[2013] UKFTT 0473 (TC)

TC02874

Appeal number: TC/2013/03685

Value Added Tax – Surcharge for late submission of VAT return; whether reasonable excuse – no; appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

J & R LEASING LTD **Appellant**

- and -

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

TRIBUNAL: PRESIDING MEMBER: PETER R SHEPPARD FCIS, FCIB, CTA, ATII
DR HEIDI POON, CA, CTA, PhD

Sitting in public at George House, Edinburgh on 27 August 2013

The Appellant was unrepresented

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

Preliminary matter

1. On 28 May 2013 the Tribunal wrote to the appellant acknowledging receipt of the Notice of Appeal. The letter also included the following paragraphs:

"You will be notified as soon as the hearing is arranged.

If you do not attend the hearing, the Tribunal may decide the matter in your absence."

On 26 June 2013 the Tribunal sent a Notice of Hearing to the appellant advising that a hearing had been arranged for 11.30 am on 27 August 2013. This included the statement: "If you do not attend, the Tribunal may decide the matter in your absence."

2. On the morning of 23 August 2013 there was a telephone conversation between John Graham, Director of the appellant and a Tribunal clerk. Mr Graham advised that he would not be attending the hearing. The clerk suggested if he was not going to attend he might like to send in any submissions he may have by e-mail. Later that morning Mr Graham sent an e-mail to the Tribunal confirming that he could not attend because it would "cost me a lot of money to be away from business to attend so I am sending this e-mail in my absence as advised". He then went on to make a number of points which are considered later.

3. If a party fails to attend a hearing, Tribunal Rule 33 allows an appeal to proceed if the Tribunal-

(a) is satisfied that the party has been notified of the hearing and reasonable steps have been taken to notify the party of the hearing.
(b) considers it is in the interests of justice to proceed with a hearing.

4. The Tribunal was satisfied that the appellant had been notified of the hearing and had decided not to attend. It was therefore in the interests of justice to proceed with the hearing.

Introduction

5. This concerns an appeal to the Tribunal dated 12 March 2013 made by the appellant against a surcharge initially of £574.82 for the late submission of payment for the appellant's VAT return for the quarter ended 31 January 2013.

Statutory Framework

6. The VAT Regulations 1995 Regulation 25(1) contains provisions for the making of returns.

7. Section 59 of the VAT Act 1994 sets out the provisions whereby a Default Surcharge may be levied where HMRC have not received a VAT return for a

prescribed accounting period by the due date, or have received the return but have not received by the due date the amount of VAT shown on the return as payable.

8. A succinct description of the scheme is given by Judge Bishopp in paragraphs 20 and 21 of his decision in *Enersys Holdings UK Ltd* [2010] UKFTT 20 (TC) TC 0335 which are set out below.

> "[20] … The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence.
>
> [21] There is no fixed maximum penalty; the amount levied is simply the prescribed percentage of the net tax due. The Commissioners do not collect some small penalties; this concession has no statutory basis but is the product of a (published) exercise of the Commissioners' discretion, conferred on them by the permissive nature of s 76(1) of the 1994 Act, providing that they 'may' impose a penalty, and their general care and management powers. Even though the penalty is not collected, the default counts for the purpose of the regime (unless, exceptionally, the Commissioners exercise the power conferred on them by s 59(10) of the Act to direct otherwise). Similarly, where the monetary penalty is nil, because no tax is due or the trader is entitled to a repayment (…) the default nevertheless counts for the purposes of the regime, subject again to a s 59(10) direction to the contrary."

9. Section 59(7) covers the concept of a person having reasonable excuse for failing to submit a VAT return or to make the related payment on time.

10. The VAT Act 1994 Section 71(b) covers what is not to be considered a reasonable excuse.

Facts

11. The appellant carries out a car and van leasing and hire business based in East Kilbride, Glasgow.

12. The annual holiday for the trades in Scotland are the first two weeks in July, and it has been a long-standing custom that the trades close their business for these two weeks.

Appellant's submissions

13. The appellant's submissions are contained in three letters.

In a letter dated 29 March 2013 to HMRC they appeal against the penalty and say:

"Normally I would receive word from my Accountant of the amount due and when it was due. Then I would receive a letter from yourselves telling me when it was to be paid. I would then make payment, as you will see from my history I usually phone you and you have kindly allowed me to pay in instalments in the past due to difficult times and the fact that we are a small company. When I phoned after receiving the letter I was told that you had changed your procedure and did not send out letters any more to my surprise as I hadn't been informed from."

The sentence is not completed but a further paragraph states:

"So what I am saying is that it was just a communication problem and not because we did not want to pay the VAT. When I learned of this I paid the VAT in full as you will see. It may not seem a lot to you, but £574.82 is a lot of money for a small company like ours and I ask that you reconsider your surcharge on this occasion. I would be most appreciative if you could refund it on the promise it won't happen again. I state again it was purely a communication problem and nothing else."

14. On 1 May 2013 HMRC replied saying they had reviewed the surcharge and confirmed it remained in force. They said that they could not accept that the appellant had reasonable excuse for the late return.

15. On 23 May 2013 the appellant wrote again to HMRC appealing the decision and the letter was passed to the Tribunal.

The letter includes the following statement:

"I think it's a scandal that you changed the way you do things and then don't inform anyone, and then expect everyone to know what your doing. If you check your records you will see that we have paid all VAT due and never defaulted before until now, and that was purely because we weren't aware of what was going on. How can you say that because I am not a mind reader that I don't have reasonable excuse."

The letter repeats in different words points made in the 29 March 2013 letter.

16. The e-mail of 23 August repeats some of the above but also says:

"The matter was simple for me, HMRC changed the way they did things and never informed anyone or certainly myself of the changes.

I usually received a letter from HMRC confirming how much I had to pay which I cross referenced with the amount I was informed I had to pay from my accountant. I then either phoned HMRC to agree a [sic] instalment payment or paid the amount in full by BACS.

On this occasion the letter never came, and instead a letter did arrive saying I was late and my company was getting fined for late payment.

When I phoned HMRC they told me they had changed the way they did things and they no longer issued letters. When I asked HMRC why I wasn't told this they couldn't answer me."

Respondents' submissions

17. Mrs McIntyre for HMRC referred to a schedule in the bundle which detailed incidences of late payments by the appellant in the periods ended 31 October 2010; 31 January 2011; 30 April 2011; 31 July 2011; 31 October 2011; 31 January 2012; and 31 January 2013.

18. It is the surcharge that was levied for the last of these failures that is the subject of this appeal. The appellant's VAT return for the quarter ended 31 January 2013 was due to be submitted by 28 February 2013. A further seven days grace is given where payment is made electronically. The return was received by HMRC on 27 February 2013 but the payment which was made by the Faster Payment electronic system was received by HMRC on 28 March 2013, which was 21 days late even taking the seven days grace into account. The six earlier failures had resulted in a surcharge rate of 15% of the tax due applying so an assessment of £574.82 was made by HMRC being 15% of the tax of £3,832.15 shown as due on the appellant's VAT return for the quarter ended 31 January 2013.

19. Mrs McIntyre submitted that the fact that the accountant had not advised the appellant of the amount to send to HMRC did not amount to a reasonable excuse for the late payment. She referred the Tribunal to the VAT Act 1994 Section 71(1)(b) which states

"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."

20. She said no reasonable excuse had been established and asked for the appeal to be dismissed

Decision

21. The Tribunal observes that in Mr John Graham's letter of 23 May 2013 he says, "If you check your records you will see that we have paid all VAT due and never defaulted before, until now." HMRC provided in the papers for the hearing (a copy of which was sent to the appellant) a schedule showing that in the period from 1 August 2010 to 31 January 2013, a total of ten quarters, the appellant had defaulted on seven occasions. In every one of the seven defaults the VAT return had been sent in on time and although payment had always been made, it had been made late. On the first three of these occasions the surcharge had been waived but subsequently surcharges of £99.43, £76.52 and £131.57 had been levied and paid by the appellant. The latter three had been levied at the maximum rate of 15%. The appellant had been sent surcharge notices on each occasion so was well aware of the situation.

22. The system the appellant describes as being in place whereby HMRC notifies the appellant of the amount to pay may be the system used for direct tax but not for VAT. The Tribunal notes from HMRC records that there had been occasions where the appellant entered "time to pay" arrangements with HMRC. On those occasions, it would appear that alternative dates for payment by instalments (other than full payment on the statutory due date) were agreed. It would appear that the appellant has recalled those occasions when such a concessionary arrangement was entered into and has mistaken a concessionary practice as being the standard practice.

23. It is the appellant's responsibility to calculate the amount of VAT due, whether that be by his own efforts or by use of an accountant. It is then the appellant's responsibility to complete a VAT return and submit it online by the due date, again by using an accountant if that is preferred. In every one of the ten periods referred to, a VAT return was indeed submitted on time. The returns show the amount due to be paid to HMRC. There is no requirement for HMRC to confirm that amount before it becomes payable. There was no reason for the appellant not to pay the amount shown on the return by the due date. If the accountant had failed to advise the appellant of the amount to be paid as stated on the return, that is unfortunate, but it would still remain the appellant's responsibility to ensure that the payment to HMRC was made on time, if necessary by contacting the accountant to obtain the figure. The VAT Act 1994 Section 71(1)(b) quoted above expressly states that this communication omission between the appellant and his accountant cannot be regarded as a reasonable excuse.

24. The surcharge of £574.82 for the quarter ending 31 January 2013 has been assessed by HMRC in accordance with the legislation. It has been correctly calculated as 15% of the tax due of £3,832.15 as reported by the appellant on its VAT return for that period. The appellant has established no reasonable excuse for the late payment; the appeal is therefore dismissed.

25. 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.

PETER R SHEPPARD FCIS, FCIB, CTA, ATII
PRESIDING MEMBER

RELEASE DATE: 12 September 2013