[2016] UKFTT 768 (TC)

TC05495

Appeal number: TC/2016/01344

VAT – default surcharge – employee concealing non-compliance from the directors - application for permission to bring a late appeal - permission granted – reliance upon an employee – no reasonable excuse established - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE DAMN YANKEE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MISS SUSAN STOTT

Sitting in public at City Exchange, 11 Albion Street, Leeds, LS1 5ES on 5 September 2016

Mr Robert Smith, Accountant, for the Appellant

Mrs Linda Shepherd, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by The Damn Yankee Limited ("TDY") against default surcharges for the late payment of VAT in the total sum of £49,786.03. The relevant periods, defaults and amounts involved are agreed by the parties and can be summarised as follows:

Period:	*Return amount:*	*Amount paid late:*	*Rate of surcharge:*	*Amount of surcharge:*
10/13	£68,722.48	£57,722.48	0%	£0.00
01/14	£58,348.90	£50,000.00	2%	£1,000.00
04/14	£60,400.68	£42,000.00	5%	£2,100.00
07/14	£57,200.43	£57,200.43	10%	£5,720.04
10/14	£55,856.59	£55,856.59	15%	£8,378.48
01/15	£55,606.41	£55,606.41	15%	£8,340.96
04/15	£52,122.88	£52,122.88	15%	£7,818.43
07/15	£56,171.24	£56,171.24	15%	£8,425.68
10/15	£53,349.60	£53,349.60	15%	£8,002.44

2. The appeal is brought out of time. TDY applies for permission to bring the appeal late. HMRC opposes this application. The hearing was listed for both the permission application and the substantive appeal. The parties agreed that evidence and submissions would be heard on both the application and the appeal and that we would issue one decision dealing with both matters.

The Factual Background

3. The factual background was not in dispute.

4. TDY carries on business as a chain of four restaurants in the Harrogate area which, as the name suggests, have an American theme. The directors of TDY are and were at all material times Mr John Walker and his daughter, Mrs Nicola Triffitt. Mr Walker's settlement trust owns all preference shares and 75% of the issued ordinary shares. Mrs Triffitt and her husband, Mr Mick Triffitt, each owned 12.5% of the issued ordinary shares.

5. Mr Walker's involvement in TDY is limited to an annual review of performance, leaving the day to day management and operations to Mrs Triffitt. This

was intentional, as Mr Walker wished to provide the funds to allow Mrs Triffitt to build up a business and livelihood for herself.

6. VAT and other financial matters were originally dealt with by TDY's employee, Miss Emma Butler. By a letter dated 13 July 2006, TDY informed HMRC that Miss Butler had authority to deal with TDY's VAT affairs. Miss Butler left TDY at some point before October 2013 to go on maternity leave and did not return. Mr Triffitt then took over TDY's VAT affairs, filing and paying TDY's VAT returns from Miss Butler. Mr Triffitt also liaised with HMRC about TDY's arrears of VAT and sought to negotiate "time to pay agreements" notwithstanding that he was not a director of TDY and notwithstanding that TDY did not file a formal written authority with HMRC for him to do so.

7. As set out above, Mr Triffitt repeatedly failed to pay VAT on time, incurring default surcharges as a result. On 20 January 2016, HMRC wrote to Mr Walker and Mrs Triffitt at their personal addresses enclosing copies of a notice of requirement to give security under paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA 1994"). This set off a chain of inquiry by Mr Walker and Mrs Triffitt, resulting in them learning for the first time that TDY had failed to make payments of VAT during the relevant periods and that default surcharges had been incurred. When they first confronted Mr Triffitt, he maintained that there were no issues with VAT. However, on 25 January 2016, Mr Triffitt confessed to Mr Walker and Mrs Triffitt that he had been paying other creditors and suppliers in preference to HMRC and had been the cause of TDY's non-compliance.

8. Mr Walker and Mrs Triffitt emphasised that they had no knowledge of this and would not have sanctioned it. Indeed, a similar issue had arisen in 2011, at which time Mr Walker had made it clear to Mr Triffitt that the payment of VAT was of paramount importance and that it should always be paid in preference to anything else.

9. On 26 January 2016, Mr Walker spoke to the officer at HMRC dealing with the matter, Mr Peter Atha. Mr Walker agreed with Mr Atha that all outstanding liabilities would be paid and also agreed that TDY would make monthly returns. Mr Walker paid, on behalf of TDY, £150,591.09 on 27 January 2016.

10. TDY then sought to collate the information required in order to bring the appeal. The notice of appeal is dated 26 February 2016 and was received by the tribunal on 29 February 2016. Appeals against the various periods were therefore between 42 days and two years out of time.

11. The essence of the application for permission to appeal late is that Mr Walker and Mrs Triffitt acted quickly once they were aware of Mr Triffitt's non-compliance. The essence of the substantive appeal is that TDY had a reasonable excuse for the non-compliance by virtue of Mr Triffitt's errant behaviour and that HMRC contributed to the problem by communicating with Mr Triffitt without TDY's authority to do so. TDY also states as follows in its notice of appeal, which Mr Walker was understandably keen to emphasise in the course of the hearing:

"Mr Walker has supported the business substantially in recent years through the injection of funds into his director's loan account. This helped the business though a loss making period whilst the closure of one of the restaurants (known as Alberts) and exit from its associated lease was undertaken. During this tricky period, Mr Walker made it abundantly clear that he was supportive of the business and his daughter, and should any financial help be required he would be willing to provide it.

In light of the support given financially by Mr Walker and the moral support given in his capacity as father to Mrs Triffitt it is completely unfeasible that Mr Walker had any knowledge of VAT arrears and penalties accumulating. His actions in settling the VAT liability immediately that he became aware of the VAT situation back up very strongly the previous assurances given to his daughter.

The company is being unjustly punished in the form of VAT penalties that simply wouldn't have arisen if the errant employee had informed the directors Mr Walker and Mrs Triffitt that there was a problem. The penalties have arisen and continued to be incurred and increase as a direct result of the failure by HMRC to communicate directly with the company directors. This lack of communication has allowed the employee deception to continue to spiral and grown un-controlled until the HMRC communication direct with the directors on 20.1.2016.

Finally, the penalties that have accrued in the sum of £49,786.03 represent an enormous sum of money to The Damn Yankee Ltd. This level of profit has not been achieved by the business in any of the previous 5 years of trading, and the imposition of these penalties threatens the very survival of the business going forward, and consequently the livelihoods of the numerous staff that rely on it for employment."

The Legal Framework

12. There was no dispute between the parties as to the legal framework.

13. The statutory basis for the default surcharge regime is found in section 59 of VATA 1994, which provides as follows:

"59. The default surcharge

(1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period –

(a) the Commissioners have not received that return, or

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to subsection (9) and (10) below, subsection (4) below applies in any case where –

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) and (10) below, if a taxable person on whom a surcharge liability notice has been served –

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that –

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsection (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been

paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

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

(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

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

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 (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where –

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day."

14. Section 59 is also to be read in the light of section 71(1) of VATA 1994:

> "71. Construction of sections 59 to 70
>
> (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct –
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> (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
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> (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance or any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse."

15. Section 83G of VATA 1994 provides that the relevant time limit for bringing an appeal in a case such as the present is the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates. Pursuant to section 83(G), the Tribunal is granted a discretion to extend this period:

> "An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so."

16. The Court of Appeal considered the proper approach to compliance with time limits in *BPP Holdings v HMRC* [2016] EWCA Civ 121 ("*BPP*"). The Senior President of Tribunals stated as follows at [37] to [38] and [44]:

> "[37] There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
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> [38] A more relaxed approach to compliance in tribunals would run the risk that non- compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.
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> …

> [44] The UT found support for its decision to overrule the FtT in the decision of Morgan J in *Data Select supra*. This is not an appropriate case to analyse the decision in *Data Select*. Suffice it to say that the question in that case was the principle to be applied to an application to extend time where there had been no history of non-compliance. In this case, HMRC neither acknowledged that they had breached a time limit nor made an application for an extension of the same. In my judgment, therefore, the question in this case turns on an antecedent principle of compliance. Had I been minded to analyse *Data Select*, that would have created a further difficulty for HMRC. Morgan J applied CPR 3.9 by analogy without waiting for the TPC to amend the UT Rules in just the manner I have suggested is appropriate."

17. Resolving previous doubt about the matter, it is clear from *BPP* that the proper approach to considering whether or not to extend the time for bringing an appeal is that set out by Morgan J in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC), [2012] STC 2195 ("*Data Select*"). Morgan J stated as follows at [34] to [37]:

> "[34] Although the FTT gave permission to appeal to the Upper Tribunal in the belief that there was a lack of case law on the approach to be adopted to an application for an extension of time pursuant to s 83G(6), there was no real difference of approach between the parties before me. That is not surprising. 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 is asked to extend a relevant time limit, the 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.
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> [35] The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the Value Added Tax and Duties Tribunal to the High Court: see *Revenue and Customs Comrs v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196.
>
> [36] I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Comrs for Aberdeen City* [2005] CSOH 135 at [23]-[24], [2006] STC 1218 at [23]-[24] which is in line with what I have said above.

> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

The Evidence

18. We heard evidence from Mr Walker and from Mrs Triffitt on behalf of TDY. They were both cross-examined but, it must be said, were not taken to task on their essential evidence that Mr Triffitt had acted without reference to them and that they did not know that the defaults giving rise to the surcharges in the present case had occurred until 25 January 2016. Both Mr Walker and Mrs Triffitt gave evidence in a clear and credible manner and we have no reason to doubt what they said.

19. No witness evidence was adduced by HMRC.

Findings of Fact

20. There is a considerable overlap between the facts to be considered for the procedural application and for the substantive appeal. We therefore make our findings of fact at this stage.

21. The factual background at paragraphs 4 to 11 above were not in dispute and were not challenged by HMRC. We therefore make findings of fact to the same effect. In particular, we find that Mr Triffitt hid the defaults from Mr Walker and Mrs Triffitt until 25 January 2016.

22. Mr Walker said that there had been a previous issue in 2011 when he had had to inject funds into TDY following a default on VAT payments. Mr Walker, to use his own phrase, "went overboard", insisting that VAT should always be paid above all else. Mr Triffitt then promised him that he would maintain all future VAT payments on time. Mr Walker asked him about this on a few occasions thereafter and Mr Triffittt assured him that everything was fine. We accept Mr Walker's evidence in this regard.

23. Mrs Triffitt's evidence was that after Miss Butler left TDY there was nobody to deal with VAT and other financial matters. The business was a small one and so, rather than this being formally delegated to Mr Triffitt, he took it over "by default" as

she put it, as he was best fitted for it and this was not something which Mrs Triffitt felt able to do herself. Mrs Triffitt accepted that Mr Triffitt therefore had the same responsibility for dealing with VAT that Miss Butler had had. Mr Triffitt therefore signed all VAT returns and was responsible for making all necessary payments. Mrs Triffitt did not oversee or check this process. Again, we make findings of fact in accordance with this evidence. In doing so, we also find as a fact that Mrs Triffitt gave Mr Triffitt actual authority to deal with HMRC in relation to all VAT matters.

24. Both Mr Walker and Mrs Triffitt said that they investigated what had happened as quickly as they could. Mrs Shepherd did not put to either of them that, once they became aware of the problem, they could have sent a notice of appeal any earlier than they did. We were told that after the problem came to light, Mr Triffitt left the company (although he later returned to the operational side as TDY was short-staffed) and a new accountant and bookkeeper as engaged. A note on HMRC's electronic log shows that Mr Walker asked for payment details on 11 February 2016 so that TDY's VAT could be brought up to date. Given that Mr Walker's undisputed evidence was that he paid the outstanding VAT on behalf of TDY as soon as he was aware of the amounts involved, we take it that these investigations only concluded on or about 11 February 2016. The appeal was then lodged with the tribunal a short time later, being sent on 26 February 2016 and date stamped as received on 29 February 2016. As such, we find as a matter of fact that TDY investigated and filed an appeal within a reasonable period of time after Mr Walker and Mrs Triffitt became aware of the defaults.

The Application to Apply out of Time

Submissions on behalf of TDY

25. In short, Mr Smith submitted that Mr Walker and Mrs Triffitt did not know about the defaults and acted promptly in issuing an appeal when they did know. They were not, therefore, in a position to lodge appeals within time.

Submissions on behalf of HMRC

26. Mrs Shepherd submitted that applications for permission to appeal out of time should only be granted in exceptional circumstances, relying upon *O'Flaherty v HMRC* [2013] UKUT 0161 (TCC) ("*O'Flaherty*"). She said that there were no exceptional circumstances as the relevant question is whether or not TDY was in a position to appeal within time, not whether or not Mr Walker and Mrs Triffitt were in a position to do so. TDY was in such a position as Mr Triffitt himself could have appealed (and in fact sought to do so, although it is not clear which period that related to or why it did not progress).

Discussion

27. We do not agree that applications for permission to appeal out of time should only be granted in exceptional circumstances. *O'Flaherty* does not stand for this proposition and instead underlines what was said in *Data Select* that all the

circumstances of the case must be considered. Judge Berner held as follows at [37] and [38]:

> [37] The exercise of such a discretion is a very material one, as it gives to the Tribunal a jurisdiction that it otherwise would not have. Time limits are prescribed by law, and as such should as a rule be respected. As the First-tier Tribunal (Judge Poole and Mr Marjoram) noted in *Aston Markland v Revenue and Customs Commissioners* [2011] UKFTT 559 (TC), referring to the comments of Sir Stephen Oliver in *Ogedegbe,* it should be the exception rather than the rule that extensions of time are granted. But neither *Ogdegbe* nor *Aston Markland* provides any guidance on the nature of the circumstances that will justify a tribunal exercising its discretion in favour of granting permission.
>
> [38] These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe,* nor in *Aston Markland,* and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional."

28. With this test in mind, we grant permission for the appeal to be brought out of time. In doing so, we have weighed the following matters and found that when taken together they tend in favour of granting permission.

(1) The purpose of the time limit is to achieve certainty and also to avoid delay.

(2) The delay was considerable when taken from the earliest of the defaults, being over two years. However, this is offset by the promptness of Mr Walker and Mrs Triffitt dealing with the matter once they became aware of it.

(3) The explanation for the delay is a good one. The directors were not able to appeal as they did not know about it. We take on board Mrs Shepherd's point that TDY was still able to appeal within time as Mr Triffitt was in fact authorised to deal with VAT matters. However, this does not take into account the important circumstance that he was concealing the position.

(4) HMRC will be deprived of a limitation defence. However, this is neutralised by the fact that TDY would be denied the opportunity to have its case considered. This is particularly stark given that the factual basis for the appeal is the same as the factual basis for the application.

(5) HMRC have not highlighted any particular prejudice which it will suffer if the application is granted.

29. It must be said that even if it had been necessary for us to make a finding that there were exceptional circumstances we would have done so. Mr Triffitt's conduct was exceptional in that it arose from the very specific situation of his opportunity and intention to hide the position from TDY's directors.

The Substantive Appeal

Submissions on behalf of TDY

30. Mr Smith raises two key arguments: first, that Mr Triffitt concealed the defaults from TDY and secondly that HMRC contributed to the problem by not communicating with TDY correctly.

31. As to the argument about Mr Triffitt's conduct, Mr Smith draws a distinction between Mr Triffitt's conduct and that of Mr Walker and Mrs Triffitt. Mr Walker and Mrs Triffitt dealt with the issue as soon as they found out about it and cleared all arrears and surcharges. Crucially, neither Mr Walker and Mrs Triffitt sanctioned or approved of Mr Triffitt's conduct. Indeed, Mr Walker had made it clear to Mr Triffitt that VAT was to be paid above all else.

32. In answer to the concern that Mr Triffitt was acting as TDY's agent, Mr Smith said that HMRC was not entitled to treat him as TDY's agent as there was no written authority to that effect and he was not a director. Mr Smith also sought to draw a distinction between dealing with the administrative processing of VAT returns and other financial matters (for which Mr Triffitt was authorised) and taking decisions about making late payments and entering into negotiations as to the date for payment (for which he was not authorised).

33. As to the argument about HMRC's role, Mr Smith said that HMRC should have been writing to the directors themselves rather than an employee. It was only when HMRC wrote to Mr Walker and Mrs Triffitt at their home addresses that the matter came to light.

Submissions on behalf of HMRC

34. Mrs Shepherd succinctly made the point that section 71(1)(b) of VATA 1994 means that reliance upon Mr Triffitt and Mr Triffitt's dilatoriness or inacurracies are not to be taken as a reasonable excuse. Even if this were not the case, Mr Walker and Mrs Triffitt placed Mr Triffittt in a position of responsibility and did not oversee what he was doing sufficiently.

Discussion

35. We find that TDY does not have a reasonable excuse for any of the defaults which are the subject of this appeal. This is for the following reasons:

(1) We agree that section 71(1)(b) means that Mr Triffitt's conduct cannot provide a reasonable excuse. It is clear from Mr Walker and Mrs Triffitt's evidence that they, and more importantly TDY, were relying upon Mr Triffitt to pay TDY's VAT on time. Section 71(1)(b) precludes that reliance from being capable of amounting to a reasonable excuse.

(2) Mrs Triffitt, as a director of TDY, did give Mr Triffitt actual authority to deal with VAT and financial matters. Mrs Triffitt was well aware that he was

signing the returns and making the payments. She clearly treated this as his responsibility and did not qualify that responsibility either herself or through anybody else.

(3) The fact that Mr Triffitt had not complied with Mr Walker's instructions does not detract from the fact that TDY was relying upon him. Crucially, this did not cause him to exceed his authority as far as HMRC were concerned as HMRC were not told about any such limits upon his responsibility.

(4) Even if Mr Triffitt's authority was limited, TDY was still relying upon him to act within his authority. Again, this reliance cannot be a reasonable excuse by virtue of section 71(1)(b).

(5) We do not accept that HMRC caused or contributed to the defaults as alleged. HMRC wrote on various occasions to TDY throughout at the correspondence address requested by Mrs Triffitt in a letter dated 13 July 2006 and which address was not changed by either Mrs Triffitt or Mr Walker. This included letters and assessments dated 10 April 2014, 6 October 2014, 14 October 2015, 12 November 2015 and 14 January 2016 (albeit that the final two of these would have made little difference to the position). In each case apart from 12 November 2015 (which was addressed to "Mr Mick Triffitt – Director") these were addressed to TDY or ""For the Personal Attention of the Directors". Although HMRC wrongly treated Mr Triffitt as a director in the course of various telephone conversations as set out in HMRC's log and notes, the fact remains that he was acting on behalf of TDY and, as we have already found, had actual authority to do so.

(6) We entirely accept that Mr Walker and Mrs Triffitt did all that they could to pay all arrears and to prevent further defaults. However, the question of whether or not there is a reasonable excuse for a default must be considered as at the date of the default taking effect, not (if later) the date when the default was remedied.

36. It follows that we must dismiss the appeal.

37. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 16 NOVEMBER 2016