



TC03522

Appeal number: TC/2012/07751

VAT - Default Surcharge - Section 83(n) VAT Act 1994 - whether there were late payments of VAT - whether there was reasonable excuse if payments were late – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NADINE CHERRY

Appellant

- and -

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

**TRIBUNAL: JUDGE IAN W. HUDDLESTON
MS CELINE CORRIGAN**

Sitting in public at Bedford Street, Belfast on 28 August 2013

Sharon Spence appeared on behalf of HMRC

James and David McKendry, Accountants appeared on behalf of the Appellant

DECISION

Appeal

5 1. This is an Appeal against default surcharges for period 07/11 to 04/12 as levied under Section 83(n) VATA 1994. The original default surcharge was reduced from £2,318.24 to £2,016.61 which is the amount which remains in dispute. There are two questions for the Tribunal.

10 (a) Firstly if the payments themselves were in fact made late based on the facts of the case; and

(b) If they were, did the Appellant have a reasonable excuse for those late payments.

The Facts

15 2. Nadine Cherry, the Appellant, did not herself appear but was represented by her accountants. Her accountants explained that the Appellant traded a small diner which she had commenced on the 1st September 2008. It would appear from the information before us that in terms of her VAT compliance the Appellant had been within the default surcharge regime from April 2009 onwards. In relation to the default surcharges in dispute the facts pertaining to these were as follows:-

20 • 07/11 – the Appellant's return was received on time but payments were received late being made over a period from the 12 October 2011 to the 19 December 2011;

• 10/11 - again the return was received on time but the payments themselves were received late during the period 19 December 2011 to 20 February 2012;

25 • 01/12 – again the return was received on time together with a payment of £1,197.90 but the balancing payment of £4,387.10 was received late during the period 12 March 2012 to 21 May 2012;

• 04/12 – again the return was received on time on the 1 May 2012 together with £812.90 but the balance of £2,043.70 due on foot of the return was received late.

30 3. In June 2011 the Appellant's representatives had advised HMRC of VAT errors in the sum of £6,890 for the VAT periods 04/09 to 04/10. There was consequently an additional deficit on the Appellant's account.

35 4. What actually appears to have happened is on the 29 October 2011 the Appellant made the last of four payments (of £2,663.11) as part of a time to pay arrangement with HMRC. From that date onward she of her own volition appears to have made voluntary payments of £400 per week to HMRC but largely regardless of the VAT which actually fell due upon her returns. It would seem from the evidence before us that she simply elected to make those weekly contributions on account of her VAT liability which there would be worked out on a quarterly basis as returns were filed.

5. As for the £400 per week payments HMRC simply allocated those payments that were made to the older debts and as a result the Appellant's account was largely in deficit throughout the period under appeal.

The Appellant's Case

5 6. The Appellant's case is relatively straightforward:-

(1) she, through her representatives, assert that the £400 instalments "are and were always meant to be utilised against current liabilities";

(2) on that basis the Appellant always ensured that both the returns and the liabilities arising on them were discharged on time; and

10 (3) although not formally pleaded it was suggested at the appeal hearing that the Appellant had insufficient resources to pay the VAT when it fell due and to do otherwise would have resulted in the business's closure.

The Respondent's Case

7. The Respondent's case is equally straightforward. What the Respondents say is that there was no time to pay arrangement in place in respect of the £400 weekly payments made by the Appellant and that therefore, in the absence of any agreement to the contrary HMRC were entitled to offset these amounts against the earlier liabilities. The result of doing that was that notwithstanding the otherwise correct filing of the VAT returns that Ms Cherry's VAT account was always in deficit and that therefore the default surcharges for the period under appeal were correctly levied.

Decision

8. This is clearly an unfortunate case. The image which the Tribunal took from it was of a trader who had struggled in business and in particular had struggled to meet her VAT liabilities as they had fallen due. At a certain point she brought in accountants to help her in that endeavour and that had resulted in a further corrective and voluntary disclosure of previous inaccuracies. The effect of that disclosure, however, was to put her VAT account into significant deficit. As to the question of whether the weekly payments which were received after that event were to be allocated to earlier or current liabilities is really the essential dispute between the parties. On the facts and evidence as produced to us at the hearing we find no evidence to confirm that there was ever any agreement between the Appellant, her representatives and/or HMRC that the £400 which the Appellant paid weekly would be allocated only to current liabilities. On that basis one can only revert to the standard legal principle as set out in *Clayton's case* namely that where payments are made they are to be deemed, in the absence of contrary evidence, to be offset against the earliest liability.

9. Having made that finding, clearly the subsequent payments against filed returns were paid late and that therefore it logically followed that default surcharges would arise.

40 10. Having established that position, therefore, we must turn our minds to the second issue. Did the Appellant have reasonable excuse for those delays? On the facts of the case this is clearly a trader who struggled in terms of cash flow and cash flow

management. There was no actual evidence produced in terms of her personal position but her representatives indicated to us that in some measure she relied upon her pension to be able to keep the business afloat and that a default surcharge would in all probability mean that the business would have to close. Whilst obviously we have sympathy with Appellants in these circumstances – and particularly in the straightened times in which we currently live - but nonetheless it is quite clear from Section 71 of the VAT Act 1994 that a lack of resources of itself is not sufficient to ground a defence of reasonable excuse. When one analyses the Appellant's case that, regrettably, is exactly her assertion.

11. Where the statute provides that lack of resource does not constitute reasonable excuse then this Tribunal has no jurisdiction to find otherwise. In any event, we were not given any information as to any underlying cause for the lack of resources save for difficult trading conditions which, regrettably, are those faced by all traders.

12. On that basis we do not find the defence of reasonable excuse is established.

13. Accordingly it follows that we dismiss the appeal.

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.

**IAN HUDDLESTON
TRIBUNAL JUDGE**

RELEASE DATE: 23 April 2014