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TC03752

Appeal number: TC/2014/02022

VALUE ADDED TAX – default surcharge – whether any reasonable excuse shown for any of the late payments of VAT involved – held no – whether the surcharge was disproportionate – held no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOVE UP LOFTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MS ANN CHRISTIAN

Sitting in public at Bradford on 18 June 2014

James Mulkeen for the Appellant

Tim Fieldsend, HMRC, for the Respondents

DECISION

1. The appellant, Move Up Lofts Limited ("Move Up"), appeals against a default surcharge in respect of late payment of value added tax ("VAT") in the period 11/13. The amount of the surcharge is £544.57 and was imposed at the 10% rate (in relation to output tax due for that period of £5,445.71) because it was the fourth default since Move Up entered the default regime, which it did when it was late in paying the VAT due for the period 11/12. It was also late in paying the VAT due for the periods 05/13 and 08/13 (which account for the application of the 2% and 5% default surcharge rates – but in the case of each of these periods no surcharge was actually levied because of HMRC's policy not to collect such penalties where they are less than £400.

2. The VAT for the period 11/13 was due to be paid by 31 December 2013 (or 7 days later in the case of electronic payments). In fact payment was received on 14 February 2014.

3. The VAT due for the period 11/12 ad been paid in instalments over the period between March 2013 and 28 February 2014. There had been a time to pay agreement concluded between Move Up and HMRC in respect of this VAT, but we find that the agreement was made after the VAT had become due (most probably in February 2013 but, in any case, after 7 January 2013.

4. The VAT due for the period 05/13 was received by HMRC on 20 August 2013 (some 6 weeks after the due date). The VAT due for the period 08/13 was received by HMRC on 7 November 2013 (about 5 weeks after the due date).

5. Mr Mulkeen did not suggest that there had been a reasonable excuse for the late payments of VAT for the periods 11/12, 05/13 and 08/13 other than an insufficiency of funds due to general adverse trading conditions. That is excluded from consideration as constituting a reasonable excuse by section 71(1)(a) VAT Act 1994 ("VATA") unless the insufficiency was caused by some underlying reason which would amount to a reasonable excuse. When Mr Mulkeen was made aware of this point by the Tribunal, he did not put forward any underlying reason for the insufficiencies of funds from which Move Up has suffered other than general adverse trading conditions, specifically in relation to underestimating the cost of projects taken on. We find accordingly that there was no reasonable excuse for the late payments of VAT by Move Up in relation to the periods 11/12, 05/13 and 08/13.

6. Turning to the late payment of VAT in relation to the period 11/13, Mr Mulkeen complained that the surcharge demanded was a penalty for losing money in the business. His case was generally that the imposition of the surcharge was unfair. Move Up had to prioritise payments to suppliers over its payments of VAT in order to remain in business.

7. Although the Tribunal has sympathy with Move Up's predicament as eloquently described by Mr Mulkeen, unfortunately his evidence does not establish a reasonable excuse of which we can take account.

8. Mr Mulkeen also said that he had looked at the decisions in *Revenue and Customs Commissioners v Total Technology (Engineering) Ltd* [2010] UKUT 418 (TCC; [2013] STC 681, *Alan Kincaid t/a AK Construction v Commissioners for HM Revenue and Customs* [2011] UKFTT 225 (TC) and *Trinity Mirror plc v Commissioners for HM Revenue and Customs* [2014] UKFTT 355 (TC).

9. The first of these decisions (*Total Technology*) is a decision of the Upper Tribunal by which we are bound. The Upper Tribunal held in that case that there was nothing in the VAT default surcharge which led it to the conclusion that its architecture was fatally flawed in the sense of the entire scheme being unlawfully disproportionate – see *ibid.* [99]. The Upper Tribunal considered however that there were some aspects of the default surcharge which may lead to the conclusion that, on the facts of a particular case the penalty is disproportionate (*ibid.*).

10. The facts of the particular case considered by the First-tier Tribunal in *Trinity Mirror* were such as to persuade that Tribunal that the surcharge in issue in that case was disproportionate and the appeal was allowed. In that case a late payment of one day had given rise to a surcharge of £95,000 later reduced to £70,906.44 (*ibid.* [7(7)].

11. We cannot regard the surcharge of £544.57 imposed in the circumstances of this case as disproportionate – and, indeed, Mr Mulkeen put forward no reasons for the view that it was.

12. In *Kincaid*, the First-tier Tribunal was considering 'reasonable excuse' in the context of the construction industry scheme legislation which does not have a provision analogous to section 71(1)(a) VATA requiring the Tribunal not to regard an insufficiency of funds as a reasonable excuse. The Tribunal found by reference to particular facts that the taxpayer in that appeal had had a reasonable excuse for the late payment of surcharge payments.

13. None of the decisions referred to by Mr Mulkeen can affect our decision applying the relevant VAT law to the facts of this case, which is that the surcharge imposed is not disproportionate and that Mr Mulkeen has not shown any reasonable excuse for the late payments of VAT which we can regard as a basis for allowing the appeal.

14. Although the Tribunal is sympathetic to Move Up in relation to its business difficulties, this appeal must be dismissed.

15. 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 WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 24 June 2014