[2018] UKFTT 510 (TC)

TC06679

Appeal number: TC/2017/04609

VAT – default surcharge – reliance on a third party – reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM STUART CRAWFORD T/A THE ORCHARD HOTEL **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Wednesday 23 May 2018

Mr Haywood, for the Appellant

Mr Boyle, Officer of HMRC, for the Respondents

DECISION

The issue

1. The decisions that had been appealed were the decisions by HMRC to impose Default Surcharges for the periods 02/14, 05/14, 08/14, 11/14, 02/15, 05/15, 08/15, 11/15, 02/16, 05/16, 08/16 and 02/17. At the outset of the hearing Mr Haywood conceded that only periods 11/15, 02/16 and 05/16 were now the subject matter of the appeal. The default surcharges for the other periods were not in dispute.

2. It was conceded that VAT had been paid late in each and every period until 02/17. It would appear that there was also a default for period 05/17.

3. The only ground of appeal was that the appellant had a reasonable excuse for the admitted late payments in the disputed three periods. Mr Haywood very helpfully conceded that HMRC had discharged their burden of proof and the decisions to impose Default Surcharges for all of the periods under appeal were correct and in accordance with section 59 Value Added Tax Act 1994 ("VATA"). Having reviewed the Bundle in detail I too find that to be the case.

Preliminary matters

4. The appellant had not complied with Rule 11 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and had not advised the Tribunal or the respondents ("HMRC") that he had appointed Mr Haywood to represent him.

5. The appeals were all late but HMRC had no objection to the substantive appeals proceeding.

6. I therefore exercised my discretion in terms of the Rules and firstly confirmed that Mr Haywood should represent the appellant and, secondly, allowed the extension of time for lodging the appeals.

7. The appellant had not complied with the Directions issued by the Tribunal dated 11 September 2017 and had not intimated that he intended to call any witnesses. He had arrived at the hearing with a witness and he himself wished to give evidence. No witness statements were available.

8. Mr Boyle confirmed that, having discussed the matter with Mr Haywood, he had no objection to that evidence being heard by the Tribunal. I therefore exercised my discretion and allowed the witness evidence to be led.

9. At the hearing we had the evidence of the General Manager, Ms Lynch and the appellant.

Overview of the law

10. The appellant accounts for VAT on a quarterly basis and is accordingly subject to the default surcharge regime in section 59 VATA. Under the regime defaults occur if either VAT is not paid in full or a VAT return is not made by the due date. The first default does not give rise to a penalty but triggers a "surcharge period" which runs to the first anniversary of the end of the period of default. Any further default within the surcharge period not only extends the period but, if the VAT is not paid in full, also triggers a penalty. The penalty is generally calculated as a percentage of the overdue VAT. The percentage rises from 2% to a maximum of 15% for the fourth and subsequent defaults occurring in the surcharge period for which there is unpaid VAT.

11. There is no surcharge if the taxable person demonstrates a reasonable excuse for the late payment or filing. However, section 71(1)(b) VATA provides that, 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.

12. Neither HMRC nor the Tribunal has the power to mitigate a surcharge.

Background

13. HMRC have recorded that the appellant has been registered for VAT since November 1993 trading as an hotelier. It is not disputed that he has been in the current default regime from period 02/14 onwards.

14. The appellant has previous experience of the default surcharge regime. HMRC's records show that default surcharges have been raised at various times since a year after the appellant registered for VAT. In particular, he had appealed the default surcharge for the period 02/03 to the VAT and Duties Tribunal, having been in the default regime at that time since period 05/02. That appeal was on the basis that the payment was late because he had relied on a member of staff and his accountant. The appeal was dismissed on the grounds that that did not amount to a reasonable excuse.

15. The grounds of appeal stated in the Notice of Appeal for this hearing were:

> "In trading since 1998 I feel I have clearly demonstrated reasonable attemps (*sic*) to pay the VAT on time. I have been left with a (*sic*) exceptionally large surcharge bill due to incompentance (*sic*) of my manager and been unaware of the surcharges applied. I feel the surcharges should be removed as they will place a massive strain on the business".

16. The covering letter argued that the issue first came to his attention in a letter dated April 2016 but that the general manager of the business had been aware of the situation since November 2016 (presumably that should read 2015) when she contacted HMRC and was told that the payments had been misplaced to the wrong account. She had believed that the matter had been resolved. He had not been aware that for payments over £25,000, the bank transfers would take longer than he thought.

17. I observe that in correspondence with HMRC on 29 July 2016 and 1, 6, 9 and 20 June 2017 that on those occasions the surcharges had either just come to his attention or he had only "very recently" become aware of them. By contrast, in oral evidence he said that he became aware of it whilst in Australia (which was in November 2015). That conflicted with Ms Lynch's evidence that when she wrote to HMRC on 23 January 2016 she did so since she had not told the appellant about the surcharges and she wanted confirmation of the position before she spoke with him.

18. In summary, Mr Haywood argued that the reasonable excuse for the three periods now in dispute had arisen because Ms Lynch had contacted HMRC in November 2015. As a result of that contact she had reasonably believed that the outstanding issues had been resolved, that payments were timeously made and that there were no Default Surcharges. He conceded that that excuse ended on receipt of the letter dated 22 June 2016 from HMRC concluding the review of the Default Surcharges for periods 05/15, 08/15 and 11/15. He conceded that the payment for period 05/16 which was due by 7 July 2016 was late but argued that she should be given some "leeway" in order to come to terms with the information.

19. That letter unequivocally stated that the due date in every instance was the 7th of the relevant month. It was pointed out that in those periods payments had been received on 10 July, 13 October and 11 January and they were therefore all late.

20. Those payment dates are relevant because in his letter to HMRC dated 29 July 2016 the appellant appeared to believe that the due date for VAT payments was the 10th of each month. Prior to period 02/14 (when the appellant's bank did not honour it so HMRC cancelled it on 12 May 2014) the appellant had been paying the VAT by Direct Debit. By concession, if that means of payment is used, the due date for payment is extended by a further three working days (see the following paragraph).

21. Ms Lynch's evidence was to the effect that she prepares the accounts, in her words, "to a point". The appellant's accountant is responsible for preparing the VAT returns. He then advises her of the amount that is due and payable and she arranges the payment. She said that in the past payment of VAT had been made by cheque but in 2015 the accountant had advised her to make payment by Direct Debit in order that the due date for payment could be deferred by a further seven days.

22. There were no Direct Debit payments in 2015.

23. She confirmed that she had not understood the difference between payment by BACs and Direct Debit or that the bank capped payments by the latter method at £25,000 which meant that the resulting balancing payment took even longer to process.

24. Her evidence was somewhat vague but she stated that originally the accountant had told her that VAT was due and payable on the 12th of each month. She conceded that she had not been aware that if the 12th fell on a bank holiday or a weekend,

payment would be deferred until the next working day so the payment should be made the day before.

25. At some stage, and she could not recall precisely when, she had queried whether the 12th of the month was the right date and the accountant had allegedly told her that it should be the 10th of the month. She said that eventually she had contacted the HMRC helpline and was told that the due date for payment was the 7th of the month. In fact that telephone call was on 21 July 2016 which was after the letter from HMRC had been received (see paragraph 20 above).

26. She alleged that the accountant had therefore given her inaccurate advice on two occasions.

27. However, the unchallenged evidence from HMRC was that even after HMRC explicitly told her that the due date for payment was the 7th of the month (see paragraph 17 above) the VAT payment was received after the due date in periods 08/16, 02/17 and 05/17. Prior to that the payment date varied but was not consistently either the 10th or the 12th of the month.

Ms Lynch's contact with HMRC

28. She stated that in November 2015 the appellant was on holiday in Australia and a VAT officer visited the premises leaving a letter for his attention. In fact HMRC's records show that the letter was dated 22 October 2015. Ms Lynch opened that letter and saw that it identified a sum of £60,215.85 that was outstanding. She said that she panicked.

29. On an unknown date Ms Lynch wrote to HMRC (the letter was date stamped as received on 9 November 2015) stating:

> "I have received your letter issued on the 20th October with regards to an outstanding balance of £60,215.85. I am at a loss to understand what these charges are for? We make an electronic payment for our VAT on the 12th date of the month the quarter is due at all times."

30. On 17 November 2015, Ms Lynch contacted HMRC by telephone on a number of occasions. She alleges that she was left with the impression that it was a simple case of misallocation of two payments (£19,752.63 for period 11/14 and £28,669.36 for period 08/15) and that would be resolved since the payments had been identified and would now be allocated to the correct periods. She believed that the Default Surcharges had been triggered by the misallocation of payments and that, since they would now be allocated correctly, the Default Surcharges were not an issue. At that point she says that she had no reason to believe that payments were being made on the wrong day.

31. HMRC has a contemporaneous record of the telephone conversations with Ms Lynch and that is in stark contrast with her assertion that she had reason to believe that payments were on time and that the surcharges would be removed once payments were allocated. On the balance of probability, I find as fact that in relation to those conversations:

(a) She was told that as at that date, £19,673.02 was outstanding for 11/14 and there were surcharges of £11,873.47. The £28,669.36 for 08/15 had since been paid on 3 November 2015 but it was late. The total is the amount specified in the Enforcement letter dated October 2015.

(b) It was explained to her that although the electronic returns were submitted timeously, payment was arriving between 15 and 31 days later.

(c) She was told that the payments did not always carry an allocation (eg 02/15 came in as 00/00). That had resulted in a Default Surcharge being raised each time.

(d) She was also told that the payments did not always tie in with the returns. Ms Lynch conceded that the payment for 05/15 had been an estimate as she had not recalled the precise figure.

(e) In between the various phone calls the HMRC officer traced the payment of £19,752.63 which had been due on 7 January 2015 but which had been paid to HMRC on 13 January 2015 but not allocated. It was therefore late and would have triggered a default surcharge even if it had been allocated to the right account.

(f) The telephone calls that afternoon concluded with Ms Lynch stating that she would explore the reason for the delay in payment reaching HMRC with her bank and that she would appeal the surcharges in writing.

32. On 23 January 2016, she wrote to HMRC referring to the telephone calls, regretting that HMRC had not confirmed that payments had now been correctly allocated, acknowledging that she had been told that her BACs payments sometimes took as long as 14 days to be received by HMRC and that that had resulted in the "late payment charges". She indicated a wish to appeal those but did not identify which Default Surcharges.

33. HMRC responded on 12 February and 15 March 2016.

34. She told the Tribunal that she had no recollection of seeing those responses from HMRC dated 12 February (asking for information) and 15 March 2016 intimating that since there had been no response the Default Surcharges would remain in force.

35. On 3 May 2016, she again wrote to HMRC, on this occasion identifying periods 05/15, 08/15, 11/15 and 02/16. She explained that she had been making the payments to the wrong account and using the wrong sort code which meant that HMRC had had to trace them and then credit them to the correct account. She said that: "At no time have we tried not to pay our Vat in full and on time…" and that all payments were made in full by BACs.

36. HMRC responded on 22 June 2016 stating that all payments had now been correctly allocated but pointing out that even if she had used the correct sort code the payments had all still been late. That was the letter that pointed out that payment was always due by the 7th of the month.

Discussion

37. Was there any reasonable excuse? There is no statutory definition of reasonable excuse. Mr Haywood correctly referred to *Rowland v HMRC*[1] ("Rowland") which at paragraph 18 makes it clear that a reasonable excuse "… is a matter to be considered in the light of all the circumstances of the particular case".

38. HMRC relied on the test articulated by Judge Medd in *The Clean Car Company Limited v CEE*[2] where Judge Medd said:-

> "…the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?"

39. One of the reasons that HMRC relied on that case, which is entirely compatible with *Rowland,* is that it refers to the "experience" and "attributes" of the taxpayer. In this instance the appellant has demonstrable experience of the Default Surcharge penalty regime.

40. The appellant denied all knowledge of the previous Tribunal appeal initially stating that Ms Lynch had handled it but, on it being pointed out to him that that placed doubt on the credibility of Ms Lynch who had previously given evidence, he retracted and said that that was mere conjecture and it might have been his accountant. It matters not. The appellant should certainly have known about the consequences of late payment and that a reasonable excuse does not encompass reliance on a third party.

41. It is the appellant who is responsible for the timeous payment of tax and a responsible trader would be expected to have in place appropriate measures to ensure that that was done. He did not.

42. Ms Lynch had explained that in December 2015 and January and February 2016 she was recovering from an operation and did very little work. It would be expected that the appellant would have put in place appropriate measures to cover that absence. Rather he denied all knowledge of seeing the correspondence, addressed to him, from HMRC in spring 2016. As indicated above, Ms Lynch suggested that she had not seen that correspondence.

43. He stated in oral evidence, which contradicted the covering letter with the Notice of Appeal, that all mail went to the hotel. He stated that he rarely opened it and only sometimes opened his mail at home. Although he is not alone in that, those are not the actions of a prudent taxpayer.

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[1] 2006 STC (SCD) 536

[2] 1991 VTTR 234

44. I observe in passing that, notwithstanding Ms Lynch's assertion that she thought that mail went to his home, it is apparent that all mail did go to the hotel and that the appellant wrote letters to HMRC from the hotel. It was only on 22 February 2017 that he intimated his home address to HMRC, albeit he continued to correspond with HMRC from the hotel address.

45. The admitted failure on the part of the appellant to read his correspondence does not assist him. Further, Ms Lynch confirmed that she had not read the Default Surcharges or the Surcharge Liability Extensions Notices. They were addressed to the appellant and at the hotel. It would seem that he too did not read them. If either had read them they would have seen that they stated that:

(a) For a payment to be on time it must clear HMRC's account.

(b) They show the distinction between Direct Debit and other means of payment.

(c) They give details of online advice.

46. I accept Ms Lynch's evidence that she was panicking when she phoned HMRC and perhaps her assumptions about the outcome of those calls were a mistake or perhaps Ms Lynch did get muddled about what she should have done. However, the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*[3] where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

> "What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. …".

47. There is absolutely no possibility of an excuse for the late payment in period 05/16. The letter from HMRC was unequivocal in its terms. Furthermore, both she and the appellant were in correspondence with HMRC about the surcharges before the due date for payment and were therefore on notice that they had a problem. They should have been opening letters from HMRC.

48. I do not accept that Ms Lynch, and by extension, the appellant has any reasonable excuse based on those telephone calls. Whilst I, like HMRC, can see that the HMRC advisor did explain to Ms Lynch in the first call that defaults may have been triggered by payments coming in without allocation, the calls concluded with Ms Lynch acknowledging that payments were delayed in getting to HMRC and that she would take that up with her bank.

49. As a sole trader the onus is on the appellant to ensure that returns and payments are submitted on time. The legislation and HMRC's own guidance clearly sets out the time limits for submitting VAT returns and paying VAT. It is the responsibility of the VAT registered trader to comply with those time limits. He did not do so.

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[3] 2012 UKFTT 315 (TC)

50. Whether or not Ms Lynch or the accountant contributed to these defaults cannot amount to a reasonable excuse.

51. Lastly, although the appellant argued in correspondence that the Default Surcharges were disproportionate, that argument was not advanced at the hearing. For the avoidance of doubt I have had regard to the principles outlined by the Upper Tribunal in *Total Technology (Engineering) Limited v Commissioners for HM Revenue & Customs*[4] and *Commissioners for HM Revenue & Customs v Trinity Mirror*[5]. In the light of those principles and on the facts of the present case I do not consider that the Default Surcharges in this case are in any sense disproportionate.

Decision

52. In all these circumstances, I find that the appellant has failed to establish a reasonable excuse for these defaults and the appeal is therefore dismissed and the Default Surcharges for the periods in question are confirmed.

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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 23 AUGUST 2018

[4] *2012 UKUT 418(TCC)*

[5] 2015 UKUT 421 (TCC)