



TC03230

Appeal number: TC/2012/00553

VAT default surcharge – course of dealing with bank relying on end of day settlement to cover payments within group – new bank manager refusing to process CHAPS payment – reasonable excuse due to lack of funds – no – reasonable to expect that VAT would be received within appropriate time due to established course of dealing – yes – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

H R TRANSPORT SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
MRS SHEILA CHEESMAN**

Sitting in public at 45 Bedford Square, London WC1 on 29 October 2013

Mr Mark Payne and Mr Nizar Pabani for the Appellant

Mrs McHugh instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

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DECISION

1. This is an appeal against the application of a default surcharge at 15% for the 08/11 VAT period under s 59 Value Added Tax Act 1994 (“VATA 1994”) amounting to £107,427.30. Payment of the VAT was due by 7 October 2011 but was not received until 21 October 2011.

2. The relevant legislation is s59(7)(a) and (b) VATA 1994 which sets out the circumstances in which a taxpayer will not be treated a liable to a default surcharge even though a VAT payment has been made late; s 59(7)(a) refers to circumstances in which “*the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit*” and s 59(7)(b) refers to a “*reasonable excuse for the VAT not having been despatched*”. s 71(1) VATA 1994 sets out the matters which cannot be taken into account in deciding whether a taxpayer has a “*reasonable excuse*” for late payment, including, at s 71(1)(a) an insufficiency of funds.

15 Facts

3. Mr Payne, the Appellant’s finance director, explained that the Appellant was one of a group of 12 UK companies run by the same individuals. It was Mr Payne who had primary responsibility for dealing with the companies’ bank accounts, which were with Barclays Bank. The cash held by each of those companies was managed proactively on a daily basis. Companies were allowed to run intra group overdrafts but if it was known that a payment was due to be made by one company, it would always be put in funds to make that payment by the end of the relevant day. It was possible however for a company to have insufficient funds on an intra day basis.

4. The Appellant’s bank understood this process and would honour payments at the time as long as there was enough cash to cover the payment in the group as a whole and on the understanding that the relevant group entity would be put in funds by the end of the day. This was done on the basis of a “gentleman’s agreement”, there was no written contract reflecting this practice. Mr Payne provided evidence of how this had usually worked, giving the example of the July 2011 VAT payment which had been made for the previous VAT period.

5. The VAT payment of £716,182.01 for the 08/11 period was paid by CHAPS which was presented to Barclays on 6 October 2011. The group as a whole had sufficient funds to cover that payment, but at the time when the CHAPS payment was instructed, the Appellant company itself did not. In accordance with the usual process, the CHAPS payment was stamped by the bank, confirmation was given to the Appellant’s accountant who requested the payment and no further information was given to the Appellant. Unknown to the Appellant and despite their previous usual course of dealing, Barclays refused to honour the CHAPS payment because at the time the Appellant did not have sufficient cash to cover the payment, despite the fact that the cash held by the whole group on 6 October amounted to £1.258m.

6. At the time when the end of day intra group balances were settled, funds were not transferred to the Appellant to cover this liability because the CHAPS payment had not been processed and therefore no amount was shown as owing by the Appellant.

5 7. The CHAPS payment was refused because a new manager at Barclays was unaware of the established practice for honouring payments on the basis of the end of day clearing process and refused to honour the CHAPS payment. This was the first time that the bank had refused to honour a payment for these reasons. Mr Payne explained that the Appellant had made a claim against Barclays for this failure but Barclays have refused to admit liability.

10 8. The Appellant did not know that the payment had not been processed until 14 days later when it carried out its usual monthly bank reconciliations. As soon as it was aware of the omission, it immediately paid the VAT due.

Taxpayer's Arguments.

15 9. Mr Payne's view was that the Appellant had acted reasonably in relying on its usual banking practices to make this payment and had no reason to suspect that the payment would not be processed as normal. As soon as it was aware that the payment had not been processed, it acted promptly to make the VAT payment in full. While there had been one previous late VAT Payment due to problems with the CHAPS process, that had been due to a clear error by the bank, not a refusal by the bank to apply their usual practices as had occurred here.

20 HMRC's Arguments

10. HMRC pointed out that the Appellant had been in default for previous periods, although it was stated by Mr Payne that this was as a result of cash flow issues, not for the reasons in dispute in this case.

25 11. HMRC argued that the Appellant's banking practices were not prudent. HMRC referred to the earlier late payment by the Appellant due to the failure of the CHAPS process which should have alerted them to potential issues. The Appellant should have ensured that it had funds to pay the VAT before the end of the day when it was due. The failure to pay was due to an insufficiency of funds which is not a reasonable excuse under s 71(1)VATA 1994. If the taxpayer did have a reasonable excuse, it was not one which could be applied for the 14
30 days it took for them to realise that the payment had not been processed and to make another payment. The Appellant should have realised much sooner that the payment had not been processed. This was a further indication that the Appellant had not acted in a prudent manner.

35 12. The Appellant had failed to demonstrate that the VAT had been paid in such a manner that it was reasonable to expect that it would be received on time under s 59(7)(a).The Appellant had not exercised reasonable foresight in ensuring that it had funds available to pay its regular VAT bill. It was not prudent to rely on a gentleman's agreement to ensure that sufficient funds were available for a payment which it knew in advance would be due on a specific date.

Discussion

13. In order to avoid being liable to this penalty the Appellant needs to demonstrate that its case falls within either s 59(7)(a) or (b) VATA 1994. In respect of s 59(7)(b) we agree with HMRC that an insufficiency of funds cannot amount to a reasonable excuse save in relatively unusual circumstances such as in the *Stepto* case ([1992] STC 75), which were not present here. We also agree with HMRC that the Appellant has not provided any other basis for a “reasonable excuse” for late payment under s 59 (7)(b).

14. Turning to s 59(7)(a) however, we do not think that the Appellant acted unreasonably in relying on its bank to manage the Appellant’s cash and process its payments in line with its usual practice. On the basis of the evidence provided by Mr Payne we have concluded that the Appellant made the payment “*in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit*”. There was nothing to put the Appellant on notice either from previous practice or from any information given to it on 6 October 2011 that this payment would not be treated as all previous payments had been, given that the group as a whole had more than sufficient funds to cover the payment.

15. In respect of the further 14 day period which it took for the Appellant to recognise that the payment had not been processed on the due date, we have concluded that since there was nothing to suggest to the Appellant that the payment had not been processed in the normal way and on time, the Appellant had a genuine belief that the payment had been made and therefore we do not agree with HMRC that the Appellant did not act in a reasonable and prudent manner in failing to check that the payment had been made earlier.

16. For these reasons we have concluded that the Appellant should not be treated as in default in respect of the 08/11 accounting period and the default surcharge should be removed on the basis of s 59(7)(a) VATA 1994.

17. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 13 January 2014

