



**TC02764**

**Appeal number: TC/2012/10419**

*VAT – default surcharge – Section 59 Value Added Tax Act 1994 -  
reasonable excuse – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHRISTOPHER STONER LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MR G. NOEL BARRETT LLB (Presiding Member)  
MR A REDDEN FCA**

**Sitting in public at Phoenix House Rushton Avenue Bradford on 25<sup>th</sup> March 2013**

**Mrs S Stoner Director and Company Secretary, for the Appellant**

**Mrs Oliver of HM Revenue and Customs, for the Respondents**

## DECISION

### *Introduction*

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1. This is an appeal against a default surcharge of £3260.74 for failure to make a VAT return and late payment of VAT by the due dates for the quarter ending 30<sup>th</sup> April 2012.

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2. The Appellants are jewellers; their appeal against the default surcharge is on the basis that they have a reasonable excuse.

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### *The Law*

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3. The provisions of *Section 59(1) (a) and (b) of the Value Added Tax Act 1994 (VATA)* operate such that a person shall be regarded as being in default for that period:

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“if by the last day on which a taxable person is required.....to furnish a return .....HMRC have not received that return, or have received that return but have not received the amount of VAT shown on the return.....”

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4. Where a default occurs and HMRC serves a surcharge liability notice (SLN), then if any further defaults are made by the taxable person before the expiry of the first anniversary of the last day of the period referred to in the SLN, then the taxable person becomes liable to a surcharge being the greater of the specified percentage or £30

5. The specified percentages are set out in *Section 59 (5) VATA*:

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- (a) in relation to the first such prescribed period the specified percentage is 2%
- (b) in relation to the second such period the specified percentage is 5%
- (c) in relation to the third such period the specified percentage is 10%
- (d) in relation to such period after the third the specified percentage is 15%

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6. *Section 59(7) VATA* provides that the taxable person shall not be liable to the surcharge and shall not be treated as having been in default;

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“If a person.....satisfies .....on appeal a tribunal that in the case of a default which is material to the surcharge....”

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

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7. *Section 71(1) VATA* provides that:

“(a) an insufficiency of funds to pay any VAT is not a reasonable excuse: and

10 (b) where reliance is placed on any 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.”

8. HMRC do not however issue a surcharge at the rate of 2% or 5% if it calculates it to be less than £400 .

15 9. HMRC send each SLN to the taxable person with notes advising what a default is and the consequences which will flow from further defaults. Those notes also advise the taxable person to contact HMRC’s local Debt Management Unit if they expect to have difficulty paying VAT on time.

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***The Evidence and our Findings of Fact***

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10. We had the opportunity to read the documentary evidence and to hear oral evidence from Mrs Stoner.

30 11. The facts as to the serving of the SLN and the subsequent failure by the Appellant to make its VAT return and VAT payments by the due dates were not disputed by the Appellant.

35 12. Mrs Oliver submitted and we accept that neither an insufficiency of funds on the part of the Appellant nor reliance on another person, in this case a book keeper, can amount to a reasonable excuse for the Appellant not making its VAT return and VAT payments by the due dates.

40 13. Mrs Oliver further submitted and we accept that the surcharge could have been avoided if a time to pay arrangement had been agreed with HMRC before the default occurred.

45 14. Mrs Stoner confirmed that she understood the points made by HMRC. She however asked the tribunal to adopt what she called a “human point of view”.

15. Mrs Stoner told us and we accept that the last few years had been very tough for her and her husband and the Appellant Company. She and her husband had purchased the business in 2008 putting themselves into considerable debt to do so. Before the financial crisis struck they had already committed in 2010 to expanding the business into a second retail property.

16. We also accept Mrs Stoner's explanations that she had young children and could therefore only work part time in the business, that her mother in law was employed originally to oversee the financial side of the business, but then left; and that as the recession deepened and the business struggled that the business then changed accountants twice in 2011 and then suffered a succession of poor quality book keepers.

17. We note that by 2011 it was clear to Mrs Stoner that she needed to keep much better financial controls on the business and that at first she was naïve and no expert but now knows a lot more than she did 18 months ago. We also accept that the Appellants were very unlucky with the various book keepers they used/employed.

18. Mrs Stoner confirmed that the Appellant had originally focused on bespoke engagement and wedding rings, a luxury market, which was particularly prone to the recession and which at the best of times suffered from poor cash flow, as rings would often be ordered by customers many months before they were fully paid for, but the Appellant would still have to pay its suppliers.

19. The business adapted to taking in a lot more part exchange jewellery, but this then resulted in cash being tied up even further as part exchange stocking levels grew, and in lower profit margins on sales of new jewellery and watches which greatly affected the Appellants ability to pay suppliers, rents, wages and VAT.

20. By the summer of 2011 staffing levels had been reduced and pay for the remaining employees, had been reduced by 15%.

21. From October 2011 the Appellant employed a M/s Warmesley one day a week as book keeper. Unfortunately, having filed the previous two returns on time, she completely forgot to file the VAT return for the quarter ending 30<sup>th</sup> April 2012 which was then filed late. That return, by Mrs Stoner's admission, was for a "huge" amount of VAT - £32,607.

22. Mrs Oliver pointed out that had the Appellant made a time to pay arrangement with HMRC before or by 7<sup>th</sup> June 2012 then the surcharge would have been avoided. However the Appellant said she did not realise about M/s Warmesley's oversight until too late and did not contact HMRC until 12<sup>th</sup> June 2012.

23. Mrs Oliver referred to the Action History notes of contact with the Appellant, these notes showed that Mrs Stoner telephoned on the 12<sup>th</sup> June and requested a time to pay arrangement stating that the business was unable to pay its VAT for the quarter ending 30<sup>th</sup> April 2012 because of the business having had a bad few months and because money set aside for VAT had been used to pay wages and rent. There was no record of Mrs Stoner having mentioned any oversight on the part of M/s Walmsley during that telephone conversation. We accept that which is recorded in these notes.

24. Mrs Stoner said that realising how serious this was, coming as it did “on top” of the Appellants previous cash flow difficulties, that she and her husband discussed liquidating the business, as the VAT surcharge was not the only debt the business faced. They however decided not to liquidate the business and instead continued trading the business, running it on “a month to month basis”.

25. We note that the Appellants accountants spoke with HMRC and a time to pay arrangement was agreed for the VAT quarter ending 31<sup>st</sup> August 2012. During that same month the Appellants held a huge sale and liquidated as much stock as possible. Even though this resulted in reduced margins it produced cash for the Appellant and in fact resulted in the Appellant paying that quarters VAT early.

26. We also note that since August 2012 the Appellants VAT returns have all been paid on time and in full.

27. Mrs Oliver confirmed that whilst HMRC had some sympathy for the Appellant’s predicament the Appellants were not the only business struggling through the recession and that the surcharge was there as a deterrent for late returns or late payment. She pointed out that the Appellant collected VAT on behalf of HMRC and that as such it should have been retained by the Appellant so as to enable it to pay it VAT return on time.

28. Mrs Stoner acknowledged on behalf of the Appellant that she accepted that VAT “is not our money” and is owed to HMRC. She also said that she completely understood that there was a rule book which had to apply to everyone.

40 ***Reasonable Excuse***

29. The burden of establishing reasonable excuse lies on the Appellant.

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30. It is established law that whilst an insufficiency of funds does not of itself amount to a reasonable excuse, the reason behind the insufficiency of funds may in certain circumstances constitute a reasonable excuse.

5 31. We have some sympathy for the hardship suffered by the Appellants in their business, particularly since 2010 and congratulate the Appellants as to the lengths to which it has gone to adapt its business to enable it to survive, in what has been, undoubtedly, a very difficult trading period.

10 32. However in these particular circumstances we find that the Appellant's business, had by Mrs Stoners own admission, been struggling financially, due principally to the recession, since 2010 and that there were no sudden events which it was not reasonable to anticipate, and which occurred at or about the time of the Appellant's defaults, and upon which a reasonable excuse could be  
15 properly grounded.

33. We do not therefore accept that the Appellant had a reasonable excuse for the late submission of its VAT returns or late payment of VAT.

20 34. It is also established law that a tax payer cannot rely on the acts or omissions of any other person to establish a reasonable excuse. *Section 71(1)(b) VATA*

25 35. Whilst we accept that the Appellant suffered considerably as a result of a succession of book keepers who seemed less than skilled in their abilities, the fact remains that a tax payer cannot "outsource" its liability. Just as in our view it would not have amounted to a reasonable excuse for the tax payer themselves to forget, (for no other good reason), to file its VAT return and pay its VAT on time, so in our view it does not amount to a reasonable excuse where the tax payers  
30 book keeper simply forgot, (for no other good reason), to file the Appellant's VAT return and pay the Appellant's VAT on time.

35 36. Given the significant consequences which would flow from a further default, consequences of which we believe that the Appellant was made fully aware, we would have expected the directors of the Appellant Company to exercise an over-riding obligation to check that its VAT return had been submitted on time and that the VAT payable upon that return had been paid on time.

40 37. We are not therefore prepared to accept that the failure by the Appellant's book keeper to file the Appellants VAT return on time amounts to a reasonable excuse.

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### *Decision*

38. In the circumstances we dismiss the appeal.

39. This document contains full findings of fact and reasons for the  
5 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  
10 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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**G. NOEL BARRETT LLB**  
**TRIBUNAL PRESIDING MEMBER**

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**RELEASE DATE: 25 June 2013**

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