

[2014] UKFTT 0144 (TC)



TC03284

Appeal number TC/2013/05467

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL ALEXANDER AND COMPANY

Appellant

- and -

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

Respondents

**TRIBUNAL: G. NOEL BARRETT LLB (Presiding Member)
BEVERLEY TANNER**

**Sitting in public at Alexandra House, The Parsonage, Manchester
on 7th November 2013**

No one in attendance for the Appellant

Mr Ian Birtles of HM Revenue and Customs, for the Respondents

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The Facts, the Law and the Evidence

5 1. This is an appeal against three default surcharges for late payment of VAT levied as follows:-

At the rate of 10%, in the sum of £1,238.67, for the quarter 07/12;

At the rate of 15%, in the sum of £2,620, for the quarter 01/13;

10 At the rate of 15%, in the sum of £1,425.46, for the quarter 04/13.

2. The quarters VAT payments were due as follows:-

The 07/12 quarters payment was due by 31st August 2012, (or 7 days after that, if the payment was made electronically, that was by 7th September 2012).

15 This quarter's payment, (paid through the Bailiff) was not actually received by HMRC until 9th November 2012.

The 01/13 quarter's payment was due by 28th February 2013, (or 7 days after that, if the payment was made electronically, that was by 7th March 2013).

20 This quarter's payment, (paid through the Bailiff) was received in part by HMRC on 20th September 2013, but the remainder was still outstanding on 3rd October 2013.

The 04/13 quarters payment was due by 31st May 2013, (or 7 days after that, if the payment was made electronically, that was by 7th April 2013).

This quarter's payment was still outstanding on 3rd October 2013.

25 3. The Appellant did not attend and was not represented at the hearing.

30 4. The Clerk telephoned the Appellant (Mr Alexander) immediately prior to the hearing commencing. Mr Alexander confirmed in that telephone call that he was unable to attend as he was representing a client at court, however he also confirmed that he was happy for the case to proceed in his absences and wished for his letter of the 5th November 2013 to be brought to the Tribunal's
35 attention

5. In the circumstances we were satisfied that the Appellant had been properly notified of the hearing and that it was in the interests of justice to proceed with the hearing.

5 6. We heard from Mr Birtles for HMRC and read the document bundle provided by HMRC and Mr Alexander's letter dated 5th November 2013.

10 7. The Appellant accepted in his correspondence with HMRC that payment had on all three occasions been made late due to his firm having to wait to receive payments from the Legal Services Commission in relation to accident cases.

15 8. The provisions of *Section 59(1) (a) and (b) of the Value Added Tax Act 1994 (VATA)* operate such that a person shall be regarded as being in default for that period:

20 " If, by the last day on which a taxable person is required.....to furnish a returnthe Commissioners have not received that return or..... have received that return but have not received the amount of VAT shown on the return....."

9. The specified percentages are set out in *Section 59 (5) VATA*:

25 "(a) in relation to the first such prescribed period the specified percentage is 2%
(b) in relation to the second such period the specified percentage is 5%
(c) in relation to the third such period the specified percentage is 10%
(d) in relation to such period after the third the specified percentage is 15%"

30 10. *Section 59(7) VATA* provides that the taxable person shall not be liable to the surcharge and shall not be treated as having been in default:-

35 "If a person.....satisfies a tribunal that, in the case of a default which is material to the surcharge...

(a) ...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...within the appropriate time limit or

40 (b) there is a reasonable excuse for the return or the VAT not having been so despatched."

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11. The Appellant first entered the default surcharge regime when it paid its VAT, late for the quarter 01/11 and subsequently paid late for the quarter ending 04/11, which late payment attracted a surcharge at the rate of 2% (£568.83). However those penalties were subsequently removed by letter from HMRC.

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12. The Appellant re-entered the default surcharge regime when it paid its VAT, late for the quarter 07/11 which surcharge, because of the removal of the previous two defaults, was reduced to zero

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13. Subsequently the Appellant paid late for the quarter 10/11 which attracted a surcharge, (when reduced) at the rate of 2% of the payment due, but as this amounted to less than £400, no penalty was charged.

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14. The Appellant paid late again for the quarter 01/12 which attracted a surcharge (when reduced), at the rate of 5% of the payment due, but as again this amounted to less than £400, no penalty was charged.

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15. The Appellant next paid late for the quarter 04/12, this attracted a surcharge of 10% which amounted to £1112.02. This penalty was subsequently removed by letter from HMRC.

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16. The Appellant's next late payment was in respect of the quarter 07/12 being the earliest of the three quarters now under appeal, which attracted a penalty at the rate of 10%

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17. Although the Appellant defaulted for the quarter 10/12 the default was removed by HMRC.

18. The Appellant's next late payment was in respect of the quarter 01/13 being the second of the three quarters now under appeal, which attracted a penalty at the rate of 15%.

19. The Appellant's The Appellant's next late payment was in respect of the quarter 04/13 being the last of the three quarters now under appeal, which again attracted a penalty at the rate of 15%.

20. The burden of proving, on the balance of probabilities, that a reasonable excuse exists, lies upon the Appellant.

21. *Section 71(1) VATA* provides that:

5 “(a) an insufficiency of funds to pay any VAT is not a reasonable
excuse...”

10 22. We have some sympathy for the hardship suffered by the Appellant in his business, and note the lengths to which he has gone to refinance his business to enable his business to survive, in what has been, undoubtedly, a very difficult trading period. The Appellant has clearly, by his own admission, suffered cash flow problems for many months.

15 23. The fact however remains that many businesses have had to refinance in order to survive and have also paid their VAT on time.

20 24. HMRC submitted and we accepted that whilst an insufficiency of funds does not of itself amount to a reasonable excuse, the reason behind the insufficiency of funds may in certain circumstances constitute a reasonable excuse.

25 25. It was unfortunate that the Appellant did not explain in his letter of the 5th November nor provide any evidence as to what, if any, sudden unanticipated specific events there were which caused his insufficiency of funds; or to explain how any such sudden unanticipated specific events may have been linked in time to his particular defaults.

30 26. On the evidence we have seen and heard we therefore find that the Appellant has not established, (as he must) that he has, on the balance of probabilities, a reasonable excuse for late payment of his VAT.

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Decision

27. For the reasons we have given we do not accept that the Appellant has established that he has a reasonable excuse against the default surcharges.

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28. In the circumstances we therefore dismiss the appeal and confirm the default surcharges in the sums of £1,238.67, for the quarter 07/12; £2,620, for the quarter 01/13; and £1,425.46, for the quarter 04/13.

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29. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

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**G NOEL BARRETT LLB
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE 29 January 2014

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