



TC05280

Appeal number: TC/2015/02008

*VAT - PENALTIES - default surcharge – defaults due to Appellant’s former partner
– failure of Respondents to alert Appellant to defaults - whether reasonable excuse -
sections 59(7) and 71(1)(b) VATA94 VAT Act 1994 - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

RAY YATES

Appellant

- and -

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**Tribunal: Judge Greg Sinfield
Mrs Janet Wilkins**

Sitting in public at Fox Court, 30 Brooke Street, London EC1 on 4 November 2015

Mr Eric Diamond, of A Real Accountant Limited, for the Appellant

Mr Mark Ratcliff, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ('Mr Yates') was the proprietor of a florist's shop which traded as 'Flowers by Zoe'. He was registered for VAT. Although he was the owner of the shop, he took no part in running the business which was left to his then partner. Mr Yates failed to submit his VAT returns and/or pay VAT due on time in relation to 18 VAT accounting periods between periods 12/08 and 09/13. The Respondents ('HMRC') imposed default surcharge penalties totalling £5,590.46 under section 59 of the Value Added Tax Act 1994 ('VATA94') in respect of the defaults. Mr Yates appealed against the surcharges.

2. At the hearing on 4 November 2015, Mr Yates did not dispute that the returns and/or payments were made late and he did not seek to argue that he had a reasonable excuse. Mr Diamond, who represented Mr Yates, submitted that Mr Yates was not liable to pay the penalty in all the circumstances which we describe in detail below.

3. For the reasons set out below, we decided that Mr Yates's appeal must be dismissed. On 19 November 2015, the Tribunal sent a written summary decision to the parties dismissing the appeal. The decision was sent to Mr Diamond by post and email to the addresses that he had given to the Tribunal. The final paragraph of the summary decision stated that a party wishing to appeal against the decision must apply to the Tribunal within 28 days of the date of release for full written findings and reasons. No request for full written findings and reasons was received by the Tribunal within the 28 day period.

4. On 25 April 2016, the Tribunal received a letter dated 14 April from Mr Diamond at Liberty Williams, accountants and tax practitioners, which stated:

"Following the Hearing at the beginning of November 2015, the Chairman indicated that his report would be available sometime in December 2015. To date, neither myself nor Mr Yates has received a copy.

Mr Yates received a letter from Mrs Doré of the Debt Management Enforcement Collection Department (but I did not receive a copy). I then spoke to her and she admitted that correspondence was being sent to an address that we vacated over a year ago. I am horrified that the report was sent to that address despite the fact that I advised the Chairman of the change of address at the time of the Hearing.

Mr Yates has now asked me to appeal. If you object to the appeal, we will go straight to the European Court of Human Justice (*sic*) to confirm that the Tribunal Service has got its position completely wrong and are not sending communications to the correct address."

5. We do not recall Mr Diamond mentioning anything about a change of address at the hearing and there is nothing in our notes to that effect. Further, there is nothing on the Tribunal's file to indicate that Mr Diamond's contact details had changed until the letter of 14 April.

6. Following a telephone conversation between Mr Diamond and the Tribunal, Mr Diamond sent a further letter dated 9 June 2016 explaining that, in June 2015, his company changed its name from A Real Accountant to Liberty Williams and changed address. It appears that Mr Diamond also changed his email address. In the letter of
5 9 June, Mr Diamond asked for a full decision and reserved Mr Yates’s right to appeal.

7. That letter was treated as an application to request full written reasons after the expiry of the time limit on the ground that the summary decision had not been received. The Tribunal wrote to Mr Ratcliff to ask if HMRC had any objections to the application. No objections were received within the time specified.

10 **Application for extension of time**

8. In considering whether time should be extended, we have adopted the same approach as the Upper Tribunal in *Data Select v HMRC* [2012] UKUT 187 (TCC). The Upper Tribunal held that, when considering an application for an extension of the time for making an appeal, the First-tier Tribunal should ask itself a number of
15 questions, namely:

- (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?
- 20 (5) What will be the consequences for the parties of a refusal to extend time?

9. In *Data Select*, the Upper Tribunal also held that, when considering an application for an extension of the time, the First-tier Tribunal should consider the overriding objective, in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (‘the FT Rules’) to deal with cases fairly and justly as well as
25 all the circumstances of the case, including the matters listed in rule 3.9(1) of the Civil Procedure Rules (‘CPR’).

10. We also have in mind the guidance provided by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 and
30 *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (‘*Denton*’) which, as the Senior President of Tribunals observed in *BPP Holdings v HMRC* [2016] EWCA Civ 121 at [29], while not strictly relevant because they concerned applications under the CPR which do not apply to the tribunals, is relevant by analogy when considering the overriding objective. In *Denton*, the Court of Appeal gave
35 guidance at [24] to [38] as to the approach to be taken when considering whether to grant relief from the consequences of a failure to comply with rules of procedure. As relevant to this application, it may be summarised as follows. We should address an application to extend time where the original time limit has already been breached in three stages. The first stage is to identify and assess the seriousness and significance
40 of the failure to comply with the original time limit. If the breach is neither serious nor significant, we will probably not need to spend much time on the second and third stages. The second stage is to consider the reason for the failure to comply with the

time limit. The third stage is to consider all the circumstances of the case, bearing in mind the overriding objective of the FTT Rules.

11. The purpose of the time limit is to promote the efficient disposal of proceedings and provide some finality to litigation before the tribunals. In this case, the delay was just over four months which is substantially more than the 28 days stipulated in the FTT Rules. On any view, that is a serious and significant breach of the prescribed time limit. However, taking account of the reason put forward by Mr Diamond to explain why the application was not made in time and all the circumstances of this case, we have decided to grant Mr Yates an extension of time to apply for full written findings and reasons. Accordingly, we set out below in full our findings and the reasons for our decision in the appeal.

Legislation

12. Regulation 25(1) of the VAT Regulations 1995 provides that a person who is registered for VAT (or liable to be so registered) must submit a VAT return to HMRC no later than the last day of the month next following the end of the VAT accounting period to which it relates. There is a seven day extension for persons who submit returns electronically which is what Mr Yates did from period 09/10 onwards. Under regulation 40(2), any person required to make a return must pay any VAT shown as payable on the return to HMRC not later than the last day on which that return is due.

13. Liability to a default surcharge arises under section 59 VATA94. Section 59(1) provides that a taxable person is in default where HMRC do not receive a VAT return and any VAT shown as payable on such return on or before the due date. Where a person is in default, HMRC may issue a surcharge liability notice (“SLN”). If, having been served with a SLN, the taxable person defaults again during the period of one year (“the Surcharge Liability Period”) from the end of the period of default, the person becomes liable to a surcharge. On each subsequent default, the Surcharge Liability Period is extended to run for 12 months from the end of the latest period of default.

14. The surcharge is the greater of £30 and a specified percentage of the outstanding VAT. The percentage specified increases according to the number of VAT periods in respect of which the person is in default during the surcharge period. The maximum percentage is 15% where there are four or more periods in default for which VAT remains unpaid.

15. Section 59(7) VATA94 provides that a taxable person is not treated as in default in respect of any period if the person satisfies HMRC, or on appeal to this Tribunal, that in respect of the period:

- (1) the return or the VAT due was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by HMRC within the time limit; or
- (2) there is a reasonable excuse for the return or VAT not having been so despatched.

16. Section 71(1)(b) VATA94 provides that, where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

Facts

5 17. HMRC produced a bundle of documents for the hearing. There were no witness statements but Mr Yates told us about the circumstances that had led to the appeal and answered some questions put by Mr Ratcliff. The narrative that follows is drawn from the evidence given by Mr Yates at the hearing and the documents provided by HMRC.

10 18. Mr Yates purchased a florist's shop and registered for VAT as Ray Yates t/a Flowers by Zoe. Although it was his business and he was registered for VAT in respect of it, Mr Yates told us that he took no part in the running of the shop. That was left to his partner, Amanda Flaherty, who was an employee of the business. Mr Yates carried on his principal occupation of installing Sky satellite dishes.

15 19. In relation to period 09/07, there was a late payment of VAT due. As Mr Yates's turnover was less than £150,000, HMRC issued a Help Letter on 30 November 2007 offering advice and support. There was a further default in period 12/07 and Mr Yates entered the default surcharge regime. That first default did not incur any penalty. From that point, Mr Yates should have known from the
20 information printed on the SLN of the potential financial consequences that would follow if any further defaults occurred. There were further defaults in periods 3/08 and 09/08 but, as the amounts payable were low, the surcharges were below the de minimis level and no demands were issued. The default surcharges that are the subject of this appeal occurred between periods 12/08 and 09/13. There were no
25 defaults in relation to periods 06/09 and 06/10. In all of the periods between 12/08 and 09/13, except 09/10, both the returns and the payments of VAT due were late. In relation to period 09/10, the return was submitted on time but the payment was made late.

30 20. Mr Yates told us that he had nothing to do with the day-to-day running of the shop and business. He assumed that it was all running smoothly and that there were no problems. In relation to the VAT accounting, Mr Yates said that Amanda sent information to his then accountant who completed the VAT returns and sent them back to the shop for signature. Mr Yates said that he assumed that Amanda paid the VAT to HMRC as she was a signatory to the business bank account. Mr Yates said
35 that he had signed the VAT return for period 12/07 but denied having signed the other paper returns. He said that he had assumed that Amanda had done so although they were signed in his name. He said that he had trusted Amanda and so did not check the returns or go through the business bank statements. He said that the first he knew of any VAT difficulties was four years after the defaults started. Mr Diamond told us
40 that the business was now operated by a limited company owned by Mr Yates, all returns were being submitted on time and all tax was paid up to date.

Issues and submissions

21. Mr Yates accepted that all of the returns and all but one of the payments for the periods under appeal had been late. Mr Yates did not contend that he had a reasonable excuse for the defaults. Mr Yates's notice of appeal stated that his appeal should be allowed because there were defaults for a total of 24 periods of which he was not aware and HMRC had not spoken to him personally about them until the summer of 2014. His former partner was running the business and she had never told him about the late VAT returns and payments. Mr Diamond argued, on behalf of Mr Yates, that the default surcharge system should not allow late VAT returns to build up, as had happened in this case, without contact being made by HMRC. Mr Diamond submitted that Mr Yates had been let down by his former partner, his accountant and HMRC. In particular, Mr Diamond submitted that HMRC had misled Mr Yates about the true extent of his liabilities to them. HMRC had told Mr Yates in December 2013 that he owed some £15,000 whereas Mr Diamond estimated that, at the time, he probably owed nearer to £30,000. The liability did not relate only to VAT. Mr Diamond also criticised HMRC for not contacting Mr Yates between December 2009 and 2014. Mr Diamond said that if there had been a VAT visit, as would have happened in former times, then the matter of the defaults would have been picked up and resolved. There was some dispute about whether and when HMRC contacted Mr Yates or his partner but, for reasons stated below, it is not necessary for us to resolve them.

22. Mr Ratcliff submitted that Mr Yates had ultimate responsibility for the timely submission of the VAT returns and payment of any tax due. He also submitted that Mr Ratcliff could not rely on the actions of his partner, Amanda, or the former accountant as providing a reasonable excuse because of the prohibition on reliance on a third party under section 71(1)(b) VAT Act 1994. Mr Ratcliff also submitted that Mr Yates could not rely on the fact that HMRC had not contacted him personally about the defaults as a reasonable excuse which should relieve him of the default surcharge. Mr Ratcliff did not accept that Mr Yates had been given incorrect information about his liability to pay HMRC outstanding taxes but submitted that, nevertheless, whether or not the total was correct, this did not give Mr Yates a reasonable excuse for the late submission of VAT returns and payment of VAT for the periods under appeal which all preceded the statement of his liabilities.

Discussion

23. Mr Yates candidly admitted that there were defaults and he did not seek to argue that he had a reasonable excuse for the VAT returns and payments being late. As he acknowledged, he owned the business and was registered for VAT in respect of it. Although he contended that the defaults were due to his partner, Amanda, failing to submit returns and/or pay VAT on time, he did not deny, when Mr Ratcliff put it to him, that he did not have any process in place to ensure that the business met its VAT obligations. In any event, section 71(1)(b) VAT Act 1994 prohibits reliance on another person from constituting a reasonable excuse. Essentially, Mr Yates contends that if HMRC had contacted him earlier then the defaults could have been stopped earlier. This, however, is not an excuse for the defaults. The legislation and HMRC's own guidance clearly sets out the time limits for submitting VAT returns and paying

VAT. It is the responsibility of the VAT registered trader to comply with those time limits and he or she must do so whether or not HMRC succeeded in making contact with the registered person about any defaults that had occurred. Accordingly, we find that Mr Yates did not have a reasonable excuse for the defaults.

5 **Decision**

24. For the reasons set out above, Mr Yates's appeal is dismissed.

Right to apply for permission to appeal

25. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

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**GREG SINFIELD
TRIBUNAL JUDGE**

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RELEASE DATE: 25 JULY 2016