



VAT – default surcharge – reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07275

Appeal number: TC/2017/08370

BETWEEN

CAMPERS SCOTLAND LTD

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Edinburgh on Wednesday 10 July 2019

No appearance by or for the Appellant

Mr G Hume, Officer of HMRC, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal in respect of the default surcharges imposed by the respondents (“HMRC”) for the periods 10/14, 07/15, 01/16, 04/16 and 01/17.

Preliminary issues

2. The administration for the Tribunal venue had contacted the appellant on 8 July 2019 to ask, for security purposes, who would be appearing. The appellant then emailed the Tribunal on the same day stating that no one would attend because of unspecified “... circumstances including staff illness”. The director, Mr Hayes, asked if the hearing could be rescheduled. HMRC opposed any postponement. The following day the Tribunal emailed the appellant confirming that the application for postponement had not been granted since there was no information and there had been a previous failure to cooperate with the Tribunal which had led to the issue of an Unless Order. The appellant was told to submit any further information or explanation by 4.00pm on 9 July 2019. Nothing was received.

3. HMRC maintained their opposition to any adjournment of the hearing. I had due regard to Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) and decided that it was in the interests of justice to proceed with the hearing.

4. The other preliminary issue was the fact that the actual appeal had been lodged late. HMRC offered no objection to that and I therefore extended the time for lodgement of the appeal.

The facts

5. The appellant has been registered for VAT with effect from 1 August 2009 and since first registering for VAT has submitted VAT returns on a quarterly basis. Originally, in addition to the periods which are under appeal, default surcharges had also been imposed for the periods 01/13, 04/13, 07/13, 10/13 and 01/15. The consequence of that is that at the time the default surcharges for the periods under appeal were imposed, they were all at the rate of 15%.

6. However, following a request from the appellant by letter dated 6 June 2016, those surcharges were reviewed and the additional surcharges referred to in the preceding paragraph were removed and those that were upheld were amended to reflect the removal of previous or subsequent periods.

7. For the purposes of this appeal, the first relevant default was for the period 01/14, where the due date for submission of the return and payment was 7 March 2014. In the absence of a return an assessment was raised on 14 March 2014 in the sum of £3,520. The appellant made payment on the assessment on 25 April 2014 and that was seven weeks late. The return was received on 14 May 2014 which was more than two months late. That return stated the true amount of the tax due as £13,216.28. The remaining payment of £9,696.28 was received on 18 June 2014 which was more than three months late. A Surcharge Liability Notice Extension (“SLNE”) was issued in respect of this and every subsequent period.

8. SLNEs are computer generated by an automated process and state that the taxpayer has been sent the Notice because it is in default. The percentage rates of surcharge are identified and advice is given on how to avoid default. All SLNEs were issued to the appellant’s principal place of business in accordance with Section 98 Value Added Tax Act 1994 (“VATA”) and therefore in terms of Section 7 of the Interpretation Act 1978, they are deemed to have been delivered unless the contrary is proven.

9. As far as this appellant is concerned, because earlier default surcharges were subsequently removed in respect of each period, new SLNEs were issued following review.
10. The period 04/14 due date for the submission of the return and electronic payment was 7 June 2014. The return was received on 9 June 2014 being two days late and payment was received on 18 June 2014, being 11 days late.
11. The period 07/14 due date was 7 September 2014 and the return was received on time but payment was received in two separate payments on 17 September 2014 and 15 October 2014 and were therefore late.
12. Ultimately no default surcharge was payable for these first three periods after revision of the position.
13. The first period which is subject to appeal is 10/14 for which the due date was 7 December 2014. The return was received on time but payment was received in six separate payments with the final balancing payment being received on 30 September 2015.
14. The period 01/15 due date was 7 March 2015 and the return was received on time but payment was received in three separate payments with the final payment being made on 15 June 2016.
15. The period 07/15 due date was 7 September 2015 and the return was received on time but payment was received late on 6 October 2016.
16. The period 01/16 due date was 7 March 2016 and the return was received on time but payment was received in eight separate payments with the last payment being received on 6 October 2016.
17. The period 04/16 due date was 7 June 2016 and the return was received on time and payment was received through an offset of credit (ie from a repayment) on two separate occasions on 6 October 2016 and 2 March 2017.
18. The period 07/16 due date was 7 September 2016 and the return was received on 13 September 2016 which was late and payment was received in four separate payments which were late. However, this default surcharge was subsequently removed by letter dated 4 May 2017.
19. The period 01/17 due date was 7 March 2017 and the return was received on time but the payment was received on 28 March 2017.
20. Lastly, HMRC point out that there is also a default surcharge for the period 04/17 where the return was received on time but the payment was received five weeks late. HMRC requested that the Tribunal include that default surcharge in this appeal since had the appellant been present, no doubt a request would have been made to include it. I agreed.
21. The total of the default surcharges under appeal is £13,863.43.
22. On 30 November 2015, HMRC received from the appellant a VAT Error Correction Form. The appellant alleged that it had made an error in all of the returns submitted between the periods 08/13 and 10/15 because it had not transferred the input VAT on goods coming into the country which had been paid by its agent and thus had not been claimed by the company.
23. Any voluntary disclosure, such as that form, has to be verified before any overpayment amount can be agreed. HMRC initiated a VAT inspection and that threw up a number of errors by the appellant. In summary, the voluntary disclosure was in the sum of £60,705 but the ultimate repayment due as at March 2017 was £52,061 although at various stages in the investigation HMRC's estimate as to the likely size of the repayment varied considerably. For example, on 30 September 2016 HMRC wrote to the appellant quantifying it at £21,041.

The Legislation

24. Section 59 VATA sets out the provisions in relation to the default surcharge regime. Under Section 59(1) a taxable person is regarded as being in default if, by the due date, the amount of VAT shown on the return as payable in respect of that period is not paid.

25. Section 59(4) provides that:-

“Subject to subsections (7) to (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 for the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.”

26. The legislation provides that HMRC may serve a Surcharge Liability Notice (“SLN”) on the defaulting taxable person, and that brings the taxpayer within the default regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. Section 59(5) sets out those percentage rates. A new default, made within the surcharge liability period, gives rise to a default surcharge being charged. The first surcharge thereafter is at 2%, increases to 5% for a second default within the period, 10% for a third and 15% for all subsequent defaults within the specified period.

27. Section 59(7)(b) VATA provides that a surcharge does not arise in relation to a default if the taxpayer satisfies HMRC or, on appeal, the Tribunal, that there was a reasonable excuse for the default.

Discussion

28. The onus of proof in respect of the imposition of the default surcharges lies with HMRC. HMRC have complied with Section 59(4) VATA and a default surcharge was correctly issued in each instance where the payment was received after the due date. The rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount because of mitigating circumstances. Each SLN and SLNE that was issued to the appellant detailed on the reverse the way that surcharges are calculated and the percentages used in determining that.

29. The default surcharge system seeks to ensure businesses that fail to pay VAT on time do not gain a commercial advantage (by way of what amounts to an interest free loan) over the majority of taxpayers that do pay on time. The system therefore imposes a financial penalty on traders who are persistently late in paying their VAT.

30. The appellant was rendering VAT invoices and knew or should have known that the VAT was due and the due dates for payment.

31. HMRC are absolutely correct in stating that as Judge Connell stated in *CG Steel Structures v HMRC*¹: “...VAT is never the property of the company ...and must be paid over as the law requires.”

¹ [2014] UKFTT 504 (TC)

32. Was there a reasonable excuse for the defaults? Reasonable excuse is not defined in the legislation. Not every excuse is a reasonable excuse. I agree with Judge Berner in *Barrett v HMRC*² at paragraph 154 where he said:

“The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard”.

33. The appellant’s Ground of Appeal was that the VAT investigation took a long time and it was due a repayment of VAT so because HMRC had held its money there should be no default surcharges. The delay in making the repayment had caused “extreme hardship”.

34. Although it is unlikely, it might conceivably have been a mistake that the appellant thought that because a repayment would, or might, ultimately be due then payment need not be made on time but the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*³ where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

“What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. ...”.

35. However, I observe from the notes of telephone conversations that on 25 November 2015 the director contacted HMRC Debt Management referring to the likely repayment and asking that tax collection be put in abeyance. That was refused and he was advised that the agreement of the repayment might take some time. More pertinently, on 4 March 2016, Mr Hayes was told that it was “...in his interest to ensure current liabilities (sic) paid”.

36. During the entire period of the investigation there was ongoing correspondence, and at a detailed level, because numerous errors had been uncovered.

37. It is evident from those detailed file records that the appellant had significant tax debt in addition to current liabilities. Mr Hayes has negotiated some Time To Pay (TTP) agreements since as long ago as mid-2015. He therefore was aware of the existence of TTP. He certainly was conversant with the default surcharge regime.

38. The first and most obvious point is that the default surcharges issued for 10/14 and 07/15 are dated before the error giving rise to the repayment claim was identified so even if the repayment was a reasonable excuse it could not apply to those periods. It cannot apply to period 01/16 where the payment was due on 7 March 2016 given the phone call three days earlier.

39. As far as period 04/16 is concerned, the due date was 7 June 2016. The appellant knew or should have known there were still extensive enquiries in hand. The appellant’s email to HMRC dated 28 May 2016 referred to invoices which had been put in the post due to their volume. That email alone extended to more than two pages of close type.

40. Lastly, in regard to period 01/17 the repayment argument is simply irrelevant because the overpayment had been allocated to the outstanding VAT on 1 March 2017 before the due date of 7 March 2017.

41. In summary, in the face of a detailed VAT investigation of the appellant, which had disclosed a number of errors, I do not accept that it was reasonable for Mr Hayes to assume

² [2015] UKFTT 329 (TC0)

³ 2012 UKFTT 315 (TC)

that because a repayment, in an unknown sum might, or would, ultimately arise, that he could default. Indeed, as period 01/17 vividly demonstrates, because the appellant had tax debt the repayment was allocated elsewhere.

42. HMRC are absolutely correct in relying on Mr Justice Lightman's finding in *R(On the application of UK Tradecorp Ltd) v HMRC*⁴ to the effect that until a claim is accepted or established there is no right to payment. There is simply an aspiration which may or may not be well founded.

43. In this instance the fact that there was even a repayment claim is because of errors made by the appellant and that no doubt significantly contributed to its cash flow problems which arose before the periods with which I am concerned. However, in terms of the legislation, insufficiency of funds, particularly where that is created or aggravated by the taxpayers own actions, cannot be a reasonable excuse.

44. I understand why the appellant may feel that it is unfair that HMRC were holding what was perceived as its funds but, firstly, that was caused by the appellant and the subsequent and inevitable compliance check took a long time primarily because of the other errors uncovered. That was not the fault of HMRC and I observe that the investigation was completed within a "normal" timescale for a matter of that complexity.

45. Secondly, the decision of the Upper Tribunal in *HMRC v Hok*⁵ is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

46. For all these reasons I find that the default surcharges for 10/14, 07/15, 01/16, 04/16, 01/17 and 04/17 were properly imposed and the appellant has not established a reasonable excuse for those defaults.

47. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 20 July 2019

⁴ [2005] STC 138

⁵ 2012 UKUT 363