TC02669

Appeal number: TC/2013/00453

VAT – default surcharge – reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LEVANTINE (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE J. BLEWITT
MR DAVID E. WILLIAMS CTA

Sitting in public at Bedford Square, London on 15 April 2013

Mr D. Danil, Director, for the Appellant

Mr Robinson, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. By Notice of Appeal dated 7 January 2013 the Appellant appealed against a penalty, with interest, totalling £12,606.61 for the late payment of VAT in the period 03/12. HMRC did not object to the fact that the appeal was made out of time and we therefore allowed the appeal and proceeded to hear the substantive appeal.

Facts

2. The surcharge for the period 03/12 was raised as a result of the Appellant's failure to render the return and full payment of VAT by the relevant due dates (namely 30 April 2012 and 7 May 2012 respectively). The Appellant was also deemed to have defaulted in periods 12/10, 03/11, 06/11 and 09/11.

3. Having reviewed the case following receipt of the Appellant's appeal to the Tribunal Service, HMRC notified the Appellant by letter dated 14 March 2013 that the Appellant had paid its VAT for the periods 06/11 and 09/11 prior to the due dates applicable to those periods and consequently the default surcharges imposed in respect of those periods were withdrawn.

4. As a result of withdrawing the default surcharges for the periods 06/11 and 09/11 the default surcharge imposed for the period relevant to this appeal was reduced from 15% of the unpaid liability to 5% and therefore totals £3,654.09.

5. In the same letter HMRC also considered the issue of reasonable excuse. It concluded that having entered the default surcharge regime in respect of earlier periods, the Appellant should have been aware of the consequences of late payment in the event of a further default. It considered the Appellant's submission that the default was brought about by time constraints on the director as a result of the loss of strategic members of staff. However it concluded that such circumstances were not out of the ordinary in the current financial climate and therefore did not amount to a reasonable excuse.

6. HMRC had, in a review letter dated 11 September 2012, considered the issue of insufficiency of funds arising from a letter from the Appellant dated 26 July 2012 which referred to "making ends meet". However the Appellant subsequently clarified in its grounds of appeal that it did not rely on insufficiency of funds in support of its appeal. For the sake of completeness, HMRC set out its view in its letter to the Appellant dated 14 March 2013 that it did not accept that the Appellant had taken sufficient steps to make payment by the due date and that there had been no events beyond its control such that could amount to a reasonable excuse.

Submissions

7. Mr Robinson on behalf of HMRC contended that the difficult trading conditions experienced by the Appellant did not go beyond the normal hazards of business and were not so entirely unforeseeable that they could amount to a reasonable excuse in respect of the period 03/12.

8. As regards the issue of proportionality, it having been suggested by the Appellant that the surcharge was unfair and excessive, Mr Robinson relied on the recent case of *The Commissioners for HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) *("Total Technology")* in which it was held that the default surcharge regime does not infringe the principle of proportionality. Mr Robinson also highlighted the fact that the penalty has now been significantly reduced.

9. Mr Danil of the Appellant Company explained the background to the case which, having found him to be an honest and credible gentleman, we accepted as a true reflection of events.

10. He stated that he had started the Company with his sister (who was also present at the hearing) and that it was he who took responsibility for filing VAT returns and making payments. The Appellant has always had a good working relationship with HMRC and makes every effort to comply with its tax obligations.

11. In the period 03/12 the Appellant was 2 days late in making its VAT payment for which it received a penalty in excess of £10,000. On 18 May 2012 HMRC made a demand for payment in a letter to the Appellant which caused Mr Danil to make a number of calls to HMRC to resolve the matter. Unfortunately Mr Danil was either promised a call back, which he never received, or he made contact with an employee of HMRC who had access to a database which contained insufficient information to settle the matter.

12. On 26 June 2012 Mr Danil received another letter from HMRC demanding payment and again he attempted to contact HMRC without success.

13. On 6 July 2012 another letter was received by the Appellant from HMRC in which payment was demanded and reference was made to bailiffs.

14. By 26 July 2012 Mr Danil had still not received the call back from HMRC as promised and consequently he wrote to the Review Team at HMRC in order to explain the circumstances of loss of staff which had led to his making payment late. Mr Danil explained that he understood the consequences of making a late payment but when employees were missing from the factory or there was a machinery breakdown, he was the only person with the expertise to take over which meant prioritising work, which generates employment and income for HMRC, over the Company's accountancy and tax matters.

15. Mr Danil received no response to his letter but instead on 2 August 2012 received a further request from HMRC for payment. On 29 August 2012 Mr Danil managed to speak to an employee at HMRC who informed him that the penalty was on hold until he was contacted by a "technical" employee of HMRC. We should note that it was unclear what a "technical" member of HMRC was, but it seemed reasonable to infer that it was someone who was dealing with the Appellant's case.

16. On 11 September 2012 Mr Danil received a review letter from HMRC which addressed the issue of insufficiency of funds. On 22 October 2012 Mr Danil contacted HMRC again but spoke to an employee who was not aware of his letter of appeal.

17. On 16 November 2012 Mr Danil received a letter setting out the amount of the penalty with interest for his delay in making payment of that penalty. He explained that this was a surprise to him as he had been informed by HMRC that the penalty had been "frozen" while his correspondence was dealt with. A further letter requesting payment was received on 19 November 2012.

18. Thereafter Mr Danil made his appeal to the Tribunal. On 29 January 2013 employees from HMRC's Debt Management Unit attended at the Appellant's premises and requested that either payment be made or they be allowed to calculate the value of assets. Mr Danil explained that he had felt threatened by the aggressive way in which HMRC pursued the debt in spite of his attempts to resolve matters.

19. He explained that he was disappointed by HMRC's conduct in reducing the penalty as it was clear to him that had he not pursued his case, at the cost of time away from his work, HMRC would never have undertaken an in depth review of his case.

Decision

20. We had a great deal of sympathy for Mr Danil who had clearly made significant efforts to resolve the penalty issue over a number of months and at a time when his factory was struggling due to staff shortages. We must note that we only had evidence from Mr Danil regarding the attempts he had made to contact HMRC, however accepting his evidence at face value we could understand his frustration and sense of grievance. That said, the jurisdiction of this Tribunal is limited to looking at whether a reasonable excuse existed for the late payment of VAT; any other matter relating to the conduct of HMRC must be pursued via a separate avenue such as the Complaints Procedure and as we made clear to Mr Danil during the hearing, whether or not he chooses to make a complaint is a matter entirely for him and one upon which we make no comment.

21. Mr Danil accepted that payment in the relevant period had been made late, the reason being that he had made the deliberate choice to prioritise the operational demands of his business over his tax liabilities. Whilst we accepted that the basis for this decision was well-meaning in that it meant the survival of the Appellant Company at a difficult time and generated income for the Revenue, we found as a fact that this could not amount to a reasonable excuse; the onus rests with a taxpayer to ensure that his liabilities are met within the deadlines set by statute. Adherence to such legislation is necessary to ensure consistency and fair treatment amongst taxpayers.

22. We noted that Mr Danil specifically stated that he did not rely on insufficiency of funds in support of his appeal and we therefore did not consider the matter further.

23. As regards the issue of proportionality, Mr Danil stated during the hearing that had the penalty been imposed at first instance in the sum at which it now stands he would not have appealed. We inferred from this that he did not, therefore, argue that the penalty was disproportionate. However for the sake of completeness we should note that we are bound by the Upper Tier decision in *Total Technology* which held that the default surcharge regime does not infringe the principle of proportionality. We also had regard to the amount of the penalty imposed in this case and we were satisfied that the amount itself also did not infringe the principle of proportionality.

24. We noted Mr Danil's comments that payment was made only 2 days after the due date. This issue was also addressed by the Tribunal in the case of *Total Technology* which held that the penalty is for failure to file and pay by the due date, not for the length of delay after the due date. In those circumstances we found as a fact that the short length of default in this case cannot constitute a reasonable excuse.

25. The appeal is dismissed.

26. 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.

J. BLEWITT
TRIBUNAL JUDGE

RELEASE DATE: 19 April 2013