TC03582

Appeal number: TC/2013/05415

VAT – Default surcharge – Whether reasonable excuse of facts – No — Appeal dismissed – Section 59 Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

RESIDENTIAL EQUITIES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MR MICHAEL BELL ACA CTA

Sitting in public at 45 Bedford Square, London WC1 on 6 May 2014

Clint Davis, director of Residential Equities Limited, for the Appellant

Femi Ojo, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Having orally announced our decision to dismiss this appeal on the day of the hearing Mr Clint Davis, the director of Residential Equities Limited (the "Company"), indicated that he wished to appeal. Under Rule 35(4) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules"), a party wishing to appeal must apply for full written findings and reasons for the decision before seeking permission to do so. Therefore, this decision is provided, in accordance with the Rules in order to enable Mr Davis to decide whether to apply for permission to appeal against the decision of the Tribunal and to assist him in formulating any such appeal.

2. Section 59 of the Value Added Tax Act 1994 ("VATA") provides that a person who has not submitted a VAT return or paid the VAT by the due date and who has been served a liability notice shall be liable to a surcharge equal to the "specified percentage of his outstanding VAT for that prescribed accounting period". The "specified percentage" increases with each subsequent default from 2% to 5% then to 10% and finally 15% (see s 59(5) VATA).

3. However, if the Tribunal is satisfied that there was a reasonable excuse for the late payment of VAT or late submission of the return s 59(7) VATA provides that:

> … he shall not be liable to the surcharge … and shall be treated as not having been in default in respect of the accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

4. The legislation does not provide a definition of a "reasonable excuse" which is "a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2008] STC (SCD) 536).

5. This appeal, by the Company which has been VAT registered since August 2008, is against VAT default surcharges for the accounting periods shown in the table below for the late payment of VAT:

Period	**£**	**%**
05/09	0.00	
02/10	0.00	1st default
05/10	0.00	2%
02/11	0.00	5%
08/11	362.32	10%
11/11	605.07	15%
02/12	0.00	15%
08/12	134.61	15%
11/12	367.63	15%
05/13	387.90	15%
Total	£1,857.53	

6. Although this table differs from the schedule of defaults provided to us by Mr Ojo at the hearing, which stated that first default occurred in the 05/09 accounting period, we have taken the figures, as amended by the Statement of Case submitted by HM Revenue and Customs ("HMRC") in accordance with HMRC's letter of 11 October 2013, which states that, "the 05/09 surcharge can be removed as this has been amended to a nil return after a Voluntary Disclosure was processed".

7. On 1 February 2009 Mr Davis completed an 'Application to join the Annual Accounting Scheme and the Flat Rate Scheme' form on behalf of the Company. It was submitted to HMRC and the Company admitted to the Annual Accounting Scheme. However, the address shown on the form was different to that held by HMRC which was, in fact, the address where Mr Davis had lived with his parents before moving to his own property (the address on the form), whilst his parents remained at the address held by HMRC for the Company.

8. Therefore, on 25 February 2009 HMRC wrote Company at the address shown on its Annual Accounting application form seeking confirmation of its address. The letter stated the information (ie the address held by HMRC) "will remain unchanged until this information is received". In the absence of any reply HMRC wrote a "Final Reminder" to the Company, on 10 March 2009, again warning that the information held would not be changed. This letter was sent recorded delivery and as a signature was 'refused' it was returned to HMRC.

9. On 8 January 2010 HMRC wrote to the Company (at the address held on its records ie the address of Mr Davis's parents) as follows (with emphasis as stated in the letter):

> The annual accounting scheme was specifically intended to assist smaller businesses and HMRC by reducing the paperwork involved in accounting for VAT and to allow businesses to manage their cash-flow with more certainty. However, businesses can only remain on annual accounting if they adhere to the criteria set out in VAT Notice 732, Annual Accounting.
>
> **According to our records the amount of VAT outstanding that relates to interim payments has risen to an unacceptable level. At the date of this letter it stands at £825.00. You are therefore unable to remain on the Annual Accounting Scheme.**
>
> A VAT return for the period 01.06.2009 to 28.02.2009 will be issued to you shortly. This return and the balancing payment must be submitted by the date notified to you on the return. Quarterly returns will be issued to you thereafter.

10. On 3 February 2010 Mr Davis telephoned HMRC to explain that he had not made any money during the year and requested that the Company remain on the Annual Accounting Scheme. In a letter sent to the Company, dated 16 February 2010, HMRC confirmed that it had been removed from the Annual Accounting Scheme but that it could be re-instated following the submission of the VAT return for the period from 1 March 2009 to 31 May 2009 and payment of the VAT.

11. However, the return was not received by HMRC and in a further letter, dated 16 March 2010, the Company was told that it would have to re-apply using a form VAT600AA if it wanted to re-join the Annual Accounting Scheme. The Company subsequently submitted quarterly VAT returns, albeit some of which were late. The return period was clearly stated on these returns.

12. In his letter to the Tribunal, of 13 August 2013, the Notice of Appeal, and before us Mr Davis explained that the Company was "unknowingly" taken off the Annual Accounting Scheme and "unknowingly" accumulated surcharges. Mr Davis said that during a telephone conversation with an officer of HMRC, on 8 June 2012, he was told by the officer that the surcharges would be removed if he immediately filed a change of address form and all outstanding VAT returns and payments.

13. However, given his telephone call to HMRC on 3 February 2009 in response to the Company's removal from the Annual Accounting Scheme and subsequent submission of quarterly VAT returns we find that Mr Davis, and therefore the Company was aware of its removal from the scheme. In the circumstances it cannot have been "unknowingly" taken off the Scheme. It therefore follows that this cannot amount to a reasonable excuse for the late payment of VAT.

14. Turning to the telephone conversation Mr Davis had with the HMRC officer on 8 June 2012, although HMRC were not able to produce a transcript of this telephone conversation and did not call the officer concerned, we were provided with a print out the "Notes" from HMRC's "Taxpayer Designatory Data" which records, in a "clerical review" for 11 April 2013 that the officer Mr Davis spoke to on 8 June 2012 "advised that she had listened to call and no where was it said about penalties would be removed."

15. As this Tribunal, the Tax Chamber of the First-tier Tribunal, was created by statute its jurisdiction is defined and limited by legislation (eg the VATA) and does not extend to the supervision of HMRC's conduct. This is clear from the decisions, which are binding on us, of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 and *HMRC v Noor* [2013] UKUT 71 (TCC)). Therefore, irrespective of what was actually said during the telephone conversation we do not have the jurisdiction to consider whether a legitimate expectation that the surcharges would be withdrawn may have arisen.

16. For these reasons the appeal is dismissed and the default surcharges as set out in paragraph 5 above, confirmed.

17. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 15 May 2014