[2012 UKFTT 175 (TC)

TC01861

Appeal number: TC/2011/02233

Default surcharge - change in relationship with major customer – impact on cash flow – possible illness of accountant – reasonable excuse – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Controlled Security Management **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S CUSTOMS and EXCISE **Respondents**

TRIBUNAL: Judge Judith Powell
IB Abrams

Sitting in public at 45 Bedford Square, London WC1 on 5 January 2012

Mr Julian Rowley and Mrs Pauline Rowley, both accountants, for the Appellant

Mr Bruce Robinson and Ms Erika Carroll with HM Revenue and Customs, for the Respondents

DECISION

Application to hear appeal out of time

This was originally an appeal concerning the period 10/10 and the default surcharge imposed by HMRC for that period. The appeal was made late but HMRC raised no objection to this and the application for it to be heard out of time was granted. It became evident that both parties also expected the appeal to concern the periods 10/05 to 10/10; there was some question whether a formal appeal had been submitted but, again HMRC raised no objection to the appeal being extended to these periods as well and the application for the appeal to cover them was granted.

The Appeal

1. The appeal concerns default surcharges and the reason for the payment being late is the same in each case up to and including the period 7/10; the appeal for the 10/10 period was withdrawn but of course the outcome of the other appeals might have a bearing on the amount of any penalty for that period since the calculation of any default surcharge depends in part on the history of the matter. The Appellant says it has a reasonable excuse for the tax being paid late. HMRC disagrees. If the Appellant shows us that it does have a reasonable excuse for any period then the appeal will succeed; if not the appeal is dismissed.

Facts

2. The Appellant's business is the provision of security management of information and personnel and "close management". Until 2005 it had one important customer who paid a regular sum on a monthly basis for services the Appellant provided to it. In the middle of 2005 that customer gave abrupt notice of its intention to change these arrangements and, instead, engage the Appellant to give discrete advice on an occasional basis for which it agreed to pay as and when the advice was required; in addition it negotiated a reduced charging basis. This meant the Appellant no longer had that reliable cash flow with the result that the partners concentrated all their efforts on chasing new business and trying to enforce timely payment of invoices.

3. Although the accounts do not reveal that the cash flow was severely affected by this change we accept that there was a down turn in profit and that although, if there was less business, the result should also have meant that fewer contractors were required so that overheads were reduced we accept that the changed cash flow had some impact and that the liability to pay contractors for work already done or which was committed to be done might continue after this change in the relationship with a significant customer. We do not find that, if the Appellants had been adequately advised of the VAT payments that fell due, they would have been unable to pay them; the main effect of the change in their business was that they focussed on winning new business and chasing payments for work done rather than on their VAT affairs.

4. The VAT affairs of the Appellant at the time of the defaults were dealt with by Chanter, Browne and Curry, a firm of accountants. The person dealing with the day to day affairs at that office was a Mr Bob Makison who was a book keeper. There was some suggestion he became progressively unable, for health reasons, to deal with his work but there was no convincing evidence about this. The Appellant may not have received regular and clear advice about their VAT affairs but there are a number of indications that the VAT was not up to date well before the period in question. Twelve VAT returns for the period 10/02 up to 07/05 were submitted together at the beginning of 2006 – this being a period starting long before the change in the Appellant's relationship with their important client. A letter written about this by Chanters to HMRC on 2 February 2006 suggested the late submission of the returns was caused by the partners being continually out of the office; we could not conclude whether the defaults were caused by the partners failing to supply Chanters with the information or because they were not asked for the information on time or because, having received the information, Chanters simply did not process it for signature and payment. Whatever the reasons may have been (and there may have been some fault on the part of the accountants) the letter from Chanters to HMRC mentions that the partners had asked Chanters to contact them (HMRC) about threatened bankruptcy proceedings and that one of the partners (Mr Jenkin) was already in contact with HMRC in February 2006. An internal HMRC record of telephone calls supports this and we find it is likely there was direct contact. We accept that the partners were away from the office a great deal on business as part of their normal business life, that security issues required them to have an accommodation address so that they were not easy to reach and that they did rely heavily on Chanter Browne and Curry paying them fairly substantial professional fees.

5. For the Appellant it was suggested that the partners thought the VAT affairs had been brought up to date in 2008 (relying on a letter from HMRC to Chanters) but this can only be as a result of misinterpreting the letter from HMRC of 17 December 2008. The letter in fact mentioned that there were outstanding returns – the relevant passage reads "As you can see there are many outstanding returns. Please submit these as soon as possible. I can advise that the debt was clear as at 20 May 08 but as the returns have not been submitted the debt will obviously change when we receive the returns."

6. By July 2009 when Chanters met with HMRC it was clear that the VAT affairs were not up to date and Chanters explained this to the Appellants. The Appellant say that HMRC should have known the partners were unaware of the difficulties because they did not attend the meeting but we accept that taxpayers often ask their advisers to attend meetings with HMRC without them and so their failure to attend would have been unremarkable. Until May 2010 the Appellants continued to try and resolve matters with HMRC through Chanters but when they failed to do so they approached their present accountants who represent them in this appeal. The new accountants found it difficult to obtain accurate records from Chanters but the VAT affairs have now been brought up to date and although there was some delay by HMRC which resulted in the new accountants making an official complaint the affairs were brought up to date from August 2010 and we do not find that this contributed in any material way to the defaults.

Submissions

7. The Appellants say that the loss of the regular cash flow in 2005 together with inadequate advice from Chanters caused them to default in paying VAT on time and submitting returns and that this was an excuse that lasted throughout the period of the appeal. They also say that HMRC contributed to the problem by failing to recognise that they were unconscious of the delays and then failing to deal promptly with queries from their new advisers.

8. HMRC say that the sales figures before and after the change in relationship with the major client do not show any severe effect on the business and even if there were cash flow problems at that time the impact cannot have lasted throughout the period in question, that there were on-going VAT problems before this time, that there was no real evidence of the accountant's illness and even if his advice was inadequate the partners were aware of VAT issues from early in the period.

The law

9. Section 59(7) Value Added Tax Act 1994 has the effect that if the Appellant can show that there was a reasonable excuse for the default or defaults in question we can allow the appeal and, because the rate at which the surcharge is imposed is progressive, any appeal which is allowed may have the effect of reducing the rate of penalty imposed for defaults where there is no reasonable excuse. If there is no reasonable excuse for any of the defaults the appeal will fail and the surcharges will be payable; and the rate of surcharge for the period immediately following the last default under appeal will remain payable at the rate originally charged.

Our decision

10. We announced our decision at the hearing which is that we did not find there was a reasonable excuse for any of the defaults which were the subject of the appeal. We looked carefully at the first in the series of defaults because it was in relation to these that the loss of the major customer might have afforded a reasonable excuse but we did not find that the circumstances amounted to such an excuse; whilst the underlying cause of shortage of funds is sufficient in some instances to amount to a reasonable excuse there was no convincing evidence that the change in relationship with the major customer did constitute such an excuse in this case and the change in the relationship seems mainly to have diverted such attention as the partners gave VAT matters to searching for new business. There was no real evidence that the VAT default arose because of shortcomings of the accountant and if the advice was not adequate there were indicators to the partners that the VAT affairs were not in order before the defaults occurred.

11. Accordingly we dismiss the Appeal in relation to all periods and this has the effect that the rate of surcharge for the period (not under appeal) 10/10 will remain at 15%.

12. 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.

Judith Powell

TRIBUNAL JUDGE
RELEASE DATE: 28 February 2012