[2016] UKFTT 507 (TC)

TC05256

Appeal number: TC/2015/03081

VALUE ADDED TAX – default surcharge penalties – taxpayer removed from annual basis of accounting – whether or not taxpayer received letter cancelling annual basis – whether or not reasonable excuse – held reasonable excuse for one default but not for subsequent defaults – appeal partially allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANGELA SPENCE T/A SPENCE AND HORNE SOLICITORS **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
RICHARD LAW

Sitting in public at Fox Court, London on 20 June 2016

The Appellant appeared in person

Mrs Rita Pavely, an Officer of HMRC, appeared for the Respondents

DECISION

1. This was an appeal against the decisions of HMRC to impose five VAT default surcharges in respect of the Appellant's VAT accounting periods ending 08/13, 11/13, 02/14, 05/14 and 08/14 totalling £4,185.05.

2. Having considered the evidence we decided that Miss Spence did not have a reasonable excuse in respect of the late payments in these periods. However we decided that she did have a reasonable excuse for an earlier default, which therefore has an effect on the calculation of the default surcharges levied for these periods. We therefore decided that the total of the default surcharges should be reduced to £2,281.10 for the reasons set out below.

Evidence

3. We heard oral evidence from Miss Spence and representations from Mrs Pavely. We also had available an extensive file of documentation, much of which had been produced from Miss Spence's own files. Based on this we make the following findings of fact.

The Facts

4. Miss Spence completed her own VAT returns. She did have an external accountant but she did not employ them to complete her VAT returns.

5. Miss Spence had been making annual VAT returns for some years but, owing to her failure to make four payments in line with her agreement for annual returns, HMRC had decided to move her from annual returns to quarterly returns with effect from 28 February 2013. HMRC stated that they had sent a letter informing Miss Spence of this change on 8 January 2013 but Miss Spence was adamant that she had not received this letter and had therefore continued to act as if she was on an annual return basis.

6. Based on the evidence presented and the subsequent behaviour of Miss Spence, including the fact that no copy of the letter was produced from Miss Spence's files, even though many other items of correspondence from HMRC were produced, we decided that as a matter of fact, on the balance of probabilities, Miss Spence had not received this letter.

7. Miss Spence acknowledged that she had received a number of other communications from HMRC during the periods in question, and indeed had produced copies of these documents from her own files for the hearing. She accepted however that she had not read these documents thoroughly at the time they had been received but had simply filed them, with the intention of dealing with them when she completed her annual return in April/May each year.

8. These communications from HMRC included letters dated 9 October 2012 and 10 December 2012 stating that HMRC had not received some of the payments due under her annual return agreement and stating that unless payment was received within 14 days she may be removed from the annual accounting regime. Miss Spence admitted that she had not read these letters thoroughly and had thought that as long as she continued to pay instalments of £3,000 roughly on a monthly basis, as and when she had funds available, this would all be reconciled when she filed her annual return the following May. Unfortunately, her agreement for annual returns required her to make nine monthly payments of £3,150, each payable before the last working day of the months in question, whereas Miss Spence had continued to make payments of £3,000, on a more ad hoc basis.

9. Other communications received included an annual information letter, dated 29 March 2013, attaching a copy of VAT Notes, a general information publication, the accompanying letter of which included the words "Because you use the annual accounting scheme …". Mrs Pavely, for HMRC, acknowledged that this may have caused some confusion as to whether or not Miss Spence was on an annual return basis, although again it was not clear that Miss Spence had read this letter any more thoroughly than she had read the other HMRC letters.

10. The first communication which Miss Spence agreed she had received which should have cast doubt on her annual return status was a blank VAT return for the period from 1 April 2012 to 28 February 2013. This was the final return, for an 11 month period, which HMRC required Miss Spence to complete on the annual basis prior to reverting to quarterly accounting. Miss Spence however assumed that this was her normal annual return and did not notice that the return was stated to be for the period to 28 February 2013 rather than the period to 31 March 2013, which would have been the correct date for her annual return.

11. Miss Spence then received three letters from HMRC, dated 12 April 2013, 12 July 2013 and 11 October 2013. These were headed "VAT Notice of assessment of tax and surcharge and surcharge liability notice extension", which were the notices advising her that in the absence of any returns HMRC had raised estimated assessments and levied default surcharges for the periods to 28 February 2013, 31 May 2013 and 31 August 2013 respectively. Again Miss Spence explained that she had filed these notices but had not read them thoroughly.

12. It was not until 24 January 2014, when her accountants asked her to contact HMRC to establish the amount of any VAT debt due, that Miss Spence rang HMRC and was informed that she was no longer on the annual return scheme and that there were a number of default surcharges on her account. Following this telephone conversation Miss Spence immediately contacted her accountants and asked them to prepare quarterly returns for the missing periods.

13. The preparation of the quarterly returns took some time because, as Miss Spence explained, her accounting system, which she maintained personally, was not set up to produce quarterly figures and could only produce annual figures, and then only once she had input all the necessary information following her year-end on 31

March 2014. Consequently the returns for 08/13, 11/13 and 02/14 were not filed with HMRC until 11 June 2014. The returns for the periods to 05/14 and 08/14 were filed on time but some of the VAT due on both returns was paid late. When asked to explain these late payments Miss Spence stated that her accountants had filed the returns and that she did not know how much she should pay until they informed her of the amounts due.

14. Mrs Pavely took us through the schedules setting out the calculations of the surcharges, which showed that all the surcharges had been calculated solely by reference to the late payment of tax rather than the late filing of the related returns, and that all the surcharge calculations had been adjusted to reflect the final returns as filed by Miss Spence's accountants and were not based on the estimated assessments which HMRC had raised earlier.

15. Miss Spence questioned whether or not the calculations had taken into account all the payments she had made on account, but, having checked the HMRC ledger print-out, we concluded that all payments on account had been taken into account correctly.

Legal Framework

16. The legislation regarding the default surcharge and reasonable excuse is set out in s 59(7) Value Added Tax Act 1994 as follows:

> "(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—
>
> (*a*) the return or, as the case may be, 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 by the Commissioners within the appropriate time limit, or
>
> (*b*) there is a reasonable excuse for the return or VAT not having been so despatched,
>
> he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed 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)."

17. S 71(1) VATA 1994 expands on the definition of what constitutes a reasonable excuse as follows:

> "(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."

18. These words are not however in point in the circumstances of this appeal. We must therefore consider what might constitute a reasonable excuse in these circumstances.

19. The test we are required to apply is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. There is no universal rule on this, it is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. What might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.

Discussion

20. The issue before us was whether or not Miss Spence had a reasonable excuse for the late payments of VAT.

21. Miss Spence argued that the cause of all these problems was that she had not received the letter of 8 January 2013. Mrs Pavely had produced a copy of this letter and referred us to s 98 VAT Act 1994 and s 7 Interpretation Act 1978 which confirmed that the letter should be deemed to have been delivered. However when looking at whether or not Miss Spence had a reasonable excuse for the late payments we considered that we should examine whether or not the letter was in fact received. As stated above, based on the evidence presented and the subsequent behaviour of Miss Spence, we decided that as a matter of fact, on the balance of probabilities, Miss Spence had not received this letter. As such, of itself, the non-receipt of this letter might have constituted a reasonable excuse for some of the late payments, especially when that non-receipt is combined with the letter of 29 March 2013 stating that Miss Spence was on the annual accounting scheme.

22. However, there were a number of other documents which Miss Spence acknowledged she had received but had not read thoroughly, specifically the three letters from HMRC, dated 12 April 2013, 12 July 2013 and 11 October 2013 which were headed "VAT Notice of assessment of tax and surcharge and surcharge liability notice extension", which were the notices advising her that in the absence of any returns HMRC had raised estimated assessments and levied default surcharges for the periods to 28 February 2013, 31 May 2013 and 31 August 2013.. We consider that if she had read these documents thoroughly they would have alerted her to the problems long before she contacted HMRC in January 2014. We therefore need to consider whether or not Miss Spence's behaviour in this regard was reasonable.

23. As stated above, the test we should apply is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

24. Miss Spence is a solicitor and we would therefore expect a fairly high standard of care and probity towards such matters, but she did explain that she is not a tax specialist and we believe that we should therefore also take that into account. On balance we find that her approach to the various letters from HMRC of not reading them thoroughly and simply filing them to be dealt with when she prepared her annual VAT return did not amount to the required level of reasonable behaviour which we would expect of someone in her position. This is especially true of the three letters headed "VAT Notice of assessment of tax and surcharge and surcharge liability notice extension", which we believe should have been enough to alert most prudent taxpayers to the fact that there was a serious problem which required to be addressed as a matter of urgency.

25. In spite of this, looking at the various documents which Miss Spence received, we do find that it was reasonable for her to have missed the fact that the blank return sent to her in February 2013 was for the period to 28 February 2013 and not 31 March 2013. This was very much in the "small print" at the top of the page and was quite easy to miss in the absence of other warning signals, especially for someone not well versed in tax issues. We do not however believe it was reasonable for her to have ignored the assessment and surcharge notices issued on 12 April 2013, 12 July 2013 and 11 October 2013. These were very clearly marked, in bold, and we believe that a reasonable taxpayer would have immediately contacted either HMRC or their accountants on receipt of these notices, which Miss Spence did not do.

Decision

26. Our conclusion from this is that the first clear indication which Miss Spence received that she was no longer on the annual accounting scheme, and which we believe she should have acted upon, was the notice dated 12 April 2013. It follows that in our opinion Miss Spence did have a reasonable excuse for the default to which that notice related, ie the default for the period to 02/13, in that she had not received any clear prior indication that she had been removed from the annual accounting scheme.

27. We find however that Miss Spence did not have a reasonable excuse for the late payments relating to the periods 05/13, 08/13, 11/13, 02/14, 05/14 and 08/14.

28. No default surcharge was levied in respect of the period to 02/13 because the surcharge calculated fell below HMRC's de minimis level of £400, but the fact that we decided that Miss Spence did have a reasonable excuse for this period has a significant knock-on effect on the calculation of the surcharges for the periods under appeal.

29. There had been a previous default, in respect of the period to 03/12, but, if we now ignore the default in respect of the period to 02/13, the default surcharge period triggered by the default in respect of the period to 03/12 had expired before the next default, in respect of the period to 05/13, occurred. The default in respect of the period to 05/13 therefore becomes the first default to be brought into account in a new series of default surcharges when calculating the subsequent default surcharges.

30. We therefore allow Miss Spence's appeal in part and determine that the default surcharges under appeal should be reduced from £4,185.05 to £2,281.10, as calculated below:

Period Dates	VAT paid late	Surcharge rate	Surcharge Amount	Comments
05/13	3,809.12	Nil	Nil	
08/13	9250.75	2%	Nil	Below £400 de minimis limit
11/13	11,742.95	5%	587.15	
02/14	5,904.43	10%	590.44	
05/14	3,321.60	15%	498.24	
08/14	4,035.84	15%	605.27	
Total			2,281.10	

31. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 18 JULY 2016