



Neutral Citation: [2024] UKFTT 00907 (TC)

Case Number: TC09315

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/16071

VALUE ADDED TAX – Default surcharge - reasonable excuse – appeal dismissed

Heard on: 1 March 2024

Judgment date: 14 October 2024

Before

**TRIBUNAL JUDGE MALCOLM FROST
SHAMEEM AKHTAR**

Between

ABG FIBRE SERVICES LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Martin Ives of Martin Ives and Co Ltd

For the Respondents: Jody Li, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against default surcharges issued by HMRC for periods 09/20, 12/20 and 03/21. The Appellant, ABG Fibre Services Ltd (“AFSL”), also sought permission to bring an appeal outside the statutory time limit.
2. For the reasons set out below, we dismiss the appeal and uphold the surcharges
3. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. 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.

FINDINGS OF FACT

4. The documents to which we were referred were a document bundle of 108 pages, a supplementary bundle of 78 pages and a legislation and authorities bundle of 261 pages.
5. From that evidence we find the following facts.
6. AFSL is a taxable person and has been registered for the purpose of VAT with effect from 01 September 2017.
7. AFSL’s business activity is the installation of telecommunications equipment.
8. Since registering for VAT, AFSL submits VAT Returns on a quarterly basis
9. Period 06/20 covered the time period of 01 April 2020 – 30 June 2020. The due date for the VAT return and Payment was 07 August 2020. The return was received on 06 August 2020. However, the VAT was not paid to HMRC until 17 September 2021. HMRC issued a surcharge liability notice on 14 August 2020.
10. Period 09/20 covered the time period of 01 July 2020 – 30 September 2020. The due date for the VAT return and Payment was 07 November 2020. The return was received on 06 November 2020. However, the VAT was not paid to HMRC until 09 November 2020. HMRC issued a surcharge at a 2% rate on 13 November 2020. The amount of the surcharge was £710.79. No explanation has been provided for the late payment.
11. Period 12/20 covered the time period of 01 October 2020 – 31 December 2020. The due date for the VAT return and Payment was 07 February 2021. The return was received on 06 February 2021. However, the VAT was not fully paid to HMRC until 14 October 2021. HMRC issued a surcharge at a 5% rate on 12 February 2021. The amount of the surcharge was £3,342.72
12. Period 03/21 covered the time period of 01 January 2021 – 31 March 2021. The due date for the VAT return and Payment was 07 May 2021. The return was received on 07 May 2021. The VAT was not fully paid to HMRC until 01 August 2022. HMRC issued a surcharge at a 10% rate on 14 February 2021. The amount of the surcharge was £4,014.62.
13. On 04 March 2022 AFSL’s representative called HMRC and requested a review of the decision to issue the relevant surcharges.
14. On 14 April 2022 HMRC issued a Review Conclusion letter upholding the 12/20 and 03/21 default surcharges.

15. On 01 August 2022 AFSL's representative requested a further review of the decision to issue the default surcharges 12/20 and 03/21 and also a review of the decision to issue the default surcharges for periods 09/20 and 03/22.
16. On 21 September 2022 HMRC issued a Review Conclusion letter for periods 12/20 and 03/21 upholding the decision made on 14 April 2022.
17. Also on 21 September 2022 HMRC issued a Review Conclusion letter for periods 09/20 and 03/22 upholding the default surcharges.
18. On 10 January 2023 the Appellant's representative requested an additional review of the decision to issue the default surcharges for periods 09/20, 12/20 and 03/21.
19. On 01 March 2023 the Respondents issued another Review Conclusion letter upholding the default surcharges.
20. On 14 March 2023 AFSL's representative wrote to HMRC asking them to reconsider their decision.
21. HMRC either did not receive or did not respond to the letter of 14 March 2023.
22. On 24 July 2023 AFSL's representatives sent a further copy of the 14 March 2023 letter to HMRC.
23. On 11 August 2023 AFSL's representatives sent a letter to HMRC seeking a reply to their 14 March letter.
24. On 25 September 2023 HMRC issued further Review Conclusion letter upholding the decision made on 01 March 2023. The letter stated "Our review process only allows for one review of each decision. We've already reviewed our decision and told you of the outcome of that review in our letter dated 1 March 2023" also "If you appeal more than 30 days after the date of our original decision letter, you'll have to apply for permission from the tribunal to make a late appeal. If you do not, the tribunal may reject your appeal".
25. On 25 October 2023 AFSL submitted a Notice of Appeal against the 09/20, 12/20 and 03/21 default surcharges to the Tribunal.

THE ISSUES

26. There are two parts to this matter:
 - (1) An application for permission to bring a late appeal; and
 - (2) A substantive appeal against the relevant surcharges

THE LATE APPEAL

27. The chronology of the appeal is as found above. In particular, the final review conclusion was dated 25 September 2023 and the appeal was made to the Tribunal on 25 October 2023.
28. In this case there was a sequence of repeated further review applications by AFSL and review conclusions by HMRC.
29. It may be that the further reviews fall outside the statutory framework such that HMRC were not strictly correct to carry out such reviews (and that the time limit for making an appeal to the Tribunal began to run from 1 March 2022, or some other date). However, HMRC nonetheless carried out such further reviews.
30. Overall, it is clear that the parties were in correspondence to resolve the dispute up until the 25 September letter, and AFSL made its appeal to the Tribunal promptly after the end of that sequence of correspondence.

31. Accordingly, in all the circumstances of the case (and bearing in mind the approach suggested in *Martland v HMRC* [2018] UKUT 0178 (TCC)), we grant permission for the late appeal to be considered

SUBSTANTIVE APPEAL

32. Having given permission for the late appeal, we go on to consider the substantive appeal against the surcharges.

33. The law on the default surcharge is primarily set out in s. 59 Value Added Tax Act 1994 (“VATA”).

34. Section 59(1) provides for the basic concept of a default:

“(1) ...if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period –

(a) The commissioners have not received that return, or

(b) The commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.”

35. The existence of a default gives rise to power for HMRC to issue a surcharge liability notice to a taxpayer. The effect of the notice is to give rise to a surcharge period. The surcharge period can be extended as a result of further defaults and the issue of extension notices by HMRC. This is provided for in ss s 59(2) and (3) VATA, as follows:

“(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where-

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period. “

36. Any defaults within the surcharge period result in the taxpayer being liable to surcharges of a percentage of the outstanding VAT for the prescribed accounting period. The surcharge and percentages are provided for in ss 59(4) - (6) VATA:

“(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

- (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;
- (b) in relation to the second such period, the specified percentage is 5 per cent;
- (c) in relation to the third such period, the specified percentage is 10 per cent; and
- (d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.”

37. Section 59(7) VATA provides for the reasonable excuse defence that is at the heart of this case:

“(7) 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). “

38. Section 71 VATA 1994 specifies two situations that are not capable of constituting a reasonable excuse, as set out below.

“71 Construction of section 59 to 70

(1) For the purpose of any provision of section 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.”

ISSUES TO BE DETERMINED

39. No issue has been taken by ASFL as to the validity of the surcharge notices. The key issue is whether AFSL has a reasonable excuse for the late payments.

40. AFSL’s grounds of appeal can be summarised as putting forward the following by way of reasonable excuse:

(1) ASFL intended to use repayments of credits generated as a result of the Construction Industry Scheme (“CIS”) in order to pay its VAT liabilities.

(2) HMRC were late repaying CIS credits to ASFL. HMRC took over 12 months to process ASFL’s repayment claims which had a serious impact on the company’s cashflow.

(3) The CIS repayments of £176,239.77 were used to offset the outstanding VAT of £107,000.62. Had the 18/19 and 19/20 claims been processed more quickly the default surcharges would not have arisen.

41. We proceed on the basis that the facts put forward as a part of these grounds are made out and find accordingly.

42. HMRC submit, and we agree, that the correct approach to a question of reasonable excuse is that set out in *Christine Perrin v Revenue and Customs Commissioners* [2018] UKUT 0156 (TCC) at [81].

43. For present purposes, the key point to take from *Perrin* is that the excuse must be objectively reasonable, taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found themselves at the relevant time or times. The Upper Tribunal suggested in *Perrin* that 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?”

44. Mr Ives, for AFSL was clear that it was known to be a problem in the industry that HMRC take a long time to process CIS claims.

45. Mr Ives also explained that AFSL had subsequently moved to gross payment status in order to mitigate the impact of the slow processing of CIS claims.

46. HMRC referred us to the case of *NSF Utilities Ltd v HM Revenue and Customs* [2018] TC06288 in which Judge Gammie stated at [22]

“a taxpayer who believes that it is due a repayment of tax from the Respondents on one account, may think it galling that the Respondents can insist on payment of tax on another account by a particular date, and impose a penalty for the taxpayer’s failure to do so, when the Respondents face no equivalent sanction. Nevertheless, this alone is plainly not enough to entitle the taxpayer to delay payment of VAT or to attempt to set off one amount against the other.”

47. And further at [32]

“a prudent taxpayer would have sought to take some steps to guard against the possibility that the VAT fell due before the repayment was received (which in fact the Appellant was able to do, albeit late) but we have no evidence that the Appellant did anything.”

48. We echo that sentiment. We have sympathy at the frustration evidently felt by a taxpayer that they were penalised for not paying their VAT liabilities whilst at the same time HMRC were being slow in processing claims which should have resulted in those liabilities being met.

49. However, we also echo the sentiment of Judge Gammie as to whether it is reasonable for a taxpayer to seek to set off a present liability owed to HMRC against another considered to be due from HMRC at a future time.

50. In this case, as Mr Ives put forward, it was well understood and expected that the CIS repayments would not be received in time to meet VAT liabilities. That being the case, AFSL would be expected to take reasonable steps to avoid late payment.

51. If evidence were put forward to establish that, as a result of circumstances beyond AFSL's control, the company was simply unable to retain sufficient funds to meet its VAT liabilities then such circumstances might constitute a reasonable excuse.

52. We note the comments of Lord Donaldson MR in *Steptoe v Revenue and Customs Commissioners* [1992] STC 757 CA (at p770):

“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 taxpayer's default, then the taxpayer might well have reasonable excuse for non-payment, but that excuse would be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

53. The COVID-19 pandemic may well have put extreme pressure on businesses, resulting in cashflow issues that fall within the comments of the Court of Appeal in *Steptoe*. However, such a position must be properly supported by relevant evidence. Difficult choices must be made by businesses facing such pressures and the Tribunal will need to understand the full facts in order to determine the matter. A deliberate choice to favour trade creditors over payments to HMRC is unlikely to found a reasonable excuse, as the default surcharge regime is intended to discourage such a choice.

54. We were not provided with evidence as to:

- (1) the exact cash position of AFSL at the material times,
- (2) what liabilities it had to meet other than VAT,
- (3) what steps were taken to seek time to pay the VAT liability, or to defer payment of other liabilities in order to enable the VAT liability to be paid.

55. We also note that ASFL could have sought gross payment status sooner, thereby avoiding the cash flow impact of CIS.

56. It appears that ASFL considered that it could simply allocate the CIS payments to VAT in due course and that the expected delays would therefore only impact HMRC. We do not consider this to be an objectively reasonable approach.

57. Where it is known that sufficient funds would not be forthcoming in time (whether from HMRC or any other potential creditor), a taxpayer which decides not to take any steps to mitigate the shortfall (such as those set out above) is not acting as a reasonable taxpayer conscious of and intending to comply with his obligations regarding tax (per Judge Medd QC in *The Clean Car Company v C&E Commissioners*).

58. The point is put succinctly in *Quality Asbestos Services Ltd* [2015] TC04742 at [55]

“a prudent taxpayer knowing that a payment was due by a given date, should not have relied on a repayment claim that was subject to verification. The taxpayer could not reasonably rely on getting the full amount claimed or when that would be paid. Shortly put the VAT is due and payable and unless and until a repayment of CIS is agreed on the basis set out in the legislation it cannot be offset. It is not reasonable to rely on a potential repayment.”

59. In this case, AFSL had little or no expectation that the CIS repayment would be received in time to meet its VAT liabilities. In those circumstances AFSL did not take reasonable steps to meet the liabilities (such as seeking gross payment status sooner, seeking time to pay or rearranging other liabilities). We therefore find that AFSL did not have a reasonable excuse for the late payment.

60. As a result, we dismiss the appeal and uphold the surcharges.

CONCLUSION

61. For the reasons set out above we:

- (1) Give permission for the appeal to be made late.
- (2) Dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

**MALCOLM FROST
TRIBUNAL JUDGE**

Release date: 14th OCTOBER 2024