



**TC02917**

**Appeal number: TC/2012/08950**

*Default surcharge – s71(1)(a) VATA 1994 – reasonable excuse - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ROBERT HENRY DUNCKLEY**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MALACHY CORNWELL- KELLY  
MS ELIZABETH BRIDGE MA**

**Sitting in public at 185 Dyke Road, Brighton on 16 August 2013**

**The taxpayer in person**

**Ms Rita Pavely of HMRC for the respondents**

## DECISION

1 This is an appeal against a default surcharge of £3,224.99 being 15% of tax paid late in respect of period 05/12. There were four previous defaults in this case, for periods 11/10, 05/11, 08/11 and 11/11.

2 The return for 05/12 was submitted in time on 4 July 2012, but two payments of the tax due were not made until 12 and 15 July respectively. A written statement by Mr Dunckley confirmed that he had owned the small family-run nursery business since February 2010; the business had an annual turnover of £380,000 yielding a net profit of £10,000. The final payment date of 7 July had fallen on a Saturday, necessitating payment on 6 July in order to meet the deadline - though, as we have noted, the return itself was filed in time electronically on 4 July. In the week following, Mr Dunckley telephoned the VAT office to warn them that he would be paying late but by then the surcharge mechanism was already in play.

3 The situation had arisen because Mr Dunckley was away from his office from the middle of June until 7 July building a show garden at Hampton Court. The quarter in question was the busiest time of year for a garden centre, the business being heavily seasonal, and Mr Dunckley said that "I completely forgot about the VAT return until I returned from . . . Hampton Court . . . and could not transfer the money until a week later". A telephone record dated 12 July 2012 of Mr Dunckley's call to HMRC, warning of the late payment, notes that he said that the lateness was "due to cashflow", though there was no evidence of any exceptional and overwhelming cashflow problem behind that.

4 Mr Dunckley's letter to the tribunal appealing against the surcharge said:-

I was not trying to avoid or delay payment of the VAT, it was just overlooked in this busy period. This penalty of £3,224.99 is an extremely large amount of money, which this business can ill afford and would cause enormous strain and pressure on the business. I would like the tribunal to reverse the commissioners' decision and help my small business in line with government policy of helping small businesses.

5 For HMRC, Ms Pavely pointed out that the falling due of the payment was entirely foreseeable and that, as Mr Dunckley had admitted, the failure to pay was due to his having forgotten that the date was coming round. Indeed, on 31 March 2012 telephone records showed that Mr Dunckley had received specific advice about meeting the quarterly VAT payment dates. The case was fully covered by section 71(1)(a) of the Value Added Tax Act 1994.

6 Section 71(1)(a) provides:-

*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-

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

(b) 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.

7 Parliament has given the tribunal no power to reduce or mitigate default surcharges. It is well established that if a surcharge complies with the statutory requirements in the circumstances of the case, it must be upheld and any indulgence or mitigation is a matter for the commissioners alone - or, in certain eventualities, for judicial review. If our powers extended to easing the burden of the surcharge according to the circumstances, this is a case in which we would have done so. With the law as it stands, however, the appeal must be dismissed.

8 We record that Mr Dunckley complained that he had had to pay the surcharge notwithstanding that his appeal was pending before the tribunal. It is not clear whether the correct appeal form was issued by the tribunal administration since no form was with the papers; if it had been, it would have been apparent to Mr Dunckley that he could have applied to proceed without payment of the surcharge on being able to demonstrate hardship. Ms Pavely helpfully undertook to contact the tribunal administration to check that the correct appeal forms are being issued.

9 Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

**MALACHY CORNWELL- KELLY**

**TRIBUNAL JUDGE**

**RELEASED DATE: 2 October 2013**