



TC03517

Appeal number: TC/2012/02849

VAT default surcharge - whether Appellant within surcharge period at the date of default – yes - whether appeal brought timeously - no- whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ADDISONS SOLICITORS

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 MR ALAN SPIERS**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 6 January
2014**

The Appellant did not attend and was not represented

Mr Tony O'Grady, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This an appeal by Addisons solicitors ('the Appellant') against a VAT default surcharge of £844.36, for their failure to submit, in respect of their VAT period ended 31 January 2008, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the VAT due of £8,443.62.

2. The Appellant asks for leave to bring the appeal out of time. HMRC object to the Appellant's application for an extension of time to bring the appeal on the grounds that it is very late and the Appellant has not demonstrated a reasonable excuse for the delay.

3. If an extension of time is granted the point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

4. The Appellant did not attend the hearing. The Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

Background

5. Prior to the default for 01/08 the Appellant had previously defaulted on VAT payments in period 07/05 when a VAT surcharge liability notice was issued and again in respect of periods on 01/06 and 01/07.

6. Section 59 Value Added Tax Act 1994 ("VATA") sets out the provisions in relation to the default surcharge regime. Section 59 of the 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].

7. 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 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.

8. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for filing

and payment. The due date for the 01/08 period if payment was made electronically was 7 March 2008.

5 9. The Appellant paid VAT on a quarterly basis, usually by cheque. The Appellant's return was due no later than 29 February 2008. It was received by HMRC on 2 April 2008 and was therefore late. Payment of the tax due of £8,443.62 was made late on 2 April 2008.

10 10. As the Appellant was already in the default regime (since the 16 September 2005) a SLNE (VAT166) was issued on the 14 March 2008. On receipt of the return an Advice of Reduction of Surcharge (VAT 163A) reducing the surcharge to £844.36 was issued on the 9 April 2008.

11. An appeal from Mr Addison, the proprietor of the Appellant firm, was received on the 18 April 2008. He appealed on the grounds that he was entitled to be overdue on one occasion every twelve months saying that "As the last occasion I was overdue was a year ago, I would challenge your right to implement this surcharge."

15 12. HMRC reviewed the position and wrote to the Appellant on the 21 April 2008 confirming they did not accept that he had a reasonable excuse for being in default for the period ended 01/08. There is no such entitlement to render a VAT return late in a twelve month period. His last default was for the period 01/07. Had the return and payment for the period 01/08 been received on time, he would have left the default surcharge cycle.

13. The Appellant was advised that he had a period of twenty-one days from the date of HMRC's letter to appeal to the Tribunal should he wish to do so. He was also instructed that unless he intended to appeal to the Tribunal, he must pay any outstanding surcharge assessments.

25 14. On the 25 April 2008 HMRC received a letter from Mr Addison advising that he wished to appeal against the decision dated 21 April 2008.

30 15. The default surcharge was reconsidered once again and Mr Addison was advised that HMRC did not accept he had a reasonable excuse for being in default for the period ending 01/08. Again he was advised that if he did not agree he could appeal to the Tribunal within twenty-one days, and further instructions on how to do so were included. This letter was issued on the 1 May 2008.

16. Mr Addison responded by letter dated 7 May 2008 advising that he wished to appeal the decision and requested HMRC to provide him with a form Trib 1 as soon as possible.

35 17. A form Trib 1, and accompanying notes, was issued to Mr Addison on the 16 May 2008.

18. Nothing further was heard from the Appellant for over three years until the end of September 2011 when he advised HMRC Debt Management Unit of his new correspondence address of, c/o 39-43 Market Place, North Ormesby, Middlesborough

TS3 6HS, “as Addisons Solicitors had closed”. Then in a letter of 1 November 2011 he advised that correspondence should be addressed to Silvia Properties Ltd, 120 Borough Rd, Middlesbrough, as following the closure of Addisons post addressed to the firm could no longer be accepted. Mr Addison had however received a VAT demand for £858.28 issued to Addison Solicitors on the 18 October 2011 for the period 31 October 2008. Mr Addison requested a copy of the return for that period as he believed an error may have been made.

19. After receiving documents from HMRC Mr Addison stated in a letter of 21 November 2011 that the monies demanded were in respect of a default surcharge notice which he claimed to have never received. Therefore he wished to appeal against the default surcharge.

20. HMRC wrote to Mr Addison on the 12 December 2011 referring to the default surcharge for the period 01/08 and Mr Addison's initial request for a review of the surcharge on the 16 April 2008. HMRC said that they did not accept that he was unaware of the penalty and as such, the surcharge for the period remained in force. He was advised of his right of appeal although because of the time which has elapsed since the default was incurred, it would be on an out of time basis.

21. HMRC received a further letter from Mr Addison on the 11 January 2012 confirming that he had downloaded the appeal form from the website but before lodging the appeal he required answers to some questions — why and how the surcharge had been calculated, why had no action been taken to enforce the charge since 2008 and asking whether it was too late, after more than three years for HMRC to claim the outstanding VAT He also requested copies of correspondence in respect of the surcharge.

22. Copies of the correspondence between HMRC and the Appellant were issued on the 31 January 2012, together with a brief explanation of how a VAT default had surcharge arisen and confirmation that a debt of three years was still within HMRC's remit to be pursued.

23. Mr Addison lodged an application to the Tribunal Service for a late appeal on the 7 February 2012.

Appellant's case

24. In the covering letter with his appeal to the Tribunal, Mr Addison said that he did not receive HMRC's letter of the 1 May 2008. He said that had he done so, he would have made the appeal at that stage.

25. Mr. Addison claims that since the decision was made, the local VAT office had made no attempt to communicate with him and he says that in these circumstances it is only reasonable for him to have assumed that his appeal had succeeded. He said *"Are they seriously suggesting that after no correspondence for 4 years to collect this debt they should be allowed to refuse me the right to appeal on the grounds of my ostensible dilatoriness, when to put it politely they have been negligent in the extreme*

in connection with the pursuit of this debt and consequently I should be given the right of appeal."

26. Mr Addison says that it is totally unreasonable for HMRC to attempt to collect a debt after failing to communicate with him for a period of four years and there must be some time constraints imposed that prohibits them from doing so. He adds that his business has now closed due to the financial crisis and consequently he is in a far worse position to make payment at this stage than he was then.

27. Mr Addison also says that there had been no explanation in any correspondence as to why the surcharge was imposed.

10 HMRC's case

28. 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 sets out the relevant provisions : -

15 ‘(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 –

20 (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

25 (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 ..’

29. The burden falls on the Appellant to establish that he has a reasonable excuse for the late payment in question.

30 30. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

 ‘(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct –

35 (a) any insufficiency of funds to pay any VAT is not reasonable excuse.’

31. Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, precedent case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

40 32. The onus of proof rests with HMRC to show that the surcharges were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that

there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of a balance of probabilities.

The Late Appeal

5 33. Mr O'Grady for HMRC referred us to the case of *Data Select Ltd v Revenue and Customs Commissioners*, an Upper-tier case, where at para 34 Mr J Morgan said:

10 "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

15 34. Other cases where late appeals were considered include, *Advocate General for Scotland v General Commissioners for Aberdeen City*, and *Browallia Cal Ltd v General Commissioners of Income Tax*. The *Browallia* case confirmed that the courts can consider issues other than just the lateness of the appeal. The *Aberdeen* case commented on the question of finality where Lord Drummond Young said:

20 "The public interest may give rise to a number of issues. One is the policy of finality in litigation and other proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being re-opened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded."

25 35. In the case of *Ogedegbe v HMRC* LON/2009/0200 Sir Stephen Oliver QC said,

"While this Tribunal has got power to extend the time for making an appeal this will only be granted exceptionally. Moreover, there must be at least an arguable case for making the appeal."

30 36. The Appellant initially appealed to HMRC against the default surcharge for the period 01/08 within the statutory time limit, on the grounds that the firm was entitled to be overdue on one occasion every twelve months.

35 37. The default surcharge was reconsidered on two occasions and the Appellant was advised that the Commissioners did not accept he had a reasonable excuse for being in default, firstly on 21 April 2008 and then again on 1 May 2008. The surcharge for the period therefore remained in charge. If the Appellant did not agree, he had a period of twenty-one days to appeal to an independent VAT and Duties Tribunal.

38. Mr Addison maintains that he did not receive HMRC's letter dated 1 May 2008. However, he must have done because he replied to that letter on the 7 May 2008. He requested a form Trib 1 to enable him to appeal to the Tribunal.

39. The Appellant failed to submit an appeal to the VAT and Duties Tribunal within twenty-one days. In such circumstances it was reasonable for HMRC to consider the Appellant's right to appeal had been abandoned or extinguished.

5 40. HMRC argue that in any event that no reasonable excuse was reported during the initial appeal process and no reasonable excuse exists for the making of appeals against the imposition of the default surcharge.

41. The appeal is also inordinately late. HMRC are entitled to an expectation of finality in the absence of a compelling reason to reopen the matter. HMRC submit that the late appeal application should be rejected.

10 Substantive Issues

42. With regard to the substantive issues relating to the appeal, the potential financial consequences attached to the risk of a default would have been known to the Appellant after the issue of the Surcharge Liability Notice in June 2011, given the information contained in the Notice. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

20 'Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.'

43. The requirements for submitting timely electronic payments can also be found -

- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website www.hmrc.gov.uk
- 25 • On the E-VAT return acknowledgement.

44. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

30 45. Therefore HMRC say that the surcharge was correctly issued in accordance with the VAT Act 1994 s 59(4).

Conclusion

46. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

35 47. The burden of proof is on the Appellant to show that he has a reasonable excuse for his failure to meet his VAT payment obligations. In the Tribunal's view, for the reasons argued by HMRC above, that burden has not been discharged and there was

no reasonable excuse for the Appellant's late payment of VAT for the 01/08 period. In fact no reason for the late payment has ever been put forward. It is clear that Mr Addison was within the surcharge liability period at the time of the default under appeal.

5 48. The appeal was in any event out of time and there is no justifiable reason for the Tribunal to extend the time for making of an appeal.

49. The appeal is accordingly dismissed and the surcharge upheld.

10 50. 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.

15

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 23 April 2014

20