



TC05672

Appeal number: TC/2015/06606

VAT – default surcharge – late payments – VATA 1994, ss 59 & 71 and FA 2009, s 108- whether reasonable excuse – yes – Appeal granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOC (SCOTLAND) LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
MEMBER: JAMES ROBERTSON, CA
JUDGE ANNE SCOTT, LLB, NP**

Sitting in public at The Eagle Building, Glasgow on Monday 23 May 2016

Determination without a hearing – 30 January 2017

Appellant:- Mrs Laura Cook, Director of the Appellant

Respondents:- Mr Mark Boyle, Presenting Officer, HMRC

DECISION

1. The substantive hearing in this case was in Glasgow on Monday 23 May 2016
5 before Judge Mure and Mr Robertson. The proceedings were subsequently sisted
until 1 October 2016. Tragically, Judge Mure has since died. Judge Mure had left
notes of the evidence heard at the substantive hearing and the parties have both agreed
that Judge Scott should decide this appeal with Mr Robertson on the basis of those
10 notes, the Bundle and the further documentation provided by both parties, all without
the need for a further hearing.

The substantive issue

2. The substantive issue is the appellant's appeal against the decision of the
respondents ("HMRC") to issue default surcharges imposed under Section 59 of the
VAT Act 1994 ("VATA") in relation to the VAT returns for the Period 03/12, 06/12,
15 09/12, 12/12, 03/13, 09/13 and 12/13.

3. The appellant submits VAT returns on a quarterly basis, being March, June,
September and December and all relevant returns were submitted timeously. Both
parties accept that all tax due was ultimately paid but in each of the periods in
question there were delays in payment. The appellant argues that although the tax
20 was paid late, it had a reasonable excuse for the defaults.

4. In the course of the hearing Mrs Cook, for the appellant, argued that in addition to
the payments identified by HMRC her record of payments indicated that a further
£4,021.90 had been paid to HMRC and HMRC had taken no account of those
payments. Mr Boyle, for HMRC, was granted a recess to consider and, if possible,
25 respond to that suggestion. On resumption of the hearing, Mr Boyle formally
intimated that the revised figure for the appellant's total potential liability should be
the lower figure of £8,081.68.

5. Judge Mure had given verbal Directions to HMRC to provide a breakdown of the
alleged outstanding monies due by the appellant and on 3 June 2016, HMRC lodged a
30 written submission to that effect. The proceedings were then sisted, as indicated
above, in order to allow further correspondence between the parties and that then
ensued.

6. We have analysed the correspondence between the parties, including the response
from the Compliance Complaints Team of HMRC. Ultimately there were three issues
35 in contention between the parties, namely:

(a) A £1,000 payment by cheque on 15 March 2012. In fact, HMRC are
correct in stating that the net value of that payment was £925.40 because £74.60
of that payment was applied to the administration fees arising from a Summary
Warrant. Accordingly that figure of £925.40, which is included at page 3 of 5
40 in HMRC's written Submission, is correct.

(b) The £2,000 payment by cheque on 1 October 2013 (cheque No. 816) had been duplicated in the appellant's records. That has been conceded by Mrs Cook. Accordingly HMRC's calculation is also correct in that regard.

5 (c) The £2,000 payment by cheque (No. 848) issued on 28 February 2014 and accounted for by HMRC on 5 March 2014, was recorded in HMRC's records as being for £1,000 only. In fact, as is conceded in the letter from HMRC's Compliance Complaints Team dated 21 September 2016, the full sum of £2,000 should have been credited to the appellant's VAT ledger.

10 7. Accordingly the appellant's total potential liability, which is the subject matter of this appeal, amounted to £7,081.68.

The Legislation and Case Law

15 8. Liability for a default surcharge arises under Section 59 VATA. Section 59(1) provides that a taxable person is in default where HMRC do not receive any VAT shown as payable on a VAT return on or before the due date. Regulation 25(1) of the VAT Regulations 1995 specifies that the due date is the last day of the month next following the end of the VAT accounting period to which it relates and there is a seven day extension for the submission of electronic returns. Under Regulation 40(2), any person required to make a return must pay any VAT shown as payable, not later than the last day on which that return is due.

20 9. As Mr Boyle explained in the course of the hearing there is no surcharge imposed on the first default but warnings are issued about the consequences of further defaults. Penalties are imposed at the increasing rates of 2%, 5%, 10% and 15%. Where the amount of a penalty is below £400, it is cancelled. The fourth default was for Period 03/12 and a 10% surcharge of £1,019,43 resulted. (Payment was one day late.)
25 Mr Boyle set out the calculation of the other six default surcharges for the other periods and related this to the Schedule of Payments. It is noted that the payment for Period 03/13 was 13 days late, and that for 12/13 was one day late.

30 10. Section 59(7) VATA provides that a taxpayer shall not be liable to a surcharge if he would otherwise be liable if HMRC or, on appeal, a Tribunal is satisfied that, in the case of a default which is material to the surcharge, there was a reasonable excuse for the VAT not having been paid on time.

11. Section 71(1)(a) VATA further provides that for those purposes, an insufficiency of funds to pay any VAT due is not a reasonable excuse.

35 12. Section 71(1)(a) was considered in the leading case of *Customs & Excise Commissioners v Steptoe*¹ ("*Steptoe*"). The Court of Appeal held that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency – the underlying cause of the taxpayer's default – might do so.

¹ 1992 STC 757

13. Reasonable excuse is nowhere defined but has been considered in a number of cases.

14. Mr Boyle referred to, and relied on, Judge Medd in the *Clean Car Company Ltd*² for the proposition that the test of reasonable excuse is considered to be objective. That is indeed the case. He invited the Tribunal to distinguish the facts in *Electrical Installation Solutions Ltd v HMRC*³ (“*Electrical*”) whereas Mrs Cook relied on that last case stating that, like the taxpayer in that case, she and her husband had done everything possible to save the business.

15. Since the hearing the Upper Tribunal has issued a decision in *ETB (2014) Ltd v HMRC*⁴ and, of course, that is binding upon this Tribunal and we agree entirely with the reasoning articulated therein.

16. At paragraph 15, Judges Sinfield and Clark summarise their understanding of the meaning of “reasonable excuse” and that reads as follows:-

“In summary, the question to be asked when considering whether someone has a reasonable excuse for failing to pay an amount of tax on time because of a cash flow problem is whether the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not, without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as having a reasonable excuse for the VAT having been paid late until it would be reasonable to expect the taxpayer to have found alternative funding or taken other action to counteract insufficiency.”

17. Lastly Mr Boyle relied on *Trinity Mirror plc v HMRC*⁵ for the proposition that the surcharge liability legislation is neither unfair nor disproportionate.

Arguments for the Appellant

18. Mr and Mrs Cook were directors of the appellant which had acquired the business, “The Bagel Basket”, in July 2004. It was a sizeable business, employing four full-time staff and additional part-time staff seasonally. Mr Cook had worked full-time in the business until cash-flow problems developed. He then reverted to employment as an engineer but assisted in the evenings and at weekends. Mrs Cook attended to the business’ books and accounts. (She worked full-time elsewhere.)

19. For four years, 2004 to 2008, the business was profitable and there were no VAT defaults. Then there was a downturn in the economy which affected the level of

² LON/90/1381 X

³ 2013 UKFTT 419 (TC)

⁴ 2016 UKUT 424 (TCC)

⁵ 2015 UKUT 421 (TCC)

trading activity. Its effects were compounded with poor summer weather over several years. Cash-flow problems developed and overheads had to be met. All VAT was paid eventually. The decision in *Electrical* was similar, she submitted, inasmuch as she and her husband had done everything possible to save the business. The business
5 was sold in 2014 as a going concern. Of 23 VAT quarters timeous payment had been made in 14.

20. Mrs Cook referred to her letter of 19 March 2014 to Mr Murray of HMRC's Debt Management, which sets out examples of variation in turnover. She felt that events were outside her control. Moreover, she could not speak directly to HMRC officers,
10 many of her letters were not answered. Her business had suffered because of the recession. Previously there had been some spare cash. However, at the material time it was impossible to predict when future payments could be made by the company to HMRC. Efforts had been made to make savings in the business. The appellant had to sell it in August 2014. In essence, Mrs Cook argues, there was a reasonable excuse
15 for the late payments.

Arguments for HMRC

21. In summary HMRC argued that the appellant's business was cash based and therefore in each period the receipts of the business included the tax and therefore the impact of seasonal trade, poor summer weather and the recession would be reflected
20 in a corresponding reduction in the amount of tax payable. These issues did not have an impact that was unique to the appellant alone.

22. In their skeleton argument, HMRC referred to Judge Medd in the *Clean Car Company* and relied on the paragraph where he stated:-

25 "... the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer ... A taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously".

23. The same point relates to the payment of tax.

30 24. HMRC concede that the appellant had been in contact from 2009 onwards and had agreed several arrangements regarding payment of outstanding arrears. On the other hand it was argued that no contact had been made by the appellant before the due date in each period with payment proposals to successfully request a time to pay agreement as provided for by Section 108(2)(b) of Finance Act 2009.

Discussion

25. It is hoped that the facts in this case in relation to the taxpayer's contact with HMRC are relatively unique. Judge Mure was very concerned about the possibility of time to pay arrangements. Indeed, at the original hearing when he granted a recess to Mr Boyle to consider the quantum of reliability, he asked him to consider the efforts
40 made by Mrs Cook to meet with HMRC officers directly. It was very evident from

the correspondence produced that both Mr and Mrs Cook had repeatedly contacted HMRC with a singular lack of success.

26. Whilst this appeal was sisted Mr Boyle arranged for the Compliance Complaints Team at HMRC to consider Mrs Cook's complaints about the handling of the appellant's tax affairs. It is appropriate to quote from their response to Mrs Cook and that as follows:-

"I have thoroughly investigated your complaint ... I agree that we have not treated you with the respect and understanding you deserve and fully uphold your complaint.

I am sorry for the very poor service we have given you and regret that we have been the cause of stress and frustration. I would like to thank you for the patience and understanding you have consistently shown us.

I should explain that our Debt Management team have strict instructions they must follow when looking at allowing additional time to pay. While it appears they have followed these instructions and considered your explanations, I agree their responses did not make this clear.

I have also seen that on a number of occasions we failed to respond to, or acknowledge your letters ... You made it clear that you needed support and were confused about information we were giving you. We should have taken the time to clearly address your concerns and help you understand your VAT liability and again I am very sorry that we did not."

27. Whilst we have not seen all of the correspondence in this matter, we wholly agree with the response from the Compliance Complaints team. Both Mr and Mrs Cook repeatedly contacted HMRC by telephone and in writing, trying to explain their difficulties and trying to make arrangements to pay. When they did send payments to HMRC, those payments were allocated to the oldest debt and also to default surcharges. It was not made explicit to them that they could and should ask for payments to be allocated to the then current debt. This exacerbated an already difficult situation.

28. In our view the appellant undoubtedly and repeatedly attempted to make time to pay arrangements. Had that been successful then one or more of the default surcharges would not have arisen. There was no lack of effort on the part of Mr and Mrs Cook.

29. Obviously the cause of the late payment in each of these periods was an insufficiency of the funds but the question for the Tribunal is did the appellant do enough to try and find alternative funding or take other action to counteract the insufficiency? In this instance Mr Cook found full-time employment elsewhere (and Mrs Cook was also employed elsewhere), they both obtained personal loans to clear VAT bills, they put the business on the market as a going concern and they also told HMRC that if the sale of the business was not successful then they would put their home up for sale and whichever asset was sold first, would clear their VAT liability. They had unsuccessfully attempted to seek a bank overdraft. Thankfully they were ultimately successful in finding a purchaser for the business.

30. Looking at the totality of the evidence in this case, we find the appellant has exhibited a reasonable excuse for the late payment of VAT. They explained their

variable turnover and the reasons therefor to HMRC. They offered payment as and when they could raise any money (and very sensibly explained why they could not commit to fixed payments each month). On every occasion, as soon as the appellants were able to raise money from any source, they paid HMRC. In the face of very
5 shoddy service from HMRC, both Mr and Mrs Cook repeatedly went to considerable time, trouble and effort to try and make acceptable proposals for payment to HMRC.

31. For all these reasons, in these very unusual circumstances, we find that there is a reasonable excuse and the appeal succeeds.

32. This document contains full findings of fact and reasons for the decision. Any
10 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
15 “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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TRIBUNAL JUDGE
RELEASE DATE: 15 FEBRUARY 2017