



TC03071

Appeal number: TC/2012/08826

VAT default surcharge - HMRC erred in removing Appellant from annual accounting scheme following a default which occurred due to technical reasons and for which HMRC bore some responsibility - error resulted in reasonable expectation by Appellant of reinstatement to scheme and delayed VAT return and payment - whether reasonable excuse - yes - Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROSS HOBSON t/a WINDMILL DENTAL SUITE Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 ROLAND PRESHO**

**Sitting in public at King's Court Royal Quays Earl Grey Way North Shields on 4
June 2013**

**Ian Coulthard and Mark Hetherington of UNW LLP Chartered Accountants for
the Appellant**

Mrs Rosalind Oliver Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. Ross Hobson T/A Windmill Dental Suite (“the Appellant”) appeals against a
5 default surcharge of £848.19, imposed for his failure to submit, in respect of his VAT
period ended 30.06.12, by the due date, a return and payment of the VAT due.

2. The point at issue is whether or not the Appellant has a reasonable excuse for
submitting a late return and making late payment.

Background

10 3. Section 59 of the VAT Act 1994 (‘VATA’) requires a VAT return and payment
of VAT due on or before the end of the month following the relevant calendar quarter.
[Reg 25(1) and Reg 40(1) VAT Regulations 1995].

15 4. Section 59 VATA sets out the provisions in relation to the default surcharge
regime. Under s 59(1) a taxable person is regarded as being in default if he fails to
make his return for a VAT quarterly period by the due date or if he makes his return
by that due date but does not pay by that due date the amount of VAT shown on the
return. The Commissioners may then serve a surcharge liability notice on the
20 defaulting taxable person, which brings him within the default surcharge regime so
that any subsequent defaults within a specified period result in assessment to default
surcharges at the prescribed percentage rates. The specified percentage rates are
determined by reference to the number of periods in respect of which the taxable
person is in default during the surcharge liability period. In relation to the first default
the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the
second, third and fourth default.

25 5. A taxable person who is otherwise liable to a default surcharge may
nevertheless escape that liability if he can establish that he has a reasonable excuse for
the late payment, which gave, rise to the default surcharge(s). Section 59 (7) VATA
1994 sets out the relevant provisions: -

30 ‘(7) If a person who apart from this sub-section would be liable to a
surcharge under sub-section (4) above satisfies the Commissioners or,
on appeal, a Tribunal that in the case of a default which is material to
the surcharge –

35 (a) the return or as the case may be, the VAT shown on the return was
despatched at such a time and in such a manner that it was reasonable
to expect that it would be received by the Commissioners within the
appropriate time limit, or

40 (b) there is a reasonable excuse for the return or VAT not having been
so despatched then he shall not be liable to the surcharge and for the
purposes of the preceding provisions of this section he shall be treated
as not having been in default in respect of the prescribed accounting
period in question.

6. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

Appellant's Case

7. In March 2011 the Appellant applied to join the VAT 'annual accounting scheme'. A person with a taxable turnover within prescribed limits in the following twelve-month period may apply to join the annual accounting scheme and submit only one VAT return per year. Under the scheme the person makes nine interim payments to HMRC each equal to 10% of the VAT liability for the previous year. The payments must be made by direct debit or by other electronic means and begin on the fourth month of the year. At the end of the year the annual return is submitted together with the final payment consisting of the balance of the VAT liability. The return and payment must be made within two months of the end of the year. The advantages of the scheme include a reduction in the number of VAT returns each year (usually from 4 to 1) and more predictable cash flows.

8. The Appellant's application was allowed and the first period allocated under the scheme was a short period from 1 January to 31 March 2011, to be submitted by 30 April 2011. However the Appellant says that after registering online to submit the return, the return was not physically available to complete. His accountant made numerous telephone calls to HMRC to resolve matters and it was only on 10 May 2011 that the return became available to complete online, that is over a month after the due date. HMRC acknowledged the fault on their part. The Appellant therefore says that the return was not submitted on time as it simply was not available to complete and submit

9. Under the annual accounting scheme payments were due to be collected by direct debit. However following submission of the 03/11 return on 10 May 2011 HMRC then failed to collect the payment of VAT due by direct debit, again due to a technical fault on its part. The Appellant was then required to make the payment of the liability by an alternative method. The Appellant says that these events will be borne out by HMRC's records of telephone conversations with his accountants.

10. The Appellant therefore says that the surcharge for the other 03/11 period should be removed and that in consequence the default which occurred for the 06/12 period in respect of which he claims to have a reasonable excuse, should not have resulted in him being removed from the annual accounting scheme and for the reasons explained below, suffering a further VAT default surcharge.

11. On 2 July 2012 without prior warning, HMRC notified the Appellant that he had been removed from the annual accounting scheme due to the 'default' in period 03/11 and the failure to file a return and make payment of VAT due on 06/12. The Appellant had expected to be reinstated in the annual accounting scheme from 1 April 2012 and says held off submitting his return for the 6/12 period to avoid duplication

of VAT returns. The final decision by HMRC not to reinstate the Appellant in the annual accounting scheme was not received until after the due date for the 06/12 VAT return, but once the decision had been received the return was submitted as soon as possible.

- 5 12. The Appellant therefore submits that he has a reasonable excuse for the 06/12 return and VAT payments being late as he quite properly expected to be reinstated in the annual accounting scheme from 1 April 2012 based on HMRC's recognition that there had clearly been an incorrect default recorded against him for the 03/11 period.

HMRC's Case

- 10 13. HMRC removed the Appellant from the annual accounting scheme on 02.07.2012. The Appellant's accountants wrote to HMRC on 16 July 2012 to ask for reinstatement. HMRC responded on 24 July 2012 advising that due to outstanding tax liabilities totalling £55,953.17, the Appellant was ineligible to use the scheme. The Appellant had therefore been advised he was ineligible to use the scheme prior to the
15 due date for the VAT return in respect of the quarter to 30 June 2012.

14. The statutory due date of 31 July 2012 for the VAT return due for the period 06/12 was extended by way of concession by seven calendar days to 7 August 2012. The direct debit is collected on the third banking day after the extra seven calendar day period. However as no return had been made by the Appellant by 17 August 2012
20 HMRC issued a notice of assessment of VAT and surcharge in the sum of £463.05. The Appellant's return was received by HMRC on 30 August 2012 and payment of the VAT due on 4 September 2012. There was further VAT due for the quarter and the surcharge was increased to £840.19 on 30 August 2012.

- 25 15. HMRC does not accept that the Appellant has a reasonable excuse. Whatever his expectation, there was a requirement to make a VAT return and payment on time. The refusal to reinstate the Appellant into the annual accounting scheme had been sent to the Appellant before the due date.

- 30 16. With regard to the Appellant's assertion that there should not be a default for the period ended 31 March 2011, the return was due by 30 April 2011. HMRC do not allow a seven-day concession under the annual accounting scheme for filing of the return and the agent only called HMRC on 3 May 2011, after the due date, to advise of difficulty filing the return online. The return was eventually filed on 10 May 2012. HMRC then established that there was an error in the return because no amount had been entered in the box which would trigger the direct debit to be collected and that is
35 why the agent was contacted on 2 June 2011 to make payment by another method.

17. HMRC therefore contends that there is no reasonable excuse for the late return and payment of VAT for the quarter ended 30 June 2012.

Conclusion

- 40 18. In short, we accept the Appellant's explanation of events. A VAT default surcharge should not have been levied in respect of the period 03/11. That being the

case, the Appellant should not have been removed from the annual accounting scheme from 1 April 2012 and we accept that he held off submitting his return and payment of VAT due in the reasonable expectation of being reinstated into the scheme. He filed his return and submitted payment as soon as he had been notified that he had not been reinstated to the scheme.

19. The appeal is accordingly allowed and the surcharge discharged.

20. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 21 November 2013