



**TC05010**

**Appeal number: TC/2014/03769**

*VAT – Default surcharge – Reasonable excuse – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**RECRUIT RIGHT LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER  
MR ALBAN HOLDEN**

**Sitting in public at Liverpool on 6 April 2016**

**No appearance by or on behalf of the Appellant**

**Mr G Hilton for the Respondents**

## DECISION

### Introduction

1. This is an appeal against the imposition of default surcharges under s 59 of the Value Added Tax Act 1994 on late payment of VAT for periods 10/12, 11/12, 12/12, 02/13, 03/13, 04/13, 05/13, 06/13, 07/13, 08/13, 10/13, 01/14 and 04/14, following the imposition of a surcharge liability notice in respect of VAT period 08/12. Default surcharges were originally also imposed for VAT periods 09/13 and 03/14, but these were subsequently withdrawn by HMRC such that they no longer form part of this appeal.

2. A schedule of defaults prepared by HMRC is set out in the hearing bundle at pages 33-38. The Appellant's grounds of appeal do not seek to dispute the amount of the VAT liability in respect of each of the periods in question, or the fact that there was a default in each of the periods in question, nor do the grounds of appeal seek to dispute the amount of the default surcharge for each of the periods in question in the event that there is no reasonable excuse for late payment of the VAT. The Appellant's grounds of appeal are based solely on the contention that there is a reasonable excuse for the late payment in each period.

### The hearing

3. At the hearing, there was no appearance by or on behalf of the Appellant. The Tribunal requested the clerk to telephone the Appellant company on the contact number on the notice of appeal to confirm whether anyone intended to be present at the hearing. The clerk informed the Tribunal that a person contacted on that number had advised that the managing director of the company was not present in the office, and that the company had not received any notification of the hearing.

4. The Tribunal invited Mr Hilton's submissions on how the Tribunal should proceed in the circumstances. Mr Hilton submitted that the Tribunal should proceed to hear the appeal in the Appellant's absence pursuant to rule 33 of the Tribunal's Rules.

5. The Tribunal took into account the following matters.

6. By a letter dated 11 December 2014, HMCTS advised the Appellant that the Appellant had not complied with directions issued by the Tribunal on 26 September 2014. In a letter of response dated 17 August 2014, the Appellant denied having previously received the directions.

7. HMRC subsequently sent notices of hearing dated 6 January 2015, advising the parties that this appeal was listed for hearing on 5 March 2015. At that hearing there was no appearance by or on behalf of the Appellant. The circumstances are set out in the Tribunal's decision and directions dated 20 March 2015. This decision records that on the date of that hearing, the clerk telephoned the Appellant company at the request of the Tribunal to check whether Mr Russell (the managing director of the

Appellant) would be attending the hearing, and the Appellant company advised that he would not due to a family emergency. The hearing of the appeal was adjourned. Paragraph 3 of the 20 March 2015 decision stated that the Appellant shall by 2 April 2015 “furnish to HMRC and the Tribunal appropriate evidence, such as a medical certificate or similar, outlining the nature of the ‘family emergency’”. That decision also stated that it was highly unlikely that a further adjournment would be allowed. The decision also encouraged the Appellant to provide HMRC with greater detail as to the reasons why the returns and payments were late.

8. In a letter to the Appellant dated 6 July 2015, the Tribunal noted that the Appellant had not complied with the request in paragraph 3 of the Tribunal’s 20 March 2015 decision and directions. The letter requested the Appellant by 20 July 2015 to provide the requested information or to confirm if the appeal is not being pursued.

9. The Appellant failed to respond to this letter. This led the Tribunal to issue a further direction dated 16 October 2015, which provided that unless the Appellant within 14 days confirmed that it intended to proceed with the appeal and complied with paragraphs 2 and 3 of the 20 March 2015 decision and directions, the appeal may be struck out without further reference to the parties.

10. On 27 October 2015, Mr Russell sent an e-mail to HMCTS (from the e-mail address to which notice of the 6 April 2016 hearing was subsequently sent). In that e-mail he confirmed receipt of the 16 October 2015 direction. He said that the reason for his non-attendance was ill health on his part which had now been resolved, and he requested that the appeal proceed.

11. By a letter to Mr Russell dated 26 November 2015 (sent to the e-mail address to which notice of the 6 April 2016 hearing was subsequently sent), HMCTS advised that the Appellant had still failed to comply in full with the 16 October 2015 direction, as the Appellant had not provided any evidence of the claimed illness of Mr Russell that had prevented his attendance at the previous hearing. The letter stated that unless such evidence was provided, it was unlikely that any future hearing would be adjourned for any reason at the Appellant’s request.

12. On 30 November 2015, Mr Russell sent an e-mail to HMCTS (from the e-mail address to which notice of the 6 April 2016 hearing was subsequently sent) attaching a letter. In that letter he acknowledged receipt of the HMCTS 26 November 2015 letter, and requested that the hearing be held at a more convenient venue.

13. By a letter dated 27 January 2016, HMCTS informed the Appellant of the date, time and place of the 6 April 2016 hearing. That letter was sent to the Appellant to the e-mail address from which correspondence in this case had last been sent by the Appellant (that is, the e-mail address from which Mr Russell had sent the 30 November 2015 letter). It is unclear whether the notice of hearing was sent only by e-mail, or whether it was also sent by post.

14. In the circumstances, the Tribunal was satisfied that it should hear the appeal on 6 April 2016 in the Appellant's absence. The Tribunal considered that reasonable steps had been taken to notify the Appellant of the hearing, and that the requirement of rule 33(a) was met. For purposes of rule 33(b), the Tribunal was also satisfied that  
5 it was in the interests of justice to proceed with the hearing, having regard to the following. The Appellant had been advised by the 26 November 2015 HMCTS letter that unless evidence was provided of the reasons for Mr Russell's inability to attend the previous hearing, it was unlikely that any future hearing would be adjourned for any reason at the Appellant's request. Mr Russell had acknowledged receipt of 26  
10 November 2015 letter, but had not provided the requested evidence. Nor had the Appellant provided that evidence within the timeframes previously specified in the 20 March 2015 Tribunal decision and the 6 July 2015 HMCTS letter. In all the circumstances, the Tribunal did not consider it plausible that the Appellant had not received the notice of the 6 April 2016 hearing. The Appellant therefore might not  
15 attend the hearing even if the matter were adjourned or postponed. Mr Hilton was present and had prepared for the hearing. Unnecessary adjournments or postponements on the day of hearing are inconsistent with the public interest in judicial efficiency. Rule 38 of the Rules makes provision for a decision of the Tribunal to be set aside in circumstances where the Appellant or his representative  
20 were not present at the hearing, if it is in the interests of justice to do so (rule 38(2)(d)). The Tribunal accordingly proceeded with the hearing.

### **The relevant legislation**

15. Section 59 of the Value Added Tax Act 1994 states in relevant part as follows:

- 25 (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—
- ...
- 30 (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 (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
- 40 (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.

...

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

5 (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.

10 (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—

15 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

20 (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.

25 ...

(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—

30 (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

35 (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).

40 ...

16. Section 71(1) of the Act states in relevant part as follows:

- (1) 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. The effect of s 108 of the Finance Act 2009 is that a person will not be liable to a penalty for failing to pay VAT by the due date if the person requests a time to pay agreement before the due date, if the request is granted, and if the person complies with the terms of the agreement.

### **The Appellant's appeal and the HMRC response**

18. The Appellant's grounds of appeal state as follows:
- (1) The Appellant company has had a "difficult journey"; it was only just coming into profitability and for a considerable period it was uncertain if it would survive so that the director effort was largely focused on rescue.
  - (2) The Appellant company had a rogue manager in one of its offices who was dismissed in January 2014, which took up considerable time, effort and cost.
  - (3) The Appellant company had a change of finance manager in 2014, and the person who covered the role in the interim had health complications.
  - (4) There had been difficulties obtaining payments from clients, and some bad debts.
19. The HMRC case is as follows. Insufficiency of funds is not a reasonable excuse (see paragraph 16 above). HMRC sent the Appellant an information sheet on how to avoid surcharges. It is not clear from limited information provided by the Appellant how the difficulties referred to affected the Appellant's ability to meet its VAT obligations. It is not reasonable to expect the public purse to support company finances on a long term basis. The default surcharge regime is not disproportionate (reliance was placed on *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC)).

### **The Tribunal's findings**

20. The burden of proof is on the Appellant to establish the existence of circumstances amounting to a reasonable excuse, on a balance of probability.
21. The Tribunal has considered the information before it, and in particular the Appellant's grounds of appeal and the letter from the Appellant to HMRC dated 19 August 2014.

22. It is noted that the Tribunal's 20 March 2015 decision encouraged the Appellant to provide HMRC with greater detail as to the reasons why the returns and payments were late. Despite this, greater details have not been provided.

5 23. Insufficiency of funds is not a reasonable excuse for late payment of VAT (see paragraph 16 above).

24. Therefore, the fact that a company is unprofitable (whether because it is in a start-up phase or otherwise) is not a reasonable excuse for late payment of VAT.

10 25. For the same reason, late payment or non-payment of debts by debtors is not of itself a reasonable excuse, even where the amounts involved are significant by reference to the amount of VAT owing. For the principle in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 to apply, it is necessary to establish that this insufficiency of funds caused the default, and that the exercise of reasonable foresight and due diligence would not have avoided the insufficiency of funds. The material submitted by the Appellant is insufficient to establish this.

15 26. Insufficient information and evidence has been provided to establish that other matters relied upon by the Appellant could amount to a reasonable excuse in this case.

### **Conclusion**

27. The Appellant has not discharged its burden and the appeal is accordingly dismissed.

20 28. 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  
25 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

30 **DR CHRISTOPHER STAKER**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 12 APRIL 2016**