



TC06221

Appeal number: TC/2017/02422

VAT default surcharge - insufficiency of funds in account to which direct debit was to be applied - Appellant had funds in another account - whether reasonable excuse - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER COWSILL LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE: MICHAEL CONNELL

**Sitting in public at Alexandra House, The Parsonage, Manchester on 05 October
2017**

The Appellant Company was not represented

Mr Richard Kelly, Officer of HMRC, for the Respondents

DECISION

The Appeal

5 1. Peter Cowsill Limited (“the Appellant”) appeals against a VAT default surcharge of £432.85, for its failure to submit in respect of its VAT period 11/16, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £2,885.70.

10 2. The Appellant was not represented at the hearing. The Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

3. The point at issue is whether the Appellant has a reasonable excuse for making the late payment.

Background

15 4. The Appellant has been registered for VAT with effect from 7 July 1988 and trades as consulting engineering geologists.

5. Prior to the default under appeal the Appellant had previously defaulted on VAT payments in period 02/15 when a surcharge liability notice was issued and again in three further periods.

20 6. The Appellant has been mandated to both render returns and pay the tax due electronically from 2013. Its usual method of payment has been by direct debit (DD).

7. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires a VAT return and payment of VAT due, on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995]

25 8. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for filing and payment.

30 9. Where payment is made by DD, HMRC collects the funds from the taxpayer’s account three working days after the due date for electronic payments, even if the return is submitted early.

35 10. Period 11/16 VAT fell due on Saturday 7 January 2017. The return was received on 2 December 2016. As the return was submitted before the due date, the payment collection date was three working days after the due date, being Wednesday 11 January 2017.

11. There were insufficient funds in the Appellant’s account and therefore the VAT was not collected.

12. On 13th January 2017, HMRC issued a default surcharge assessment in the sum of £432.85, calculated at the 15% rate due to previous defaults, to the Appellant.

13. The amount payable of £2,885.70 was paid on 23 January 2017, sixteen days late. On the same date the Appellant wrote to HMRC saying:

5 “Last autumn I forgot to submit my VAT return up to August and was then fined for failing to carry out my unpaid tax collection efficiently.

 Determined not to be fined again I submitted the next return on 2nd December. This morning 23rd January I received another fine of £432.85 in a letter dated 13th January (10 days!). This seems to be because despite my filling in the return on 2nd December
10 you did not draw down the funds until 11th January 40 days later. By this time that account had been depleted and had insufficient funds. As a result the payment was refused. I will now be charged by the bank to add insult to injury.

 I am the only employee of my business and have to distribute my time between serving clients and dealing with admin.The fine is stated to be for not sending payment in
15 time, as far as I am concerned it was sent in plenty of time you chose not to pick it up in time.

 I wish to appeal this fine on the ground that it is unreasonable and that I made every effort to pay it well within the required period.”

20 14. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default
25 surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. The specified percentage rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default the specified percentage is 2%. The percentage ascends to 5%, 10%
30 and 15% for the second, third and fourth default.

15. A taxable person who is otherwise liable to a default surcharge, may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59 (7) VATA 1994 sets out the relevant provisions : -

35 ‘(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

40 (a) the return or as the case may be, 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

(b) there is a reasonable excuse for the return or VAT not having been so despatched then 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 in question ..’

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16. It is s 59(7)(b) on which the Appellant seeks to rely. The burden falls on the Appellant to establish that it has a reasonable excuse for the late payment in question.

17. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

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‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

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18. Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

Appellant’s Case

19. The Appellant does not dispute that its VAT payment for the period under appeal was late. The stated grounds of appeal in its Notice of Appeal to the Tribunal are:

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“We argue that the VAT return was submitted well within time (2nd December 2016). At the time funds were available in the current account attached to the direct debit. The return was made as early as possible specifically to prevent this sort of problem. We did have a reasonable expectation that payment would be received by the due date. When the HMRC drew down the funds 40 days later the current account was depleted and insufficient because we had thought that the funds had already been drawn down.

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HMRC incorrectly considered the review on grounds of lack of ability to pay. They have, therefore, considered the appeal incorrectly. The company had available funds albeit in the wrong bank account.

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The fine imposed is unreasonable and inequitable; this is simply a small administrative error.”

HMRC’s Case

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Mr Kelly for HMRC said that the onus of proof rests with HMRC to demonstrate that a penalty is due. Once so established, the onus is then on the Appellant to demonstrate there is a reasonable excuse for late payment. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

21. There is a statutory obligation on a person required to make a return to pay the VAT to HMRC. Value Added Tax Regulations 1995, at Regulation 40, state that any person required to make a return “shall pay” to HMRC “such amount of VAT as is

payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.”

22. The first default was recorded for period 02/15 and the Appellant entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default would have been known to the Appellant from this point onward, given the information printed on the Surcharge Liability Notice issued.

23. Furthermore, given the default history and information available, the Appellant would have been aware of the potential fiscal consequence of a further default prior to the periods subject to appeal.

24. HMRC collects DD payments via an automated process on the third working day after the extended due date for electronic returns (VAT Notice 700/50, 3.1.1). The Appellant should have been aware of the collection date and, accordingly, ensured that funds were available in the relevant account. HMRC are unable to collect the funds at an earlier time due to the process being automated.

25. On submitting the VAT return for the period 11/16, the Appellant would have received an acknowledgement which stated:

“The tax due as declared on this return DOOOCX will be debited from your bank account on (**/**/**). If you have submitted this VAT Return on behalf of the VAT Registered entity, you must print this acknowledgement and present to the account holder/ authorised signatory of the account prior to the stated Direct Debit collection date.”

26. The Appellant was therefore made aware of the date when the DD would be collected. Having failed to ensure that funds would be available in the correct account on the payment date, the Appellant could not have had a reasonable expectation that the funds would be received by HMRC (s 59(7)(a)VATA).

27. The HMRC website provides the following information regarding paying via DD:

“HMRC recommends that you pay by Direct Debit because your payments are collected automatically from your bank account on the third bank working day after the extra seven calendar days following your standard due date.”

28. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice for period 06/15, when a Surcharge Liability Notice was issued, particularly given the information contained in the Notice which on the reverse states:

“Please remember your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.”

29. The requirements for submitting timely electronic payments can also be found:

- In notice 700 “the VAT guide” paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

5 30. Also, the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA s 59(5).

31. The Appellant has submitted returns online, with payments to be collected by DD, since period 11/10. HMRC contend that the Appellant should have become familiar with the methodology and requirements for using this payment method.

32. The Appellant could not have had a reasonable expectation that the VAT payment would be made on time. The fact that the return was submitted on time does not create a reasonable expectation; the Appellant is also obliged to ensure that the funds are in the correct account at the appropriate time. By not ensuring that sufficient funds were in the correct account on the payment date, the Appellant’s default was caused by an insufficiency of funds. An insufficiency of funds is not capable of being a reasonable excuse for late payment (section 71(1)(a)VATA).

33. Therefore HMRC say that the surcharge has been correctly issued in accordance with VATA s 59(4).

20 **Conclusion**

34. The Appellant was clearly aware of the due date for payment of its VAT and the potential consequences of late payment.

35. VATA, ss 59 and 71 set out the reasonable excuse provisions which apply to the default surcharge. As regards the Appellant Company’s cash flow shortages generally, it is clear from s 71(a) VATA, that an insufficiency of funds to pay any VAT due is not in itself a reasonable excuse.

36. The Appellant’s grounds of appeal are that the VAT return was submitted on 2 December 2016 at which time funds were available in the account to which the DD was to be applied. The Appellant’s proprietor says he had a reasonable expectation that “payment would be received *by the due date*”, but that when the HMRC drew down the funds the account was depleted and insufficient because the proprietor thought that the funds had already been drawn down.

37. To decide whether a reasonable excuse exists where insufficiency of funds causes the failure, the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person’s exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates,

those factors would not have avoided the insufficiency of funds which led to the failures.

5 38. The burden of proof is on the Appellant to show that it has a reasonable excuse for the default. Having considered the background facts and circumstances leading up to the default, the reason for the late payment was not an unforeseeable or unexpected event outside the proprietor's control. The primary cause of the default was that he did not ensure sufficient funds were in the Company's account on the due date. The proprietor says that the Company was not suffering an insufficiency of funds but he appears to have misunderstood when the 'due date' would fall. That is not a
10 reasonable excuse.

39. In the Tribunal's view, for the reasons given above, there was no reasonable excuse for the Appellant's late payment of VAT for the 11 /16 period.

40. The appeal is accordingly dismissed and the surcharge upheld.

15 41. 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)"
20 which accompanies and forms part of this decision notice.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 15 NOVEMBER 2017

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