NCN: [2021] UKFTT 235 (TC)

TC08184

VALUE ADDED TAX – default surcharge – SLN not received – whether reasonable excuse. Appeal refused. Permission to appeal out of time - refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/04537

BETWEEN

ASH SIGNS & ENGRAVING LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 4 June 2021 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 15 December 2020 (with enclosures), and HMRC's Statement of Case (with enclosures) dated 21 February 2021.

DECISION

Introduction

1. This is an appeal by Ash Signs and Engraving Ltd ('the Appellant') against a default surcharge assessment for the period 06/19. A surcharge in the amount of £544.93 was imposed by the Respondent ('HMRC') under Section 59 of VAT Act 1994, for failure to submit payment on time.
2. Section 59 Value Added Tax Act 1994 ("VATA 1994") sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. HMRC may then serve a surcharge liability notice (SLN) on the defaulting taxable person, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. The specified percentage rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first chargeable default the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

3. It is not disputed that the amount of the surcharge had been correctly calculated. The applicable surcharge rate was 5 % of the VAT due for the period 06/19, it being the second chargeable default.

Background

4. The Appellant has been registered for VAT since 16 April 2001. The appellant paid VAT on a quarterly basis using the Faster Payment Service. Section 59 of the VAT Act 1994 requires a VAT return and payment of VAT due, on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995.]

5. At present Gary and Julie Richardson are directors of the company.

6. It is not disputed that the 06/19 payment was made late. The relevant defaults were as follows:

Period	Due date	Date return received	Date payment made
12/18	07/02/19	05/02/19	08/02/19
03/19	07/05/19	07/05/19	10/05/19
06/19	07/05/19	07/05/19	08/05/19

7. The Appellant incurred default surcharges in the periods 03/19 (that being the first chargeable default period), however that period is not under appeal.

8. The Appellant appealed to the Tribunal on 15 December 2020.

The Law

9. Section 59(7) VATA 1994 liability does not arise in relation to failure to make a return and / or payment if 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.

10. Section 59 further provides that a surcharge does not arise in relation to a failure to submit a return and / or payment by the due date if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

11. The law (section 71 VATA 94) specifies two situations that are not reasonable excuse:

    (a) An insufficiency of funds, and

    (b) Reliance on another person to perform any task, either the fact of that reliance or any dilatoriness or inaccuracy on the part of the person relied upon.

12. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

13. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test 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.

PERMISSION TO APPEAL OUT OF TIME

14. The appellant's appeal to the Tribunal under s83G VATA 1994 was made outside the statutory deadline which expired 30 days after the date of the document notifying the decision to which the appeal relates. For the following reasons, I have decided not to give permission for the appeal to be notified late:

15. A decision letter was sent to the Appellant and their agent dated 25 October 2019. That letter details the necessary procedure to appeal to the Tribunal. Following the receipt of further information, a further review was carried out by the Respondent, however, the surcharge was upheld by letter dated 9 January 2020. That letter indicated again the procedure for appealing to the Tribunal. The time limit for appealing therefore expired on 10 February 2020.

16. An appeal was in fact made to the Tribunal on 18 December 2020. It is therefore over ten months late. That is a serious and significant delay.

17. The Appellant states that they did not receive the review letter of 9 January 2020 upholding the surcharge. If I accept that, then it is unrealistic to suggest that in ten months they would not have chased a response from the Respondent. The Appellant's grounds of appeal suggest that the lack of response led them to assume that the surcharge had been withdrawn. I can envisage no circumstances in which the lack of correspondence would lead a party to that conclusion. Had they not received the 9 January 2020 letter then the assumption must be that the earlier decision of 25 October 2019 is to be upheld as per paragraph 83(F)8 VATA 1994. The Appellant's agent telephoned the Respondent four times prior to the second review to check that the

Respondent had received the request. I find it highly unlikely that having been so proactive prior to the second review, they would have been so lax in the aftermath had they not received any response.

18. In any event, the decision notices of October 2019 and January 2020 were sent to the correspondence address of the Appellant. That is the same address upon the notice of appeal. There is no suggestion throughout the evidence provided to me of postal difficulties at the relevant time, and no documentation has been returned to the Respondent marked undeliverable. Letters have been delivered to the Appellant at that address from HMRC both before and after the date of the decision letter. The letter of 9 January 2020 was also sent to the Appellant's agent however, it is acknowledged by the Respondent that there was an error in the postcode. I find it likely however that the review letter of 9 January 2020 was received by the Appellant, albeit I accept that it may not have been properly processed by the Appellant upon receipt.

19. The consequences to either party of an extension of time limits must be considered in light of my assessment of the merits of the substantive appeal. The Respondent is entitled to some finality in properly administering the VAT regime and the time limits have been imposed by statute to provide that finality. The Appellant would be prejudiced by a refusal to extend the time limits, however, they have offered no good explanation for their delay in appealing and I consider that the merits of the appeal are poor.

20. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* I have considered:

    a) The length of the delay;

    b) Whether there is a good explanation for that delay;

    c) The consequences of permission to appeal;

    d) The consequences of refusal of permission.

21. In the circumstance I do not consider that the Appellant has a good explanation for their delay which is of some significant length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal, and the application for permission to appeal out of time is refused.

Appellant's case

22. The Appellant argues that the review letter of 9 January 2020 was not received and therefore they did not realise that the surcharge had been upheld until November 2020. Further, the default was late by only one day.

HMRC's case

23. Surcharges issued under section 59 VAT Act 1994 are a penalty based solely on the amount of VAT paid after the due date, no matter the length of delay, and in accordance with s70 of the said act neither the respondents nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

24. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that 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 that there is a reasonable excuse for the late payment.

Reasonable Excuse

25. Under Section 59 VATA 1994 liability to a penalty does not arise in relation to failure to make a return and / or payment if the taxpayer has a reasonable excuse for failure.

26. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

> "It has been said before in cases arising from default surcharges that the test of whether or not 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 at the relevant time, a reasonable thing to do?" [Page 142 3rd line et seq.].

27. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

28. If there is a reasonable excuse it must exist throughout the failure period.

29. The Appellant has not provided a reasonable excuse for his failure to make payment for the VAT periods on time and accordingly the penalties have been correctly charged in accordance with the legislation.

30. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Findings of fact

31. Under Regulation 25(1) VAT Regulations 1995 the payment ought to have been made by 30 April 2019, however, the Respondent has exercised its discretion to allow the payment to be made by 7 May 2019. Being made on 8 May 2019 the VAT payment was not made on time for the period under appeal.

32. It is not disputed that VAT was paid late in the periods 12/18 and 03/19. Nor is it disputed that the result of those defaults was to bring the Appellant initially within the surcharge period, and then to extend that surcharge period. It is further not in dispute that the surcharge has been properly calculated based on the legislation. It is therefore accepted that the surcharge has been properly charged. The only issues before me are whether the VAT was dispatched in such a manner that it was reasonable to expect that it would be received within the time limit, or whether the Appellant has a reasonable excuse for the failure.

33. There is no information before me to indicate when the payment was dispatched. Although the Appellant states that bank transfers were being delayed due to a switch in banking procedures, I have been provided with no explanation as to how long this has been an issue, when the Appellant became aware of the problem or what the Appellant did to ensure that the payment was made on time. I am therefore unable to conclude that the payment was dispatched expeditiously, or that it was reasonable to expect that it would be received within the time limit.

34. The Appellant asserts that it did not receive the surcharge notice in relation to the two earlier default periods – 12/18 and 03/19. Section 98 of VATA 1994 states;

> "Any notice, ... to be served on, … any person for the purposes of this Act may be served, … by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative."

35. Unit A4, Lingard court, Lingard Lane, Bredbury, Stockport, SK6 2QU has been the address held on HMRC's system since 15 March 2016. Surcharge notices dated August 2019 and November 2020 have been received at that address and no surcharge liability notice has been returned to HMRC marked undeliverable. SLN's are automatically generated by the HMRC computer system and therefore would have borne the address above.
36. The Appellant has noted that other correspondence has been received which has borne an error in the address – the "A" missed off from "Ash" - however, that correspondence may not have been automatically generated. Within the documentation sent to the Respondent is a letter with the address of the Appellant's agent upon it, but bearing the postcode of the Appellant. That letter appears to be in fact a re-issue of the 9 January 2020 letter, sent to the agent rather than the Appellant and therefore generated manually. The original review letter of the Respondent dated 9 January 2020 is also within the bundle and bears the correct address for the Appellant. Given the Appellant's account that the original 9 January 2020 notice was not received, they can give no evidence as to what address it may have borne. There is no realistic prospect that automatically generated notices could have born an address other than that detailed above. I therefore find that the notices in relation to the periods 12/18 and 03/19 were properly served on the Appellant, and the letter of 9 January 2020 was similarly properly sent.
37. The surcharges have been properly calculated given the amount of VAT paid after the due date.

Discussion

38. Section 59(7)(a) VATA 1994 provides that a surcharge does not arise in relation to a failure to submit a return and/or payment by the due date if the person satisfies HMRC (or on appeal, a Tribunal) that:

> "the VAT shown on the return was dispatched 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."

39. On the evidence before me I am not satisfied that the payment was dispatched at such a time or in such a manner.
40. There is no statutory definition of "reasonable excuse"; it is an objective test to be considered in the circumstances of the particular case. The test is what a reasonable and prudent taxpayer intending to comply with their tax obligations, in the position of the appellant, would have done in the same circumstances (*Perrin* [2018] UKUT 0156 (TC)).
41. The reality in this case is irrespective of the receipt of letters or notices, the payment was made after the due date and no other excuse has been offered other than an oblique reference to banking procedures. No excuse has been offered and in those circumstances there can be no question of whether such an excuse is reasonable.
42. It is said that the two previous SLN's were not received and therefore the Appellant was unaware that it was within the surcharge period. However, it is not the Appellant's case

that he deliberately defaulted on payment because he thought that he wouldn't incur a penalty, and so there is no causative connection between not receiving earlier SLN's and the default.

CONCLUSION

43. For the reasons set out above, I uphold the surcharge of £544.93 for the periods 06/19. The appeal is therefore refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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.

ABIGAIL HUDSON
TRIBUNAL JUDGE

Release date: 24 June 2021