



Neutral Citation: [2022] UKFTT 00427 (TC)

Case Number: TC08645

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video & telephone hearing

Appeal reference: TC/2022/00937

VAT – default surcharge – whether reasonable excuse

Heard on: 1 November 2022

Judgment date: 10 November 2022

Before

**TRIBUNAL JUDGE HOWARD WATKINSON
MOHAMMED FAROOQ**

Between

KATTRAK INTERNATIONAL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr. Gareth McLaughlin, Director

For the Respondents: Ms. Tracy Gibson, Presenting Officer of HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video. Mr. McLaughlin, representing the Appellant, dialled in by telephone due to technical difficulties accessing the video platform. The documents to which we were referred were: a bundle of documents running to 63 pps., HMRC's Statement of Reasons, and a bundle of legislation and authorities.
2. 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.
3. This is an appeal against VAT default surcharges as set out below:
 - (1) Surcharge dated 13.8.21 under s.59(5)(c) Value Added Tax Act 1994 ("VATA") for VAT period 06/21 at 10% in the sum of £2,850.03; and
 - (2) Surcharge dated 12.11.21 under s.59(5)(d) VATA for VAT period 09/21 at 15% in the sum of £2,767.27.

BACKGROUND

4. The Appellant has been registered for VAT since 17.3.04. If making a paper VAT return the Appellant would have been required to submit a VAT return, and any payment due, not later than the last day of the month following the period to which the return related (Regulation 25(1) of the VAT Regulations 1995 ("VATR")). If the Appellant filed VAT returns electronically it was permitted a further seven days to submit a VAT return, and make any payment due (by a direction made under Regulations 25, 25A(20) and 40(3)-(4) VATR).
5. The Appellant entered the default surcharge regime because its payment for the 06/20 quarterly VAT period was paid late, on 10.9.20. As this was the first default no surcharge was payable, but a surcharge liability notice was issued with a surcharge liability period of 14.8.20 – 30.6.21.
6. The Appellant's VAT payment for the 09/20 quarterly VAT period was then paid late, on 27.4.21. The Appellant therefore became liable to a surcharge at 2%. However, since the surcharge was less than £400 no financial penalty was levied, and the Appellant was notified that the surcharge period was extended to 30.9.21.
7. The Appellant's VAT payment for the 12/20 quarterly VAT period was then paid late, on 5.3.21. However, since the surcharge was less than £400 no financial penalty was levied, and the Appellant was notified that the surcharge period was extended to 31.12.21.
8. The Appellant's VAT payment for the 03/21 quarterly VAT period was then paid late, on 28.5.21. However, the surcharge was cancelled.
9. The Appellant's VAT payment for the 06/21 quarterly VAT period was then paid late, on 20.8.21 (in part) and 25.1.22 (in part). That was the fourth default and therefore attracted a surcharge of 10% of the VAT of £28,500.31 that had been paid late (£2,850.03). The Appellant was notified that the surcharge period was extended to 30.6.22.
10. The Appellant's VAT payment for the 09/21 quarterly VAT period was then paid late, on 12.11.21. That was the fifth default and therefore attracted a surcharge of 15% of the VAT of £15,115.14 that had been paid late (£2,767.27). The Appellant was notified that the surcharge period was extended to 30.9.22.

11. The history of returns and payments set out above is not in dispute, nor is it in dispute that the Appellant received the various surcharge documents. The Respondents have therefore established that the surcharges were properly imposed, and the issue for the Tribunal is whether the Appellant can show that it has a reasonable excuse for the failure to make the payments for the 06/21 and 09/21 quarterly VAT periods on time.

THE RELEVANT LAW

12. The VAT default surcharge is imposed by Section 59 Value Added Tax Act 1994. Under Section 59(7)(b) VATA, if the Appellant satisfies the Tribunal that there is a reasonable excuse for the default in question then it will not be liable to the surcharge. Section 71(1) VATA provides that for the purpose of any provision of Sections 59-70 of VATA which refers to a reasonable excuse (a) an insufficiency of funds 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.

13. The Respondents having established that the surcharges are due it is for the Appellant to demonstrate a reasonable excuse to the ordinary civil standard, the balance of probabilities.

14. There is no statutory definition of “reasonable excuse”. The Respondents referred the Tribunal to *Rowland v Revenue & Customs Commissioners* [2006] STC (SCD) 536 where the Tribunal noted at [19] that the issue was to be considered in the light of all the circumstances of the particular case. The Respondents also referred the Tribunal to *The Clean Car Company Ltd v The Commissioners of Customs and Excise* [1991] VATTR 234 in which Judge Medd QC set out that the test is an objective one, where the Tribunal must ask itself: “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?”

15. Finally, the Respondents referred the Tribunal to *Christin Perrin v The Commissioners for Her Majesty’s Revenue and Customs* [2018] UKUT 156 (TC) where at [81] the Upper Tribunal set out a useful approach that the First-tier Tribunal can take in considering the issue of reasonable excuse.

“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.”

THE APPELLANT’S CASE

16. Mr. McLaughlin had set out the Appellant’s case in three documents.

17. Firstly, in a letter to the Respondents dated 19.11.21 Mr. McLaughlin said:

“...We were late in getting this payment sent across as it is only one person within the company that makes payments. This is due to their being a previous issue with an employee committing fraud at the company, so we have had to be very careful with who makes payments.

I have previously asked if our VAT payments can be taken by direct debit instead to ensure that these are paid on time but as of now this has not been done which means it relies solely on myself. While sometimes this is fine, there are times when due to staff illness or isolating I have not been present at the office and cannot make these payments remotely often due to location, with the nature of the business.

...”

18. In a letter to the Respondents dated 9.12.21, in relation to the second surcharge, Mr. McLaughlin said:

“...this only just missed the deadline and as explained previously this is because there is no direct debit in place.

...”

19. The Appellant’s Notice of Appeal said:

“As advised in my original appeal, there is only one person who holds the bank card for the company due to previous issues with fraud. Due to this issue we made sure that there was a direct debit set up and I assumed that payment would just be taken that way and the money would automatically come out and as we were overdrawn it would have come out of our overdraft. Gareth, who makes our payments, was off sick and it was not until he was back into the business that he realised this had not happened and the mandate had been cancelled, which had not been asked for. This is why it was paid a few days late but it was paid in full. Gareth then spoke to the bank and it appears this was cancelled on your end, which is why a manual payment was made. I feel that a surcharge of over £2,000 pounds for being a couple of days late seems really expensive. We are struggling at the moment and covid did hit our business quite hard, which has led us to struggle with our bills at the moment”

20. In the bundle of document was a letter from HMRC to the Appellant dated 1.6.21 which confirmed that the direct debit instruction had been cancelled and that if the Appellant wished to pay VAT by direct debit in the future it would need to complete another direct debit instruction. An internal HMRC document recorded that a direct debit instruction set up letter was accepted on 21.5.21, but stated “DDI cancelled by payer, Paying bank cancelled DDI” with a date of 1.6.21. Mr. McLaughlin said that he was not aware of this, didn’t receive

the letter, and didn't cancel the direct debit. There was no intention to make a late payment and there was a misunderstanding about the direct debit as to how it was set up and the complications caused.

THE RESPONDENTS' CASE

21. The Respondents' case was that the Appellant had provided no reasons why payment could not be made on time, nor had it taken reasonable steps to ensure that payment was made on time, and that the Appellant had not proved that there was a reasonable excuse for the late payment.

FINDINGS OF FACT

22. It is not in dispute, and we find, that the Appellant has been registered for VAT and has the default surcharge regime history set out at [4] – [10] above.

23. We find, on the balance of probabilities, that it was not HMRC that cancelled the direct debit instruction, nor are we aware of how it could do so. Either the Appellant, or its bankers cancelled the direct debit.

24. We accept that there may have been some confusion on the Appellant's part about the direct debit situation, but we find that this could have been resolved with the Appellant's bank. Further, had there been a history of difficulties with a direct debit we think it reasonable that the Appellant should have checked with its bank when the payments of VAT fell to be made that the direct debit was in place and would operate as intended. Certainly, the situation both could, and should have been resolved by the time the payment for VAT period 09/21 was due, because it must have been obvious that the direct debit for 06/21 had not worked. There was no evidence that the Appellant did this.

25. We find that, as a matter of fact, whatever the effect of Covid on the Appellant's business, there was nothing preventing the payment of VAT on time.

DISCUSSION

26. We have set out the facts we find proved above. We find that the Appellant has not established a proper factual basis on which to say that it had a reasonable excuse for the late payments leading to the surcharges. The direct debit was cancelled by either the Appellant or its bankers before either surcharge was due.

27. Applying the test in *Perrin*, even at their highest and viewed objectively, the rather vague suggestions of confusion about the direct debit situation would not suffice as amounting to a reasonable excuse in any event.

28. Further, the Appellant was on notice of the need to make its VAT payments on time from the previous surcharge notices and extensions to the periods. The reasonable taxpayer would therefore have been particularly vigilant to ensure timely payment.

29. We therefore find that the Appellant has not proved a reasonable excuse for the late payments of VAT which led to the surcharges imposed.

DECISION

30. For the above reasons the appeal is therefore dismissed, and the surcharges are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

31. 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.

**HOWARD WATKINSON
TRIBUNAL JUDGE**

Release date: 10th November 2022