[2016] UKFTT 758 (TC)

TC05485

Appeal number: TC/2016/02291

VAT - Default Surcharge Regime - Late payment - Appellant's Direct Debit instruction linked to account with insufficient funds - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MICHAEL J BROMLEY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR PHILIP JOLLY

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 20 October 2016

The Appellant appeared in person

Mr John Nicholson, an Officer of HMRC, for the Respondents

DECISION

1. Mr Bromley appeals against a VAT default surcharge of £20,597.26. It was imposed by HMRC on 13 November 2015 in relation to the late payment of VAT due for the period 09/15.

2. On 14 January 2016 HMRC reviewed the default surcharge, but upheld it on the basis that the appellant did not have a reasonable excuse for the default.

3. On 14 April 2016 HMRC considered additional information supplied by the appellant, but concluded that the default surcharge should stand.

4. In his Notice of Appeal dated 20 April 2016, Mr Bromley writes:

> *"We believe that HMRC has made the wrong decision as there was a genuine reason for the late payment. When informed that we had a surcharge of £20,597.26 we couldn't understand this. As far as we were concerned, the payment direct debit was set up by our book-keeper Julie Harrison on the 16.10.15 for the payment to leave the account on the 11.11.15...*
>
> *When appealing to HMRC we honestly thought that there was a glitch in the system and there was an error between the bank's system and HMRC's ... Still at this point we didn't know why this wasn't paid on time. Eventually after a call again to HMRC on 13.4.16 an officer who was really helpful and sympathetic to our case checked which bank account the direct debit had been linked to and unfortunately it was showing registered to an old dormant account which we used to hold and hadn't been used for two years."*

5. We heard evidence from Mr Bromley, and also from Ms Harrison, a self-employed book-keeper, and Ms Ashcroft (who was the Appellant's PA at the time).

The Facts

6. On the basis of the evidence which we heard, and the documents contained in the hearing bundle, as well as the further documents provided to us by Mr Bromley on the day (including his 'Opening Statement' and 'Further Information', dated 3 August 2016, which had been earlier provided to HMRC, and which should have been included in the bundle but which was not) we make the following findings of fact.

7. The appellant registered for VAT on 1 May 1992.

8. He owns and operates a business called 'Tunit BVS Limited' ('the Company'). At all times relevant to this appeal, Mr Bromley was its sole director and shareholder. The Company was registered for VAT and had its own VAT number. It banked with Barclays.

9. The appellant was the Company's landlord and he was charging it rent to occupy premises which he owned. This generated a VAT liability on the part of the appellant. The appellant's personal registration for VAT seems largely to have been in

response to this arrangement. There was no evidence that the appellant, for VAT purposes, was otherwise trading on his own account.

10. Mr Bromley had been in the default surcharge regime since 03/08. The 15% surcharge rate was first imposed on him for the quarter 12/09 and had remained in place continually since then. Surcharge documents (Form V162) were issued for the three immediately preceding quarters - 12/14, 03/15 and 06/15.

11. The amounts of VAT payable by the appellant, in the ordinary course of things, mainly relating to the rent being paid by the Company (or, if not being actually paid, being credited to the appellant against his director's loan account) were fairly modest, and, even at the 15% surcharge rate, generated correspondingly modest surcharges (which were paid).

12. An online direct debit instruction in favour of HMRC was set up by or on behalf of the appellant with effect from 31 July 2014. That was linked, by or on behalf of the appellant, to an account named 'Varra', with number '726'. The account was held with HSBC, and not with Barclays: 'the HSBC Account'.

13. However, no VAT payments were ever taken under that direct debit instruction from the HSBC Account. HMRC made several attempts, all of which failed. These were:

(1) 13 August 2014 (in relation to period 06/14);

(2) 12 February 2015 (period 12/14);

(3) 13 May 2015 (period 03/15); and

(4) 13 August 2015 (period 06/15).

14. In consequence of each of these failures, the payments for 12/14, 03/15 and 06/15 were made by Faster Payments Scheme (FPS) or Telephone Payment (TPS) (payments made to HMRC by phone using a debit or credit card).

15. Default surcharge notices in Form V162 were issued to Mr Bromley for the periods:

(1) 12/14 (13 February 2015 - £588.78);

(2) 03/15 (15 May 2015 - £100.94); and

(3) 06/15 (14 August 2015 - £225.00, but later removed).

16. On 30 July 2015, the appellant sold his business premises to a third party. The sale generated a VAT liability of £137,315.10. This VAT liability was approximately 35 times greater than the appellant's highest previous VAT liability.

17. As well as the HSBC Account, the appellant had (at least) two accounts with Barclays - a business account (for the Company) and a personal account. The purchase proceeds were paid into a Barclays account.

18. On that same day, 30 July 2015, the appellant suffered a cardiac arrest and was hospitalised for three weeks - that is, until late August 2015.

19. On 16 October 2015, and therefore in good time, the appellant's VAT return for the quarter 09/15 was submitted electronically and tax due of £137,315.10 was declared.

20. In its acknowledgment, HMRC indicated that the tax due would be 'debited from' (the appellant's) 'bank account on 11 November 2015', which was the last day for payment by direct debit.

21. Therefore, as at 16 October 2015, the appellant intended to pay HMRC, £137,315.10, by direct debit, timeously, on 11 November 2015.

22. The VAT due was not paid on time. HMRC attempted to take the money by direct debit on 11 November 2015, and the direct debit failed. This was because there were insufficient funds in the HSBC Account, to which the direct debit was linked, to allow the payment to be made.

23. On 16 November 2015 the Appellant's accounts manager, who had been on leave, and had returned to work that day, emailed the appellant to say that the VAT had not been taken on 11 November 2015.

24. The appellant contacted HMRC on 16 November 2015 and said that the 'direct debit instruction had failed' and he was sending payment.

25. The whole sum due was paid in three instalments, on 16, 17, and 18 November 2015. Those payments were all late. The payments were made from a Barclays Bank account in the name of Mr Bromley, with an account number ending '592'.

26. The failure to make payment on time came about in the following way: Mr Bromley was operating a number of bank accounts - at least two with Barclays, as well as the HSBC Account. The direct debit was linked to the HSBC Account. There was no direct debit for Mr Bromley's personal VAT liability linked to either of Mr Bromley's Barclays accounts. Since The none of the sale proceeds had been deposited into the HSBC Account, there were insufficient funds in that account, on 11 November 2015, to permit the payment to be made.

The Law

27. Section 59(7)(b) of the *Value Added Tax Act 1994* provides that a person shall not be liable to a surcharge if he can satisfy us that *'there is a reasonable excuse for ... the VAT not having been despatched'*.

28. Section 70 of the *Value Added Tax Act 1994* provides that the Tribunal may reduce the penalty to such amount (including zero) as we think proper.

29. However, we are not allowed to take into account *'the fact that the person liable to the penalty has acted in good faith'*: section 70(4)(c).

Discussion

30. We are satisfied that the default surcharge was correctly calculated, on the right sum, and at the correct specified percentage rate: 15%.

31. The Appellant must therefore satisfy us, to the civil standard (that is, on the balance of probabilities) that he had a reasonable excuse for non-payment.

32. We are not so satisfied.

33. We have no hesitation in accepting that the appellant acted in good faith. He declared the tax due, in good time, intended to pay it, and had the funds to do so. However, when the business premises were sold, the sale proceeds were put into the appellant's personal Barclays' account. None of the money was ever put into the HSBC Account.

34. The appellant knew that he had a direct debit, and chose to use it as the mechanism for payment. But he had either forgotten, or not realised, that the direct debit was linked to the HSBC Account and not to a Barclays Account. The HSBC Account was still a live account. It was producing statements, and these were being seen by Ms Harrison.

35. There was undoubtedly a muddle. As the appellant put it, 'we were watching the wrong bank account'.

36. We agree with the Tribunal in *Garnmoss Limited t/a Parham Builders v HMRC* [2012] UKFTT 315 (TC) (Judge Charles Hellier and Ms Hewett) that the VAT Act does not provide shelter for mistakes, only for reasonable excuses: see Para [12] of that decision.

37. We do not consider that the circumstances of this appeal amount to a reasonable excuse.

38. The direct debit which was intended to deal with the appellant's personal VAT liability had not been set up in the dim and distant past. It had been set up just over a year previously. At that time, the appellant, or someone on his behalf, had taken the deliberate decision to use the HSBC Account (which otherwise had been set up in relation to a second trading business, Varra, which never took off) which was known not to be a particularly active account. The appellant, or someone on his behalf, had chosen not to use one of the Barclays accounts for this purpose. Even if the HSBC Account was 'virtually dormant', it was nonetheless an open account, statements were still being produced, and still being received by the appellant.

39. Moreover, and as the appellant either knew, or should have known, the direct debit linked to the HSBC Account, once it had been set up, was not working. Before 09/15 there had been several direct debit failures. It does not matter whether HSBC wrote to the appellant to tell him of these failures, since each failure brought about a late payment situation, which in turn led (i) to the imposition of a default surcharge, (ii) a written notice notifying the appellant of the same, and (iii) the consequent need

to make payments to HMRC, both of the VAT due and the surcharges, by other means - in this case, FPS and over the telephone.

40. Given that the VAT returns for those affected quarters were being filed in time, then the only explanation for the surcharges and the need to make payment by FPS or over the telephone was that the direct debit was not working.

41. Hence, even if the appellant did not actually realise that the direct debit was not working, he should have done. He told us that 'not a day went by without looking at his bank account'. But by this he meant his Barclays account, and not his HSBC Account, which he accepted he looked at less often. It does not matter that he did not spot the failed direct debit on an HSBC statement. Knowing that there was supposed to be a direct debit, he should have spotted that there was no direct debit mandate in effect with Barclays.

42. Unfortunately, no-one ever seems to have asked why - if, as was believed, there was a direct debit in place set up to meet the appellant's personal VAT liability - Mr Bromley was still receiving default notices in relation to late payments, and was having to make payments of VAT by FPS or over the telephone.

43. We do not accept the appellant's evidence that his normal practice was to pay by direct debit. That is demonstrably wrong in relation to the appellant's personal VAT liability. We wish to emphasise that we do not reject Mr Bromley's evidence on this point because we consider him to be dishonest. For the avoidance of any doubt, we consider him to be honest. But his evidence flows from a confusion since the Company's VAT liability (judging from the Barclays' Bank email of 21 January 2016) seems to have been met by direct debit.

44. The VAT due for period 09/15 was an extremely substantial payment, arising from a 'one-off' transaction. In our view, the reasonable taxpayer would have made sure, if intending to make payment by direct debit, that the direct debit mandate was effective.

45. It was obvious in this case that the direct debit was not working.

46. Whilst the appellant was entitled to leave payment to the very last day, this inevitably meant that he was running a risk that, if anything went wrong, as it did here, he would not be able to pay in time, and a default surcharge would be imposed. That risk was only accentuated where, as here, the appellant knew that he was in the default surcharge regime, and knew that surcharges were being levied at 15%.

47. We note that the appellant has never tried to put the blame on his book-keeper. But, and even if he was relying on her, the law is still clear that reliance on her, as a third party, cannot be a reasonable excuse.

48. But, for the sake of completeness, we do not consider that the absence of Ms Harrison on leave until 16 November 2015 made any material difference. We accept that, as soon as she returned from leave, she checked and realised that the VAT had not been taken. But she was checking a Barclays account. Even then, it still took

several months - until April 2016 - before the true nature of the mistake which had been made was uncovered. Even if the fact of non-payment had been discovered on the due date, we do not see that the situation would have developed in any different way.

49. We have considered whether the appellant's serious illness in the summer of 2015 (which was accepted by HMRC as a reasonable excuse in relation to the default surcharge which had been imposed for the period 06/15) constitutes a reasonable excuse in relation to this quarter.

50. We have concluded that it does not. We accept that Mr Bromley was seriously ill. But he was out of hospital by the end of August 2015 - that is, at least 6 clear weeks before the filing (timeously) of the return for 09/15 and at least 9 clear weeks before the payment was due. Even if his cardiac arrest and illness had lasting effects, he was nonetheless not only out of hospital but also attending to business affairs well before the due date for the period 09/15 (for instance, in his letter to HMRC dated 13 October 2015 in relation to the default surcharge for 06/15, which was removed)

Decision

51. Accordingly, we are bound to reject the appeal against the surcharge imposed in relation to the quarter 09/15, and the surcharge of £20,597.26 is confirmed.

52. This document contains full findings of fact and reasons for the decision.

53. Any party has the right to apply for permission to appeal against this decision 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 CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 14 NOVEMBER 2016