



TC03540

Appeal number: TC/2014/00029

VALUE ADDED TAX – default surcharge – whether the appellant was liable for the penalty – yes - whether there was a reasonable excuse for late payment – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HUGH HARRIS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 04 April 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 20 December 2013 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 03 February 2014.

DECISION

The Appeal

- 5 1. This is an appeal against a default penalty surcharge of £1,558.78, imposed for the late payment of VAT for the three month period ending 31 July 2013.
2. Ms Sarah Shearer, of Emmaus accountants, appeals on behalf of the appellants company (“the company”)

The issues

3. The appellants appeals on the following grounds:
- 10 (1) They are not liable for the penalty and
(2) There was a reasonable excuse for late payment.
4. These matters are disputed by HMRC.

The law

Liability for the penalty

- 15 5. Section 59 (1) Value added Taxes Act 1994 (“VATA”) provides
- “...If, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period...
- 20 (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,...
- then that person shall be regarded for the purposes of this section as being in default in respect of that period.
- 25 (4) if a taxable person on whom a surcharge liability notice has been served—
- (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
- (b) has outstanding VAT for that prescribed accounting period,
- 30 he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.”

Time to pay agreements

6. Section 108(1) Finance Act 2009 (“FA”) provides

“(a) If a person “P” fails to pay an amount of tax ..when it become due and payable,

(b) P makes a request to an officer of Revenue and Customs that payment of the amount be deferred, and

5 (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

10 (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.”

Reasonable excuse

7. Section 59 (7) VATA provides:

15 " If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies ..a tribunal that, in the case of a default which is material to the surcharge—

(a) ... 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, or

20 (b) there is a reasonable excuse for the ... VAT not having been so despatched,

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period..”

8. The legislation does not define the term “reasonable excuse”. It has been held to be “a matter to be considered in the light of all the circumstances of the particular case” *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

Insufficiency of funds

9. Section 71(1) VATA provides:

30 “For the purpose sections 57 -70 which refers to reasonable excuse for any conduct

an insufficiency of funds to pay any VAT due is not a reasonable excuse;”

10. In the case of *Customs and Excise commissioners v Steptoe [1992] STC 757* Court of Appeal held that an insufficiency of funds cannot, of itself, constitute a reasonable excuse but that the Tribunal was obliged to consider whether the reasons for an insufficiency of funds, or the underlying cause of a default, might do so. Lord Donaldson MR indicated :-

“if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular

date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment”

Burden of proof

- 5 11. HMRC has the burden of proving that the penalty has been incurred. The taxpayer has the burden of proving that there was a reasonable excuse. *Jussila v Finland (73053/01) [2006] ECHR 996*.

The facts

The agreed facts

- 10 12. The default history was not contested and can be summarised as follows:
- (1) Period 01/13 - default one - electronic payment was due on 07 March 2013 and the VAT was paid in instalments on 14 March 2013 and 26 April 2013. No penalty was incurred but a surcharge liability notice was issued.
- 15 (2) Period 04/13 - default two - electronic payment was due on 07 June and payment was made in instalments on 11 and 19 June 2013. A default penalty surcharge of 5 % was applied in the sum of £962.74
13. The VAT for the period 07/13 was due to be paid electronically on 07 September 2013. The return was filed on 06 September and the VAT liability amounted to £46,000.80. The sum of £14,825.08 was paid on 06 September and the remainder was paid in instalments on 16, 23 and 30 September 2013.
- 20 14. HMRC’s website contains the following information:

“VAT default surcharges will not be charged if you contact HMRC before the payment is due and HMRC agree to a time to pay agreement which is adhered to”

25 *The contested facts*

15. On 07 September the company discovered that they had insufficient funds to pay the VAT. Sarah Shearer was not able to call HMRC on 07 September as this was a Saturday. She contacted HMRC on 09 September and agreed to pay the remaining VAT by instalments. It was verbally agreed that no penalty would be issued if the payment plan was adhered to.
- 30 16. HMRC state that their call centre was open on Saturday 07 September. They accept that Ms Shearer contacted them on 09 September and that a payment schedule was agreed. However they do not accept that there was an agreement for the penalty to be waived. In support of their case they have provided a contemporaneous record of the telephone call.
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The arguments

The appellant's case

17. Ms Shearer submits that HMRC clearly promised that the penalty would be waived provided they adhered to the revised payment schedule. As the payments were made in accordance with the agreed instalments HMRC were not entitled to impose the penalty. In the alternative she submits that there is a reasonable excuse for the late payment as the company were unable to pay the VAT on time due to cash flow problems.

The respondent's case

18. HMRC oppose this appeal on the grounds that the request for time to pay was not made before the due date and the officer had no authority to waive the penalty in accordance with Section 108 FA. In addition they do not accept that the customs officer agreed to waive the penalty and had no authority to do so.

19. They do not accept that the company has established a reasonable excuse due to an insufficiency of funds.

Reasons for decision

Findings of fact

20. I am satisfied that the business support centre was open on 07 September as this has been confirmed by HMRC and Ms Shearer has not provided any contradictory evidence.

21. I am satisfied that HMRC agreed a payment schedule on 09 September as this evidence is agreed. However I am not satisfied on the balance of probabilities that HMRC agreed to waive the penalty because HMRC have provided a contemporaneous note of the telephone call which makes no reference to the waiving of the penalty and Ms Shearer has not provided any record of the conversation.

Liability for the penalty

22. The taxpayer is liable for the penalty if the tax is paid after the due date. s59(1)(b) VATA. In this case the company became liable for the penalty as the tax was paid after the due date.

23. The effect of s108(2)(b) FA (above) is that the company "is not liable to a penalty" if the request to defer payment was made and agreed before they "become liable" i.e. before the due date. In this case the request for time to pay was made and agreed after the due date. Accordingly HMRC had no power to suspend the penalty in accordance with s108(2) FA.

24. I do not find as a fact that Ms Shearer was given an assurance that the penalty would be waived. However in the event that such an assurance had been given it

would not have served to remove liability for the penalty since the officer had no statutory authority to give such an assurance

25. For these reasons I am satisfied that the company is liable for the penalty.

Reasonable excuse

5 26. An insufficiency of funds can amount to a reasonable excuse for late payment if the company can establish that they acted with “reasonable foresight and due diligence such that the insufficiency could not have been avoided” (*Steptoe above*).

10 27. Ms Shearer has not provided any details as to the insufficiency of funds or the manner in which they arose. In the event of an insufficiency of funds it would have been reasonable for the company or their accountants to have made request time to pay on or before the due date in accordance with the advice given on the HMRC website referred to in paragraph 14 above. I find as a fact that facilities were available for the request to have been made on the due date.

15 28. For these reasons I am not satisfied that there is a reasonable excuse due to an insufficiency of funds.

Decision

29. The appellant is liable for the penalty.

30. There was no reasonable excuse for the late payment of VAT.

20 31. The appeal against the VAT default penalty surcharge of £, of £1,558.78 is dismissed.

Rights of appeal

25 32. 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.

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**JOANNA LYONS
TRIBUNAL JUDGE**

RELEASE DATE: 28 April 2014

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