  
30 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.

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**ANNE FAIRPO**

**TRIBUNAL JUDGE**

**RELEASE DATE: 15 FEBRUARY 2017**

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