



TC07824

VALUE ADDED TAX - default surcharge - whether reasonable excuse

FIRST-TIER TRIBUNAL

Appeal number: TC/2019/06729

TAX CHAMBER

BETWEEN

CONCEPT MULTI-CAR LIMITED

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 19 August 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic and the cancellation of all oral hearings and the Tribunal considered it was able to decide the matter without a hearing. The documents to which I was referred are contained in a combined Court Bundle of documents, correspondence and legislation and case law of 154 pages prepared by HMRC.

DECISION

INTRODUCTION

1. The appellant appeals against a VAT default surcharge for the period 04/19 in the amount of £4,090.90

FINDINGS OF FACT

2. Where a trader pays their VAT electronically, the due date for submission of the return and payment of the VAT due is seven days after the end of the month following the end of the VAT period in question. The due date for the 10/18 period was therefore 7 December 2018.
3. Where a trader pays their VAT by direct debit, the VAT is collected three working days after the due date provided the return is submitted on or before the due date. Otherwise, it is collected three working days after receipt of the return.
4. Since 2010, the appellant had paid VAT by direct debit.
5. The appellant entered the default surcharge regime from the period 10/18 onwards. Its VAT return for the period was due on 7 December 2018 but was received by HMRC on 3 January 2019. A time to pay agreement was entered into on 2 February 2019. A Surcharge Liability Notice was issued and the appellant entered the default surcharge regime.
6. The direct debit for the 10/18 period failed. The appellant asserts that the direct debit was cancelled by HMRC. HMRC deny this. A letter from HMRC dated 9 January 2019 states “The Direct Debit payment described above has been returned unpaid as your bank has stated that your Direct Debit Instruction (DDI) has been cancelled.”
7. The letter made it clear that if the appellant wished to use direct debit in future, it would have to set up a new direct debit instruction and there was a link to the online form to do this.
8. The due date for the 01/19 period was 7 March 2019. Payment was received on 12 March, five days late. A default surcharge of £689.55 was imposed.
9. The appellant’s grounds of appeal indicate that Mrs Shortland, the managing director of the appellant, thought that the VAT payment would be taken by direct debit and that when she realised it had not been taken, she immediately paid by BACS. Given the terms of the 9 January letter, Mrs Shortland would have been aware that there was no direct debit in place in January 2019 and there is no evidence to indicate that she set up a new direct debit instruction on behalf of the appellant.
10. VAT for the 04/19 quarter, the period under appeal, was due on 7 June 2019. Payment was received by HMRC on 11 June 2019 and a default surcharge of £4,090.90 was issued.
11. The Notice of Appeal states “When I made the return at the end of May for the VAT quarter 1 Feb-30 April I was careful to fill in the Direct Debit request assuming that this would be implemented. When again I realised that the funds had not been taken from the bank account I immediately telephoned HMRC and was told that if the funds were sent via CHAPS that day (11 June) there would be no penalties. The money was sent that day but the Surcharge was still issued.”
12. The appellant has not provided any evidence to show that it made a request for a new direct debit arrangement. Mrs Shortland states that she “assumed” that the request was

implemented but it does not appear that she checked that this was the case until she realised the payment had not been made.

13. HMRC provided a transcript of the call of 11 June 2019 in which Mrs Shortland claimed she was told that the appellant would not be in default if she paid by CHAPS that day.
14. The transcript did not show that.
15. The transcript states that Mrs Shortland wanted to check that the direct debit had been implemented and was told that it had not and that she would have had to set it up five days before submitting the return for it to be effective for that quarter. Although the person Mrs Shortland spoke to confirmed that she could pay by BACS, he or she informed her that the payment was already late and she would have to pay a 5% surcharge.
16. The appellant submitted a Direct Debit instruction on 20 September 2019 which was effective from 27 September 2019.

DISCUSSION

17. I have found that the appellant's VAT payment for the 04/19 period was made late. This was the third default in the surcharge liability period and the rate of surcharge was therefore 5% of the amount of VAT. The amount of VAT was £81,818.16 and 5% of that amount is £4,090.90, the amount of the surcharge.
18. I conclude that, subject to the consideration of "reasonable excuse" the surcharge for 04/19 was properly issued.
19. Section 59A(8)(a) of the Value Added Tax Act 1994 provides that a surcharge does not apply in relation to a late payment of VAT if the person satisfies HMRC or, on appeal, the tribunal, that they had a reasonable excuse for the failure.
20. There is no statutory definition of a reasonable excuse. The case of *The Clean Car Company Limited v The Commissioners of Customs and Excise* [1991] VATTR 234 sets out helpful guidance in the following well known passage:

"... the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it can not. It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

21. In the case of *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) the Upper Tribunal provided guidance as to the approach to be adopted by this Tribunal:

"81. When considering a reasonable excuse defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

22. In the present case, the appellant contends it had a reasonable excuse for the late payment in that it thought that it had completed a new Direct Debit instruction which it believed should have been implemented for the 04/19 quarter.
23. As noted, there is no evidence that the appellant had completed a direct debit instruction and it has not proved on the balance of probabilities that it did so.
24. The appellant presumably did *something* but it is unclear what. When it realised that no direct debit was in force for the 01/19 quarter and it incurred a default surcharge, a responsible trader conscious of and intending to comply with its obligations would have made sure that they gave the instruction and would have checked that it had been implemented in good time for the next payment.
25. The appellant had been provided with a link to the online form to set up a direct debit in the 9 January 2019 letter. HMRC guidance on its website states that a taxpayer can use their VAT online account to set up a direct debit and that “*the direct debit must be set up at least three working days before you submit your online VAT return, otherwise the payment will not be taken from your bank account in time*”.
26. Following the surcharge for 01/19, it appears that the appellant took no further action until it completed the 04/19 return at the end of May 2019. Even assuming that Mrs Shortland did make a direct debit request, which is not proved, this was not the action of a responsible taxpayer in the appellant’s position.
27. It had previously thought it had a direct debit in place and it was wrong. The information about what to do had been given to it and further information about timing etc was available on HMRC’s website. A responsible trader would have checked what they had to do and by when, especially as they had had two previous defaults because there was no direct debit in place.
28. Even though the appellant did nothing further until submitting their VAT return for 04/19, it could have checked that the direct debit request would be implemented before the due date for payment. Had it done so, it would have discovered it was too late for the direct debit to be actioned for that quarter, but would have had sufficient time to make an in-time payment by BACS, so avoiding the third surcharge. The appellant did not enquire whether the request was effective until too late.
29. Having taken all the circumstances into account and having adopted the approach set out in *Perrin*, I have concluded that the appellant has not proved the facts that it says give

rise to a reasonable excuse and that, in any event, its actions (or inaction) in the circumstances was not objectively reasonable for a taxpayer in the appellant's circumstances.

CONCLUSION

30. For the reasons set out above, I have concluded that the default surcharge for the 04/19 VAT period was properly issued and that the appellant did not have a reasonable excuse for its late payment of the VAT due.
31. Accordingly, I dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

Release date: 26 August 2020