

# WHEN IS A REASONABLE EXCUSE NOT A REASONABLE EXCUSE?



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In the 28 years I have specialised in VAT I do not think I have ever seen so egregious a case of maladministration of the VAT system as that in the case of Sandpiper Car Hire Ltd.

The case is a default surcharge case. The default surcharge regime applies when a taxpayer is either late in submitting their return, or fails to pay the amount of VAT due on a return in full by the due date. The surcharge is based on a percentage of the VAT due on a return, or an estimate of what HMRC think is due in cases where the return has not been submitted. The percentage increases each time a default occurs, and the only way to get out of the regime is to submit and pay in full on time for four consecutive quarterly return periods.

HMRC win most default surcharge cases since one either has, or has not, submitted and paid in full by the due date and the only way one can escape a surcharge is by having a reasonable excuse for a default. The legislation says that certain things do not count as a reasonable excuse, such as reliance on a third party.

What then was so bad about HMRC's stance in the case of Sandpiper? The Company was set up by its sole shareholder, owner and director in 2007. The owner had Ménière's disease. Ménière's is a disease which causes hearing loss, and because it affects the ears can also cause loss of balance and for a sufferer to pass out. There is no cure and attacks can last for several days.

The owner set the company up after having been diagnosed with the disease in the hope he could continue to earn a living. He acquired several cars on HP and installed a manager to run the taxi company. Shortly before setting the company up the owner had had a routine blood test as a part of monitoring his Ménière's. By (fortuitous) mistake his blood sample was also tested for carcinoma which showed he had cancer. He was given an appointment at the Royal Marsden Hospital where further tests showed he required an urgent operation to remove a tumour.

Prior to the operation he met with his manager and solicitor and instructed the manager to run the business in his absence, and instructed his solicitor to sell the business to the manager if he did not survive the operation.

Unfortunately during the operation the surgeon clipped a major nerve to the owner's spine. This necessitated several further operations over the following years and left the owner with significant mobility difficulties and in severe pain.

When the owner was eventually able to return to work he found

the manager had set up his own business and taken the main client with him significantly reducing cash flow and profit.

By July 2010 turnover had increased, a new manager was in place, but profitability remained under pressure and the company had significant debts, particularly in relationship to the vehicles. Shortly afterwards the owner had to have another operation to try to ameliorate the damage to his back and restore some of his mobility. The plan was to insert a box into his spine which delivers electric shocks to the leg muscles so they would move. But, during the operation the surgeon found that the spine was crumbling. As a result, they closed the incision and referred the owner to another hospital.

The box was installed after an operation at the second hospital, but the night after the owner left hospital he suffered a significant post-operative discharge from the wound site. His son drove him to A&E and he had an immediate operation. He was told that had he arrived half an hour later he would have died.

When he was eventually able to return to work, he discovered that the second manager had sold four of the company's hire purchase cars for £65,000 and pocketed the money. He reported the theft to the Fraud Squad, but the company had to find around £80,000 to repay the finance house which had lent the money as part of hire agreements for the vehicles.

The theft, together with the owner's absence in hospital caused the company to default on its first VAT payment. The

owner arranged to pay the amount due under a time to pay arrangement. The company then began to factor its debts but received only 64% of the amounts due when the drivers were entitled to receive 70% of the bookings, and so this did not assist with cash-flow as had been hoped. Moreover the factoring company charged a transaction fee which it should not have done which cost the company £18,500 over four years. It has not been able to recover its money.

In an effort to expand its business it invested in a website and recorded a domain name with a company called Sky Design for £3,500. However the company then demanded a further £1,850. When Sandpiper refused to pay this, the company sold the use of the website to a rival taxi company with the result that when someone contacted the website they were directed to the rival company.

Sandpiper successfully sued the company in the County Court, but they were only awarded the original £3,500 and £150 to be paid at £50 per month. The owner was advised that he had a good case for a further claim of theft of intellectual property, but as this would have cost between £5,000 to £10,000 to take the case which he could not afford no further claim was made. During the winter of 2014/2015 the Company's business was affected by severe flooding which affected the geographical area in which it operated.

Throughout the period of the defaults the company generally submitted its returns on time, but was continually behind with its payments. The owner continued to be frequently absent from the business with further operations and the ongoing attacks of Ménière's. The HMRC contact records showed numerous threats of distraint, but these were not followed up as the company had no assets.

The owner continued to run the business to try and pay off his debts, and in late 2015 sold part of his business for £45,000 which he used to clear a substantial part of the company's VAT debts. At the end of 2015 the company deregistered from VAT because of reduced turnover. Since then the company continued to operate at a much reduced level with the aim of raising sufficient money to pay HMRC.

The owner had spent significant time trying to find out exactly how much was still owed and he had identified three payments which did not appear to have been credited to his VAT account. HMRC subsequently confirmed that two of these amounts had been credited to the company's PAYE account, and he then wrote to HMRC explaining that he was deaf and unable to hear and asking for the money to be transferred to his VAT account. The response to this was a letter saying that they could not carry out the transfer but that his query had been forwarded to the PAYE office and the letter ended, "should you need to speak to them regarding this matter, they can be contacted on" followed by a phone number.

The owner wrote two further letters only to receive a reply which said, "as stated in my previous reply you would need to speak to the PAYE team direct on telephone number...". As the owner's hearing is seriously impaired his wife called the

number but it was unobtainable. She eventually found a correct number, but the PAYE team refused to speak to her as she was not an officer of the company. Further correspondence followed and eventually one of the letters was treated as a complaint. The response from the complaints team denied that HMRC had not considered his illness and went on to say, "any queries concerning your PAYE credit should be addressed [to the PAYE section] and you should contact them on" followed by a telephone number.

At the hearing, the hearing loop in the Tribunal was not compatible with the owner's hearing aids but as he could lip read the Tribunal reconfigured the room so that the parties were sitting as closely together as possible.

HMRC argued that none of the above points constituted a reasonable excuse and that "a taxable person wishing to be compliant in his tax affairs would have put arrangements in place for both the VAT returns and the required payment to be submitted on time".

When the Tribunal reminded the HMRC representative that he had put in place managers to run the business whilst he was in hospital, one of who had set up a rival business and another who had fraudulently taken business assets worth around £80,000, HMRC's response was that reliance on a third party was not a reasonable excuse.

In response to a question from the Tribunal as to how they could reconcile these two statements, HMRC said that the owner should have made "alternative arrangements", but they could not explain how the owner could have done this without relying on a third party.

Needless to say the Tribunal had no hesitation in finding that the company had a reasonable excuse. The reasonable taxpayer in the owner's position on behalf of the company, with his serious and life threatening health conditions and in continual pain, would have delegated to a manager; faced with the financial consequences which followed that breach of trust, he would have reported the manager's fraud to the police, factored the debts, sought new business, and pursued in the courts a business which had sold him a website but subsequently operated it on behalf of a competitor.

The reasonable person would also have tried his best at all times to pay HMRC and the owner did all these things finally selling a part of his business to try and settle the company's VAT debts.

As regards the crass behaviour of HMRC continually writing to a person over 70 who they knew to be deaf and asking him to call a number, the Tribunal made a number of comments on HMRC's statements made in compliance with the Equality Act 2010 that persons in need of extra support would receive it.

In reference to the HMRC guidance on dealing with vulnerable people the Tribunal stated that there was no indication that any of this guidance had been followed.

Like many VAT specialists I started my career in, what was then Customs & Excise, now HMRC. I worked with many conscientious officers doing their best to administer the tax fairly. I continue to deal with VAT officers who in the vast majority of cases act fairly. But this case is appalling, there is simply no indication that anyone with an iota of common sense actually even thought about it. If what the owner went through was not a reasonable excuse for the company's defaults then what would be. How it got to Tribunal is beyond me, and for

HMRC to argue there was no reasonable excuse is just absurd, I could not have looked the Judge in the face if I was making such an argument.

The only comfort I take from the case is that we have a judiciary who consistently see through the ridiculous, whether it is a taxpayer with a contrived avoidance scheme or HMRC abusing their powers.

For more information or if you have any questions regarding the case of Sandpiper Car Hire Ltd, please speak to your usual haysmacintyre contact, or [Phil Salmon](#), partner and head of [VAT](#).



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