TC03136

Appeal number: TC/2012/09433

Value added tax – default surcharge for late payment – whether reasonable excuse – repayment due to associated company – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MUSION EVENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: DR K KHAN

Sitting in Bedford Square, London on 23 October 2013.

The Appellant was not present nor represented.

Alison McHugh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Appeal

1. This is an appeal by the Appellant against a Default Surcharge for the periods ending:

(1) 31 December 2011 (12/11) in the sum of £1,212.47 being 2% of the tax outstanding of £60,623.80.

(2) 31 March 2012 (03/12) in the sum of £4,562.42 being 5% of the tax outstanding of £91,248.54.

2. The total amount of surcharges under appeal is £5,774.89 and not £6,752.25 as stated in the Notice of Appeal.

3. There is no dispute that the VAT was paid late. The issue for the Tribunal is whether Default Surcharges have been correctly incurred and charged and whether there is a reasonable excuse for the late payment.

Legislation

Value Added Tax Act 1994 (VATA 1994)

(1) Under s.59(1)(a) VATA 1994 a taxable person is in default if payment of VAT is made late.

(2) Under s.59(4) VATA 1994 if a taxable person is in default for a prescribed accounting period then they are liable to a surcharge in the amount of a prescribed percentage.

(3) Section 59(7) VATA 1994 provides for the Commissioners or on appeal the Tribunal, setting aside the surcharge if 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 at the appropriate time or the Appellant had a reasonable excuse for the late payment.

(4) Section 71 VATA 1994 sets out the meaning of reasonable excuse for the purpose of s.59 whereby s.71(1)(a) states that an insufficiency of funds is not a reasonable excuse.

The Evidence

4. The Tribunal was presented with correspondence between the parties and case law including the *Commissioners for Her Majesty's Revenue & Customs v Total Technology (engineering) Limited* [2012] UKUT 418.

Appellant's Submissions

5. The grounds of appeal are set out in the Notice of Appeal dated 12 October 2012.

6. The Appellant makes the following points:

(1) The Appellant says that a significant degree of intercompany trading took place and the funds due from a late repayment from an associated company Musion Systems Limited, was to be used to repay VAT payments owed from the Appellant, Musion Events Limited. In essence the funds were always held by HMRC. The Appellant had offered that HMRC keep the repayment of VAT due and offset this against the VAT owed by the Appellant. The Appellant says that HMRC are responsible for the lack of funds and therefore their appeal should be allowed and the surcharge paid should be re- funded.

(2) That HMRC delayed in replying to letters sent regarding this matter and the imposition of the penalty was unfair. This delay resulted in increases in the surcharge. The Appellant wrote to HMRC to explain the situation but HMRC had not replied. It was HMRC's delay which created some of the surcharge penalties. In the circumstances the penalty should be recalculated considering the time taken by HMRC to respond to explanations.

The Respondents' Submissions

(1) For the period 12/11 the VAT Returns and payment of VAT due thereon was due by 7 February 2012. The Return was received on 9 February 2012 and was late and the payment was received on or after 9 February 2012 and was also late.

(2) For the period 3/12 the VAT Returns and payment of VAT due thereon was due by 7 May 2012. The Return was received on 30 April 2012 which was on time but the payment was received 31 May 2012 which was late.

(3) As the Appellant was in a period of default pursuant to s.59 (2) and 59(3) of the VATA 1994, a surcharge penalty was correctly imposed by virtue of s.59 (4) for the above periods. The Respondents say the Default Surcharge had been correctly incurred and charged.

(4) The Appellant's claim that they were waiting for a repayment from an associated company to pay their own VAT liability, indicating that this resulted in a lack of funds to pay VAT. Insufficiency of funds does not constitute a reasonable excuse for the purposes of s.59 VATA pursuant to s.71 (1) (a). The two companies are entirely separate entities and as such are responsible for ensuring they meet their individual statutory payment obligations and the two entities do not form a VAT group. The Appellant provided an application for group registration on 2 April 2012. The two

companies had separate VAT registration numbers and were not part of a group at the relevant time.

(5) It was not reasonable for the Appellant to rely on or assume that the repayment would have been made before their own due date for VAT.

(6) Furthermore the repayment return of the associated company for the period 03/12 was submitted on 1 May 2012, six days before the final due date for the Appellant's payment of VAT. The repayment was subsequently authorised without delay on 23 May 2012.

(7) At no point did HMRC consider offsetting payments due to the associated company against liabilities owed by the Appellant. It was not reasonable for the Appellant to assume that there was sufficient time for any credit due to be agreed before their own liability was due for payment.

(8) The non-payment of amounts due from HMRC to a separate entity could not be considered as a reasonable excuse for non-payment of tax due from another separate entity.

Discussion and Conclusion

(1) The company had not taken steps at the appropriate time to register itself or an associated company as a group. It could not therefore claim that non-payment to a separate legal entity was a reason for its own non-payment. It seems that the company failed to make payments on the due date and subsequently made an application for a group registration. It then made the assertion that because certain repayments had not been made to an associated company, which was a separate legal entity, that somehow there could be a reasonable excuse. It is established in law that a late payment which resulted from a late repayment claim by an associated company does not constitute a reasonable excuse and the case which decided this was the *Artful Dodger (Kilmarnock) Limited CS* [1993] STC 330.

(2) The Return of the associated company for VAT period 12/11 was received on 9 February 2012 which was two days late. The Appellant would already have been aware that a repayment would not be made by the due date for their own tax to be repaid. An adjusted repayment was authorised on 12 April 2012.

(3) The repayment return for the associated company for period 03/12 was submitted on 1 May 2012, six days before the final due date for the Appellant's payment of VAT. The repayment was subsequently authorised without delay on 23 May 2012. The VAT Return for this period was received on 30 April 2012 and the VAT Return and payment of VAT was due on 7 May 2012. In this circumstance it would have been reasonable for the Appellant to make suitable arrangements to ensure that

the VAT Returns and payments were made on time. HMRC wrote to the Appellant on 27 February 2012 to advise that a claim return was being dealt with and there was no guarantee that a credit would be released. It was made clear in the letter that they were unable to suspend action on the Appellant's company for payment based on a credit due. The letter cannot be taken as an indication that HMRC were considering offsetting payments due to the associated company against liabilities owed by the Appellant. In the circumstances where the repayment was due to a different company which was not in the VAT group and had a separate VAT registration the argument cannot succeed.

(4) The Appellant has provided no financial information regarding the company which would show that the money was allocated for the payment of VAT. The Appellant says in correspondence that "the turnover size of both companies and its increase in trade generally means that MEL does not have the cash available to fund the VAT payment without receiving the VAT repayment". Financial figures supporting this position would have helped the Tribunal to understand how the repayment of VAT was to be allocated between the two companies, which at the time, were separate companies and not in the VAT group. The Tribunal would have been willing to entertain the Appellant's submission on a reasonable excuse should such figures had been provided. It is not conclusive that with the VAT repayment the money would have been allocated to pay outstanding VAT of another company.

(5) In the circumstances, the only excuse which has been put forward is an insufficiency of funds which does not give rise to a reasonable excuse. The application of funds received as repayment between different corporate entities to satisfy outstanding VAT liability cannot provide a reasonable excuse without cogent evidence and detailed financial information which shows that the companies traded as in effect one economic entity and that such repayment was to be allocated to satisfy outstanding VAT liability. Whilst the Appellant have said that this is the case this has not been supported by any reliable evidence. The Appellant chose to conduct their business through two separate companies. It is not known whether there is common shareholding between the companies or whether common decisions were made regarding financing and tax. It would appear to the Tribunal that the businesses were for all intents and purposes treated as separate.

(6) In conclusion, it should be noted that a Tribunal has a limited jurisdiction to look at reasonable excuse only and no general discretion to examine issues of fairness and proportionality which have also been raised.

(7) In the circumstances, the appeal is dismissed.

7. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 12 December 2013