



Neutral Citation: [2022] UKFTT 209 (TC)

Case Number: TC08532

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/03112

*VAT – default surcharge – section 59 of the Value Added Tax Act 1994 - whether reasonable excuse – no – Perrin considered - appeal dismissed*

**Heard on:** 16 June 2022

**Judgment date:** 6 July 2022

**Before**

**TRIBUNAL JUDGE RACHEL GAUKE  
JANE SHILLAKER**

**Between**

**HAWKSMOOR CONSTRUCTION LTD**

**Appellant**

**and**

**THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Rebecca Smith, Office Manager of the Appellant

For the Respondents: David Corps of HM Revenue and Customs’ Solicitor’s Office

## **DECISION**

### **INTRODUCTION**

1. This is an appeal by Hawksmoor Construction Ltd (Hawksmoor) against a VAT default surcharge of £2,252.12 imposed under section 59 of the Value Added Tax Act 1994 (VATA 1994) in relation to period 06/21.
2. Having heard and considered the evidence and arguments of both parties, we have concluded that Hawksmoor did not have a reasonable excuse for not paying the VAT shown on the return for period 06/21 by the last day on which it was required to be paid. The appeal is therefore dismissed, for the reasons we set out below.

### **THE FORM OF HEARING**

3. The hearing was conducted by video link on the tribunal's Video Hearing Service. The documents to which we were referred were a bundle containing 41 pages, HMRC's statement of reason, and a separate bundle of legislation and authorities. Ms Smith gave oral evidence at the hearing.
4. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

### **PRELIMINARY ISSUE**

5. At the outset of the hearing we asked whether Ms Smith had the documents referred to above (the 41 page bundle, HMRC's statement of reason, and the bundle of legislation and authorities). She said that she did not. Mr Corps confirmed that HMRC had sent the documents to Hawksmoor, and gave the email address that HMRC had used for this purpose. Ms Smith confirmed that this was a valid email address to which she had access, but she had not seen the email from HMRC attaching the documents.
6. We asked Ms Smith if she would like Mr Corps to forward her the documents, and if she would like some time to familiarise herself with them. Ms Smith said that she would prefer to proceed immediately with the hearing without seeing the documents.
7. We were mindful that this was not a case that involved technical legal arguments. It was not in dispute that the surcharge was properly imposed: the only issue was whether Hawksmoor had a reasonable excuse for its late payment of VAT. Hawksmoor's case did not depend so much on documentation as on an explanation of what had taken place, and Ms Smith had a full opportunity to describe this in the hearing. Moreover, the bundle was short and its contents should largely have been familiar to Ms Smith.
8. In light of these considerations, and of the fact that Ms Smith did not request an adjournment, we were satisfied that it was fair and just to proceed with the hearing without Ms Smith having seen the documents.

### **BACKGROUND**

9. Hawksmoor's business is the construction of domestic buildings. It has been registered for VAT with effect from 1 April 2017 and submits VAT returns on a quarterly basis. It had previously used the VAT cash accounting scheme, but it had left this scheme by period 06/21.
10. The VAT return and payment for period 09/20 was due by 7 November 2020. The return was received on time. The VAT was paid in two instalments, the first on 6 November 2020,

the second on 9 November 2020. The second payment was therefore late, and HMRC issued Hawksmoor with a surcharge liability notice. No surcharge was payable at this time, but the notice specified a surcharge period of 20 November 2020 to 30 September 2021.

11. The VAT return and payment for period 03/21 was due by 7 May 2021. The return was received on 7 June 2021. The VAT was paid in three instalments, on 11 May 2021, 13 May 2021 and 10 June 2021. As the return and payments were late, and were made within the existing surcharge period, HMRC issued a further surcharge liability notice and imposed a surcharge at 2% of the outstanding VAT for period 03/21. The surcharge period was extended to 31 March 2022.

12. Hawksmoor does not dispute the validity of the surcharge liability notices that were issued in respect of periods 09/20 and 03/21 and has not submitted that it had a reasonable excuse for the defaults that resulted in the issuing of those notices.

13. The VAT return and payment for period 06/21 was due by 7 August 2021. The return was received on 6 August 2021. The VAT was paid in five instalments, the first (of £15,000) on 5 August 2021 and the last on 22 September 2021. On 7 August 2021, the outstanding VAT for period 06/21 was £45,042.32. HMRC imposed a surcharge of 5% of this amount, which was £2,252.12. This is the surcharge that is the subject of this appeal.

14. Hawksmoor does not dispute the lateness of the payments of VAT for period 06/21, nor the amount of the surcharge, nor that the surcharge liability notice for period 06/21 was properly served. The dispute concerns whether Hawksmoor had a reasonable excuse for the late payments.

#### THE LAW

15. VATA 1994, s 59(7) provides (and at the relevant times provided) as follows:

“If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(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,

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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).”

16. VATA 1994, s 71(1) provides (and at the relevant times provided) as follows:

“For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.”

17. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234, Judge Medd QC said the following on the meaning of a reasonable excuse:

“...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?”

18. The Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) confirmed that this was the correct test, and set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse. This is set out at paragraph [81] of that decision as follows:

“(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.”

#### **WAS THERE A REASONABLE EXCUSE?**

19. We are satisfied that Hawksmoor was properly notified of each surcharge and surcharge period, and that the surcharge for 06/21 was properly calculated. We are also satisfied that part of the VAT for period 06/21 was paid late.

20. This means that the sole issue for us to decide is whether Hawksmoor had a reasonable excuse for making late payments of VAT for period 06/21. If Hawksmoor satisfies us that it did have a reasonable excuse then, in accordance with VATA 1994, s 59(7), we should set aside the surcharge.

#### **Hawksmoor’s submissions and findings of fact**

21. The facts that Hawksmoor asserts give rise to a reasonable excuse were set out in its grounds of appeal and in oral evidence presented to us by Ms Smith, Hawksmoor’s office

manager. HMRC did not dispute this evidence and we therefore find the following facts to be proven (to the requisite standard of balance of probabilities).

22. Hawksmoor's sole director is Mr Paul Fitzgerald.

23. Hawksmoor's previous business manager left the company in March 2021 without an immediate successor, meaning that there was a period in which a number of administrative and financial tasks were not attended to.

24. Ms Smith became Hawksmoor's office manager on 26 April 2021. She needed to spend time learning about the business, at what was a busy period for the company as it was approaching its accounting year end. This was the reason for the late submission of the VAT return for period 03/21. As stated above, Hawksmoor does not contend that there was a reasonable excuse for this late submission.

25. Ms Smith had not been involved in financial management before beginning work at Hawksmoor. She obtained some guidance from the company's external accountants on VAT compliance matters.

26. In July 2021, Mr Fitzgerald contracted covid. He was isolating and recovering from 22 July 2021. Mr Fitzgerald's partner also contracted covid, and they had a baby who was born on 27 July 2021. For these reasons, Mr Fitzgerald was absent from the business for approximately three weeks from 22 July 2022, returning to the office in the second week of August. On Mr Fitzgerald's return to work, Ms Smith took a week's annual leave.

27. Ms Smith did not contact Mr Fitzgerald at all during his three-week absence. She took the decision that, due to his personal circumstances at the time, she did not want to disturb him to ask him questions about the business.

28. Mr Fitzgerald's absence meant that the company was behind in issuing invoices. There were some categories of invoice for which Ms Smith did not have the knowledge or authority to determine the amount that was due, meaning that the company did not issue this type of invoice while Mr Fitzgerald was away. This meant that there was less money coming into the business than would otherwise have been the case. In addition, although Ms Smith had a spending budget, for instance to pay the company's suppliers, she did not have full access to the company's bank account.

29. Ms Smith, with guidance from the external accountants, submitted the VAT return for period 06/21 on time. HMRC received this return on 6 August 2021. She also made a partial payment of the VAT, on 5 August 2021, but the remainder of the VAT owing for period 06/21 was not paid by the due date of 7 August 2021.

30. In Mr Fitzgerald's absence Ms Smith made decisions on her own as to how to spend the budget that was available to her. She explained to us that she had a certain amount of money with which to pay HMRC and pay the company's staff, and for budgeting reasons she chose to pay the staff rather than paying the full amount of VAT that was owed to HMRC. She did not have enough money to pay both the staff and HMRC, mainly because of the reduction in income caused by the backlog in issuing invoices. This situation was exacerbated by Ms Smith not having full access to the company's bank account, but we find that the main reason for the lack of funds was the failure to issue certain categories of invoice while Mr Fitzgerald was away.

31. Hawksmoor's normal practice is to give its customers seven days in which to pay invoices, and in Ms Smith's experience customers generally pay on time.

32. Ms Smith was unaware that HMRC can enter into 'time to pay' arrangements and did not contact HMRC to discuss Hawksmoor's difficulties in paying the VAT that was due.

33. On Mr Fitzgerald's return, he and Ms Smith worked to catch up with the invoicing and continued to make payments of VAT, with the final amount owing for period 06/21 being paid on 22 September 2021.

34. Mr Fitzgerald and Ms Smith were aware of the surcharge liability notices that were issued for periods 09/20 and 03/21, and were aware that further defaults would lead to surcharges.

### **HMRC's submissions**

35. Mr Corps, for HMRC, did not dispute the facts submitted by Hawksmoor and summarised above, but did not agree that these amount to a reasonable excuse for the late payment of VAT for period 06/21. HMRC's submissions about reasonable excuse were, in summary, as follows.

36. The risk of covid has been known since the beginning of the pandemic, and so the company should have had in place plans for the absence of key staff.

37. The birth of a child was a known event. Mr Fitzgerald should have known he was likely to have to step away from the business around July 2021. The company should have made alternative arrangements in relation to its VAT compliance obligations, and was in fact able to submit the VAT return and make a first payment of VAT for period 06/21 by the due date.

38. Hawksmoor would have known the completion dates for the work that was represented in the outputs for period 06/21, and should have known its VAT liability for that period in advance. It should therefore have issued invoices or made other financial arrangements to ensure it could meet that liability.

39. Mr Fitzgerald was unable to issue invoices during his absence, but could have given Ms Smith the necessary authority to issue invoices on the company's behalf.

40. VATA 1994, s 71(1) provides that an insufficiency of funds is not, on its own, a reasonable excuse for the late payment of VAT. However, the underlying cause of the insufficiency may be a reasonable excuse: this appears from the judgment of the Court of Appeal in *Customs and Excise Commissioners v Steptoe* [1992] STC 757.

41. *Steptoe* requires the Tribunal to ask itself whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become payable on a particular date would have avoided the insufficiency of funds which led to the failures.

42. Mr Corps submitted that if Hawksmoor had exercised reasonable foresight and due diligence, it could have paid the VAT on time. It has not established that it did not have sufficient funds to pay the VAT.

43. Mr Corps contended that as most invoices were being paid within seven days of issue, the invoices issued in period 06/21 should have been paid in time for the date on which the VAT for that period was due. If those funds were not available to pay the VAT, this means that the output VAT that was owed to HMRC was effectively being used for other purposes.

44. Mr Corps further contended that alternatively, Hawksmoor could have contacted HMRC to seek a 'time to pay' arrangement. Under section 108 of the Finance Act 2009, a taxpayer is not liable to a surcharge if a time to pay arrangement is in place.

45. Mr Corps further submitted that even if Hawksmoor had a reasonable excuse on the due date for paying the VAT (7 August 2021), this excuse ended on or before 25 August 2021 (the date of Hawksmoor's notice of its appeal to this tribunal). In the notice of appeal, Mr Fitzgerald states: "Due to my absence from the business, I was also behind...with invoicing clients. This is now all resolved, and I am in a position to clear the VAT bill."

46. Mr Corps contended that this demonstrates that Hawksmoor could have paid the outstanding VAT on 25 August 2021, but did not do so until 22 September 2021. Therefore, Hawksmoor failed to remedy its failure in a timely fashion.

### **Discussion and decision**

47. In deciding whether Hawksmoor had a reasonable excuse, we must apply the first three steps of the test in *Perrin* (we comment on the fourth step below). We have set out above the facts that Hawksmoor asserts give rise to a reasonable excuse, and have decided that these facts are proven. We must now decide whether, viewed objectively, those facts amount to a reasonable excuse. In reaching this decision we have taken into account the evidence presented to us of the experience and other relevant attributes of Mr Fitzgerald and Ms Smith, and the situation in which they and Hawksmoor found themselves at the relevant time.

48. Hawksmoor's contention, in essence, is that Mr Fitzgerald's absence from the business meant that it did not have sufficient funds to pay the VAT for period 06/21 in time, and that the reasons for that absence (Mr Fitzgerald and his partner contracting covid, and the birth of their child) constituted a reasonable excuse for the late payment.

49. An insufficiency of funds is not, on its own, a reasonable excuse for the late payment of VAT, but the underlying reason for the insufficiency may itself be a reasonable excuse.

50. The circumstances in which the cause of an insufficiency of funds may provide a reasonable excuse was considered by the Court of Appeal in *Stepto*. Lord Donaldson MR and Nolan LJ gave the majority judgment in that case. Lord Donaldson MR said, at paragraph [770]:

“The difficulty which then arises is that Parliament has not specified what underlying causes of an insufficiency of funds which lead to a default are to be regarded as reasonable or as not being reasonable. ... Nolan LJ, as I read his judgment explaining and expanding on his judgment in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and 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, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

51. We appreciate that it was highly unfortunate that Mr Fitzgerald and his partner both contracted covid at the time that their child was born, and that this would have been a difficult time for them. We accept that it was reasonable for Mr Fitzgerald to have stepped away from the business for this time.

52. However, this does not mean that there was a reasonable excuse for the late payment of VAT for period 06/21. In our judgment, with the exercise of reasonable foresight and due diligence and a proper regard for the due date for payment, it would have been possible for Hawksmoor to pay the VAT on time.

53. Both Mr Fitzgerald and Ms Smith were aware that Hawksmoor was in a VAT surcharge period, and that as a result any late payments of VAT would result in the imposition of surcharges. They were aware that the due date was 7 August 2021 and should therefore have been particularly mindful that the VAT needed to be paid in full by this date if surcharges were to be avoided. They should have known the amount of VAT that would be payable for period 06/21 because the business should have been keeping records of invoices received and issued in that period.

54. It is reasonable to expect businesses to have procedures in place to enable them to pay tax as it falls due. These procedures should have been sufficiently robust to withstand the temporary absence of the company's director, particularly at a time when the arrival of a child meant that a period of absence could have been anticipated.

55. Ms Smith's evidence was that Hawksmoor's difficulties in paying the VAT that was due on 7 August 2021 were caused partly by her lacking full access to the company's bank account, and partly by her not having the knowledge and authority to issue certain categories of invoice.

56. We consider that, with reasonable foresight, Hawksmoor would have been able to prepare for the likelihood of Mr Fitzgerald's absence by arranging for Ms Smith to have the necessary access to the bank account. We also observe that Ms Smith did have sufficient access to funds to pay the first instalment of the VAT due for period 06/21, in the form of a payment of £15,000 on 5 August 2021.

57. Ms Smith's difficulties with issuing invoices during Mr Fitzgerald's absence were foreseeable and the business could have put in place arrangements to overcome this, for instance by providing Ms Smith with the necessary training and authority to issue these invoices, or by arranging an alternative source of finance. In any event, a prudent business should not have been relying on income from invoices issued after 22 July 2021 to fund the VAT for the period ending on 30 June 2021.

58. We further note that Mr Fitzgerald returned to the business in the second week of August 2021, but that the overdue VAT was not fully paid until 22 September 2021. This suggests that the non-payment of the VAT was not solely the result of the lack of an authorisation that only Mr Fitzgerald could provide.

59. In reaching our decision, we have taken account of the experience and attributes of Ms Smith (Hawksmoor's office manager) and Mr Fitzgerald (Hawksmoor's director), and the situations in which they found themselves at the time the VAT was due. While Mr Fitzgerald did not appear to give evidence to the tribunal, it was not suggested to us that there was anything in his experience or attributes that would have contributed to the company's inability to pay VAT on time. His absence from the business placed him in a difficult situation, but we have outlined above how it should still have been possible for the VAT to have been paid on time.

60. Ms Smith lacked experience in financial management, but she was receiving advice during Mr Fitzgerald's absence from Hawksmoor's external accountants, who had provided her with guidance on the company's VAT compliance obligations. We have found that she was aware of the need to pay the VAT for period 06/21, and that she was aware of the risk of surcharges if this did not happen.

61. On Ms Smith's evidence, the great majority of the invoices that Hawksmoor had issued in period 06/21 would have been paid before the date on which the VAT was due. A prudent trader would be expected to earmark payments received in respect of VAT as being payable to HMRC. If this money was no longer available by 7 August 2021, then we agree with Mr Corps that this means that the VAT which was owed to HMRC had effectively been borrowed for other purposes.

62. Ms Smith explained to us that she had been put in a difficult position in Mr Fitzgerald's absence, in which she had had to decide how best to spend the money available to her. She said that she had chosen to pay the company's staff rather than pay the VAT that was due, and expressed her view that this was the best decision she could have made from a commercial perspective. That may be the case, but this does not amount to a reasonable excuse that would require us to set aside the surcharge. As Nolan J (as he then was) said in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907:



“I would add however that in my view the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of 'reasonable excuse' must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to invoke s 19(6)(b) [*the statutory predecessor to VATA 1994, s 59(7)*]. In other words, he will be hard put to it to persuade the commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian.”

63. In our view, Hawksmoor had put itself in the position described by Nolan J in this passage. It received VAT from its customers, it used this money for its business expenses, and as a result it was unable to hand the VAT over to HMRC at the date of payment. In these circumstances, Hawksmoor has a very high bar to cross to persuade us that it had a reasonable excuse for the late payment, and it has not done so.

64. For these reasons our decision is that Hawksmoor did not have a reasonable excuse for the late payment of £45,042.32 of the VAT that was owed to HMRC for period 06/21.

#### **Whether the failure was remedied without unreasonable delay**

65. Mr Corps, for HMRC, also made submissions on the question of whether, if there had been a reasonable excuse on the due date, the failure to pay the VAT was remedied without unreasonable delay once the excuse had ceased. Mr Corps explained that HMRC made these submissions to address the fourth sub-paragraph of the test set out in *Perrin* at paragraph [81] and reproduced above.

66. We have not considered these submissions, for two reasons. The first is that we have decided that there was no reasonable excuse for the VAT not having been paid on the due date, and this determines the appeal. The second reason is that the fourth sub-paragraph in *Perrin* does not apply in the context of a VAT default surcharge. As Judge Anne Redston said in *Porter & Company* [2019] UKFTT 0178 (TCC) at paragraph [30], the statutory provisions being considered in *Perrin* contain an extra requirement which does not apply to default surcharges.

#### **DISPOSITION**

67. For the reasons set out above, the appeal is dismissed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

68. 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 GAUKE  
TRIBUNAL JUDGE**

**Release date: 06 JULY 2022**