



Neutral Citation: [2024] UKFTT 001009 (TC)

Case Number: TC09347

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/16656

VAT Default Surcharge – whether notice properly served – S7 Interpretation Act 1978 – reasonable excuse considered – appeal ALLOWED IN PART.

Heard on: 23 May 2024

Judgment date: 05 November 2024

Before

**TRIBUNAL JUDGE SUSAN TURNER
CHRISTOPHER JENKINS**

Between

FOSTER AND SONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mark Foster, director, and Seamus Ryan, accountant

For the Respondents: Hifsa Shabir, litigator of HM Revenue and Customs’ Solicitor’s Office

A summary decision was issued to the parties on 25 June 2024. A request for a full decision was subsequently received from the Appellant. This is our full decision in this appeal.

DECISION

INTRODUCTION

1. Foster and Sons Limited (Foster & Sons) appeal against VAT default surcharges imposed under s 59 Value Added Tax Act 1994 (VATA) for the late payment of VAT in respect of accounting periods 08/21; 11/21; and 08/22. The total amount of the surcharges under appeal is £9,068.03.

2. The form of the hearing was V (video) and all parties attended via the Tribunal's video hearing platform. We referred to a bundle of legislation and authorities of 157 pages; a document bundle of 42 pages; a supplementary document bundle of 21 pages; and a statement of reasons submitted by the Respondents.

3. 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.

BACKGROUND AND FACTS

4. Foster & Sons is in the business of providing transportation support activities and was first registered for VAT in August 2020 at the time it was incorporated. Its registered address was provided to HMRC as Tudor Court and its principal business address was at Oakbank.

5. In January 2024, Foster & Sons' principal business address was changed in HMRC's systems to Tudor Court.

6. A number of VAT periods are relevant to this appeal as follows: 02/21; 05/21; 08/21; 11/21; and 08/22. For each of these periods, VAT was paid after the due dates. For 02/21, the VAT return was also filed late.

7. Foster & Sons submitted VAT returns for periods 08/21; 11/21; and 08/22 on time, but the VAT due for the same periods was paid after the due dates. As these defaults followed earlier defaults for periods 02/21 and 05/21, the surcharges were calculated at 5% for the 08/21 period; 10% for the 11/21 period; and 15% for the 08/22 period, making total default surcharges of £9,068.03.

8. Upon request of Foster & Sons, HMRC conducted first and second reviews into the VAT surcharges for 08/21; 11/21; and 08/22. On each occasion, in November and December 2023, HMRC upheld the surcharges.

9. On 27 November, Foster & Sons appealed to this Tribunal.

THE ISSUES

10. The Tribunal considers first whether the VAT surcharges under appeal, and the default surcharges which were material to these surcharges, were correctly issued. The burden of proof rests with HMRC to demonstrate, on the balance of probabilities, that the penalties were due.

11. The Tribunal next considers whether there could be a reasonable excuse. The burden of proof rests with Foster & Sons to demonstrate, on the balance of probabilities, that a reasonable excuse exists.

12. If the surcharges were correctly issued, unless there was a reasonable excuse for the late payments, the surcharges must stand.

THE LAW

Liability to the surcharge

13. A liability to a default surcharge arises under s 59 VATA if a person fails to file a VAT return or the amount of VAT on that return is not received by HMRC by the due date.

14. In this case, there is no dispute that there were late payments of VAT for the periods under appeal and the periods material to those periods.

Service of the surcharge notice

15. A surcharge liability notice (surcharge notice) is sent to the taxable person for a default which carries a warning that a liability to a surcharge will arise if there are any further defaults within the next 12 months (the surcharge period). A default surcharge is imposed at a rate of 2% of the outstanding VAT at the date of the surcharge for a first default within a surcharge period. A default surcharge is imposed at a rate of 5% of the outstanding VAT at the date of the surcharge in respect of a second default within a surcharge period. This percentage increases with any subsequent default to 10% and then 15%. Upon each default, the surcharge period is extended by 12 months.

16. Macpherson J concluded in *Customs and Excise Commissioners v Medway Draughting and Technical Services Ltd* [1989] STC 346 that the whole scheme of surcharges depends upon the service of the surcharge notice.

17. Under s 98 VATA, a surcharge notice is served on a person if sent by post and addressed to the last or usual residence or place of business of that person. In accordance with s 7 Interpretation Act 1978 (IA 1978), service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the surcharge notice unless the contrary is proved.

18. The burden of proof rests with HMRC to demonstrate service of the surcharge notices on the balance of probabilities. Where this is demonstrated, it is for Foster & Sons to prove, on the balance of probabilities, the contrary.

Reasonable excuse

19. Finally, under s 59(7) VATA, a surcharge does not arise if a person has a reasonable expectation that the payment would reach HMRC within the due date or a “reasonable excuse” for the failure to submit a return or make a payment within the due date. Although there is not a definition of reasonable excuse in the legislation, it is “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]). However, insufficiency of funds or reliance on another person is not a reasonable excuse under s 71 VATA.

20. This Tribunal is required to approach the question of reasonable excuse in accordance with the decision of the Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) at [81]:

“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?”

SUBMISSIONS AND EVIDENCE

Service of the surcharge notice

21. The Tribunal heard that Foster & Sons had not been aware of any of the VAT default surcharges because the surcharge notices had not been received. They had first become aware of the surcharges when Mr Foster received a demand addressed to Tudor Court in September 2023.

22. The principal business address of Foster & Sons at Oakbank was merely a small part of an Amazon warehouse, and Mr Foster had used a chair and desk at this location to carry out administrative work, as he had no alternative business premises.

23. While Mr Foster had provided the Oakbank address to HMRC, he had not been aware that this address would be used for correspondence. Although Mr Foster had registered for VAT upon setting up the business, he had not taken professional advice at this time given the difficulties presented by Covid. He therefore did not think subsequently to notify HMRC about any change of address.

24. We heard that, in January 2021, the Amazon warehouse moved away from Oakbank. From this time until 1 November 2021, the warehouse premises at Oakbank were unmanned, there was no postbox to receive delivery of mail, and no post delivered to the Oakbank address was forwarded to Foster & Sons.

25. The following documentary evidence was provided to the Tribunal on behalf of Foster & Sons:

(1) An undated letter on headed paper from Amazon Logistics, attached to an email to Mr Foster dated 14 May 2024, stating that Amazon Logistics ceased operations from a delivery station with an address at the Channel Business Park, Belfast. It says that no delivery service providers were in operation at that site after 1 January 2021.

(2) A letter dated 25 January 2024 to Mr Foster from the estate manager of the Titanic Quarter in Belfast. This letter confirms that Amazon UK Services vacated a business unit at Channel Commercial Park on 1 July 2021. This letter goes on to say that the property was vacant until 1 November 2021, that there was no post box or method to receive mail, and that the property was unmanned during this time.

26. We understand that Oakbank is the same place as the Channel Commercial Park, or Channel Business Park, and they indeed appear to share the same postcode.

27. We note that the estate manager says that the premises were vacant from 1 July 2021 until 1 November 2021, rather than from 1 January 2021, when Amazon Logistics ceased operations.

28. For HMRC, we heard from Ms Shabir that surcharge notices had been sent to the Oakbank address and that no post had been returned to HMRC as undelivered.

29. Ms Shabir presented documentary evidence that surcharge notices had been posted to the Oakbank address in the form of an HMRC certificate detailing extracts from print service records of Communisis, who provide print and despatch services to HMRC. This was supplemented by evidence from HMRC's own systems showing when surcharge notices had been issued.

30. The data in HMRC's systems was consistent with the data in the Communisis document, save for period 02/21. For this first default period, unlike for the other periods, the Communisis document records N/A rather than dates for printing and despatch.

Reasonable excuse

31. We heard that Foster & Sons was successful as a business, but the start-up proved challenging, taking place in the midst of the covid-19 pandemic.

32. In addition to submissions and evidence about the delivery of surcharge notices, we heard that, in May 2021, Foster & Sons changed their banking arrangements. Instructions to make VAT payments were given to the new bank by Foster & Sons in the same way as they had been given to Foster & Sons' previous bank. However, payments from the new bank took longer than expected to process and did not reach HMRC by the due date. Mr Foster had not been aware that payments from the new bank would take longer than payments from the old bank.

33. It was submitted that Foster & Sons had a reasonable expectation that the payment would be made on time as the same payments procedure had been followed with the new bank as with the old.

34. Finally, Foster & Sons made it clear that an accountant had been engaged to assist with meeting VAT obligations and that VAT returns had been filed on time.

35. For HMRC, Ms Shabir submitted that Foster & Sons should have checked the payment processes of the new bank and that it was good business practice to ensure that a taxpayer was familiar with their bank's cut-off times, daily restrictions and clearing times for electronic payments.

DISCUSSION AND DECISION

Service of the surcharge notice

36. We first considered whether the default surcharges were correctly issued. Foster & Sons were in the default surcharge regime for a considerable period of time following several defaults between 02/21 and 08/22.

37. The default surcharge regime depends on the service of surcharge notices as set out at [15] to [18] above. Considering the evidence before the Tribunal, we find that the default notices for periods 05/21; 08/21; 11/21; and 08/22, on the balance of probabilities, were properly posted to the address held in HMRC's records at Oakbank.

38. While we accept that Foster & Sons did not receive the surcharge notices and were not aware of the surcharges until September 2023, it is for Foster & Sons to demonstrate that the surcharge notices were not delivered to the Oakbank address.

39. Considering the evidence before the Tribunal, we accept that the warehouse premises at Oakbank were not occupied by Amazon for a number of months during 2021. However, the evidence we have seen as to the receipt of mail at Oakbank is not sufficient to prove, on the balance of probabilities, that the surcharge notices were not delivered. No mail was returned from Oakbank to HMRC, which suggests that the correspondence had been delivered to the address. Furthermore, the estate manager refers to the Oakbank unit being vacant from July to November only, and no surcharge notices were received by Foster & Sons for any of the

periods under default, including for periods 11/21 and 08/22, for which default notices were served after 1 November 2021.

40. Consequently, we find that Foster & Sons did not receive the surcharge notices not because they were not correctly served, but because Foster & Sons did not notify HMRC of the change of address from Oakbank to Tudor Court in a timely fashion.

41. We therefore find that the surcharge notices for periods 05/21; 08/21; 11/21 and 08/22 were properly served by HMRC. However, in respect of the default for period 02/21, HMRC have not demonstrated, on the balance of probabilities, that the relevant surcharge notice was sent as set out at [29] and [30] above. We therefore find that the surcharge notice for the 02/21 period only was not correctly issued.

Reasonable excuse

42. In determining whether there was a reasonable excuse, we have considered all of the evidence provided to us and acknowledge the many challenges and difficulties faced by Mr Foster in setting up his business during the covid-19 pandemic. However, we are unable to find on the evidence before us that these challenges and difficulties, viewed objectively, constitute a reasonable excuse for the failure to make timely VAT payments for the periods under appeal.

43. Notifying HMRC in a timely fashion of the change of address from Oakbank to Tudor Court would have ensured that surcharge notices were received and that Foster & Sons were notified about the consequences of failing to meet VAT obligations on time. While we acknowledge that Foster & Sons instructed an accountant to take care of VAT filing obligations, steps could have been taken to avoid the payment defaults by checking the new bank processes to ensure VAT payments would be made on time. Without carrying out these checks, there could have been no reasonable expectation that the VAT payments would reach HMRC within the due date.

Decision

44. It follows that this appeal is ALLOWED IN PART. The failure by HMRC to demonstrate service of the surcharge notice for 02/21 means that that default for that period does not stand. The surcharge rate applicable to the subsequent periods therefore must be adjusted so that the defaults will be charged at the rates of 2% for the 08/21 period; 5% for the 11/21 period; and 10% for the 08/22 period.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**SUSAN TURNER
TRIBUNAL JUDGE**

Release date: 05th NOVEMBER 2024