



Neutral Citation: [2024] UKFTT 1010 (TC)

Case Number: TC09348

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2023/15870

*VAT Default Surcharge – insufficiency of funds – whether a reasonable excuse exists – no -  
appeal dismissed*

**Heard on:** 12 July 2024

**Judgment date:** 05 November 2024

**Before**

**TRIBUNAL JUDGE SUSAN TURNER  
IAN SHEARER**

**Between**

**RUSSELL SCHEEF**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Russell Scheef in person

For the Respondents: Timothy Hackett, litigator of HM Revenue and Customs’ Solicitor’s  
Office

A summary decision was issued to the parties on 24 July 2024. A request for a full decision was subsequently received from the Appellant. This is our full decision in this appeal.

## **DECISION**

### **INTRODUCTION**

1. This is an appeal against a VAT default surcharge imposed under s 59 Value Added Tax Act 1994 (VATA) for the late payment of VAT for period 01/23 in a total amount of £12,486.74.
2. The form of the hearing was V (video) and all parties attended remotely via the Tribunal's video hearing platform. We referred to a bundle of legislation and authorities of 157 pages; a hearing bundle of 102 pages; a statement of reasons prepared by the Respondents; and additional documents submitted to the Tribunal by Mr Scheef on 2 May 2024.
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**

4. Mr Scheef is in the business of letting and operating real estate.
5. Mr Scheef first registered his business for VAT in 2009.
6. Mr Scheef is founder, owner and manager of another business, All Outdoor Limited, which failed during 2023.
7. This appeal is in respect of the 01/23 period, for which Mr Scheef submitted the VAT return one day late, on 8 March 2023. The VAT for this period was not paid by the due date.
8. The 01/23 default followed nine earlier payment defaults, for periods: 10/20; 01/21; 04/21; 07/21; 10/21; 01/22; 04/22; 07/22; and 10/22, therefore the surcharge under appeal was calculated at 15%.
9. For the first four earlier defaults and the period under appeal, the VAT return was also filed late.
10. As at the date of the hearing, no VAT had been paid for any of the periods of default, including the period under appeal.

### **THE LAW AND ISSUES**

11. 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 shown on that return is not received by HMRC by the due date.
12. 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 second default within a surcharge period carries a penalty of 5%, a third default carries a penalty of 10%, and fourth and subsequent defaults carry a penalty of 15%.
13. In this case, there is no dispute that the VAT for period 01/23 and for the earlier periods was not received by the due date or that the VAT returns for periods 10/20; 01/21; 04/21; 07/21; and 01/23 were not filed by the due dates.
14. Under s 59(7) VATA, a surcharge does not arise if a person has 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]).

15. There are two situations which will not constitute a reasonable excuse under s 71 VATA: insufficiency of funds to pay any VAT due; or reliance on another person.

16. 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?”

17. The issue before this Tribunal is whether there was a reasonable excuse for the late payment of VAT and the late filing of the VAT return for the 01/23 period.

18. The burden of proof rests with Mr Scheef to demonstrate that a reasonable excuse exists.

#### SUBMISSIONS AND EVIDENCE

19. Mr Scheef told the Tribunal that his property business first faced difficulties during the Covid-19 pandemic. He described this period, when tenants stopped paying rents and there was a block on evictions, as chaos. Problems at this time caused a fall in Mr Scheef’s business income.

20. Mr Scheef also said that he had been aware that VAT payments to HMRC were outstanding and that he had planned to clear the defaults.

21. We note that Mr Scheef contacted HMRC during July 2021 seeking a time-to-pay arrangement. On that occasion, his request was declined by HMRC, who explained that this was because no VAT returns had been submitted since 01/20.

22. While the VAT returns for periods 10/20; 01/21; 04/21; 07/21; and 10/21 were all filed on 7 December 2021, and then the VAT returns during 2022 were filed by their respective due dates, no further telephone contact was made with HMRC until March 2023, after the 01/23 due date had passed.

23. We heard that clearing the VAT defaults became impossible when Mr Scheef’s other business, All Outdoor Limited, failed during 2023.

24. All Outdoor Limited had been a successful camping and outdoor business, which specialised in online sales, with an annual turnover by 2017 of around £4.8 million. The company had three warehouses in which goods were stored, and Mr Scheef was clearly passionate about this business, of which he was founder, owner and manager.

25. In an attempt to scale up the business of All Outdoor Limited, and with a view to his own retirement, Mr Scheef entered into discussions with a third party business partner during 2021 and then entered into an agreement with them in around August 2021. It soon became apparent that efforts to scale and grow the business were unsuccessful, and the company entered administration in May 2023.

26. Since this time, Mr Scheef has been embroiled in a legal dispute in connection with the failure of All Outdoor Limited, which he told the Tribunal was due to the malpractices of the new business partners.

27. As a consequence, Mr Scheef was faced with demands for the repayment of several debts, including a personal guarantee he had given in connection with All Outdoor Limited and a large bill for legal fees.

28. The £12,486.74 VAT surcharge for 01/23 came as a huge surprise to Mr Scheef. We understand that this large surcharge was incurred when Mr Scheef tried to raise money to meet his VAT obligations by selling one of his rental properties, greatly increasing the amount of VAT assessed for that period.

29. However, rather than use the sale proceeds to meet his VAT liability, Mr Scheef used them to meet obligations and substantial debts incurred in connection with the failure of All Outdoors Limited.

30. Upon realising the size of the VAT surcharge in March 2023, Mr Scheef contacted HMRC. He wished to work out how to budget to meet his outstanding VAT obligations. In particular, he told HMRC he was prepared to sell another of his rental properties. As of the date of this hearing, Mr Scheef had tried to effect that sale but it had proved difficult and so far unsuccessful.

31. Mr Scheef was very clear that he accepted that he was responsible for VAT payments and intended to make full payment of outstanding amounts. He asked the Tribunal to remove the surcharge for the 01/23 period to allow him to reach an agreement on the remaining sums with HMRC.

32. For HMRC, Mr Hackett submitted that this appeared to be a case of insufficient funds. While insufficiency of funds or reliance on another person is not a reasonable excuse under s 71 VATA, Mr Hackett acknowledged that the underlying reasons for the insufficiency of funds can in some circumstances constitute a reasonable excuse in accordance with *Customs and Excise Commissioners v Steptoe* [1992] STC 757.

33. Mr Hackett reminded the Tribunal that Mr Scheef had continued to trade throughout the period of default and submitted that Mr Scheef should have put measures in place to ensure his VAT obligations would be met. Mr Hackett said that Mr Scheef had instead chosen to meet alternative obligations linked to the failure of All Outdoor Limited and had not contacted HMRC to inform them of his difficulties or to arrange a time to pay arrangement before the 01/23 due date.

#### **DISCUSSION AND DECISION**

34. In determining whether there was a reasonable excuse for the late payment of VAT, we have considered all of the evidence provided to us.

35. While s 71 VATA specifically excludes insufficiency of funds from being a reasonable excuse, we have considered the reason for the insufficiency of funds in accordance with *Steptoe*, as the cause of the insufficiency might itself constitute a reasonable excuse.

36. In this case, a 15% penalty has been imposed for period 01/23 because this default followed several earlier defaults. While Mr Scheef made some attempts during 2021 to contact

HMRC to discuss his financial difficulties, no contact was made between July 2021 and March 2023, when Mr Scheef became aware of the penalty imposed for period 01/23. Throughout this time, Mr Scheef was aware of the outstanding VAT from earlier default periods and of the existing surcharges and should have been aware of the consequences of failing to make payment on time. We understand that he did want to meet his VAT obligations but was prepared to accept the smaller penalties imposed for earlier defaults while he tried to stabilise his financial position. However, a pattern of non-payment of VAT is evident for a substantial period before the 01/23 default.

37. We acknowledge with some sympathy the very difficult circumstances faced by Mr Scheef as he attempted to scale and grow All Outdoor Limited, an endeavour which resulted in disappointment as the business he had been so passionate about fell into administration following an association with a third-party commercial partner which appears to have been disastrous.

38. However, we find that the difficulties caused by the failure of All Outdoor Limited around the time of the 01/23 due date, viewed objectively, are not sufficient to amount to a reasonable excuse for the late payment of VAT for the 01/23 period. Notwithstanding the difficult and stressful situation Mr Scheef found himself in, we consider that Mr Scheef, with his level of experience, ought to have taken steps to avoid the default or to contact HMRC before the due date to explain his situation and arrange a time-to-pay arrangement.

39. It follows that this appeal is **DISMISSED**.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

40. 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: 05<sup>th</sup> NOVEMBER 2024**