Neutral Citation: [2024] UKFTT 00640 (TC)

Case Number: TC09245

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2023/09240

*VAT – default surcharge – appeal allowed for one period but not the other*

**Heard on:** 24 June 2024
**Judgment date:** 16 July 2024

**Before**

**TRIBUNAL JUDGE NIGEL POPPLEWELL**
**MISS SUSAN STOTT**

**Between**

**HANA SERVICES LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Frank Bertalan director of the appellant

For the Respondents: Thomas Brown litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

## INTRODUCTION

1. This decision relates to VAT, and in particular two default surcharges visited on the appellant pursuant to section 59 of the Value Added Tax Act 1994 ("**VATA 1994**") for the periods 03/21 (in an amount of £666.36) and 09/21 (in an amount of £2,043.33) (together "**the surcharges**").

## THE LAW

2. There was no dispute about the relevant law which is set out below.

3. The appellant paid VAT on a quarterly basis. Section 59 of the VATA 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].

4. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs 25A (2), 40(2)]. Under that discretion, HMRC allow a further seven days for filing and payment.

5. Section 59 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 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.

6. A taxable person who is otherwise liable to a default surcharge, may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59(7) VATA 1994 sets out the relevant provisions: -

> "(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (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 then 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".

7. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows: -

> "(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any 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".

8. Under Section 98:

"Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made 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".

9. Under Section 7 of the Interpretation Act 1978:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

## THE EVIDENCE AND THE FACTS

10. We were provided with a bundle of documents. Mr Bertalan ("**FB**"), who is a director of the appellant presented the appellant's case and also gave oral evidence on its behalf. From this evidence we find the following:

(1) The appellant has been registered for VAT with effect from 1 January 2018. Its business is the refurbishment and redecoration of property. During the period in question, the sole director was FB.

(2) The original business address of the appellant was a ground floor flat in Askew Road, London ("**the flat**").

(3) On 19 January 2020, FB moved house to his current address in Greenstead Gardens, London ("**the house**").

(4) The appellant has been within the default surcharge regime since period 12/19.

(5) At the time when the surcharge liability notices were issued by HMRC for the periods 12/19 to 09/21, the address which HMRC had on their records for the appellant was the flat.

(6) HMRC's records evidencing the change of address from the flat to the house, indicate that this did not take place until 23 June 2023.

(7) A surcharge liability notice for £666.36 for the period 03/21 was dated 14 May 2021 and was sent to the appellant at the flat. This was actually received by the appellant as he had returned to the premises at which the flat was located, shortly after that date, in order to carry out some redecoration.

(8) Following receipt of that notice, the appellant telephoned HMRC. The transcript of the call evidences that the telephone conversation took place on 21 May 2021. In that call, FB explained that he had previously asked his accountants to change his address but it seemed that that this had not been put into effect. He asked the adviser to change his address but was told that the adviser could not do it and that he would have to speak to the VAT helpline. He sought to clarify the payments that he had made and the liabilities to which they had been attributed. He was told about setting up an online account.

(9) It was FB's unchallenged evidence that he did not receive any of the surcharge liability notices other than that for the period 03/21. His further unchallenged evidence was that following that telephone conversation, he was sent a number of letters from debt collectors,

acting on behalf of HMRC, which letters were sent to his new address at the house. It was also his unchallenged oral evidence that he had asked his accountants to change his address (something which is reflected in the record of the telephone conversation on 21 May 2021). It was also his unchallenged oral evidence that his accountants had confirmed to him that they had done so.

(10) FB also told us that he had phoned HMRC two or three times in 2020/2021. And told them of his change of address. HMRC have no record of any conversation between FB and HMRC, nor with his accountants, other than records of the telephone conversation on 21 May 2021, and the subsequent one on 15 November 2021. In that latter telephone conversation, FB confirmed the business address as being the house. From the hearing record it is clear that HMRC had not updated their records, and that the original registration certificate evidenced the business address as being the flat.

(11) In a letter dated 23 May 2023, sent to the house, HMRC enclosed a copy of the letter sent by HMRC to the appellant on 5 September 2022. However, the review conclusion letter in relation to the surcharges dated the same date, was sent to the appellant at the flat.

(12) The appellant changed its registered office address at Companies House from the flat to the house with effect from 16 March 2020.

**DISCUSSION**

11. It is for HMRC to establish, on the balance of probabilities, that valid surcharge liability notices were served on the appellant. If they can establish that, then the burden switches to the appellant to show that it has a reasonable excuse for failing to submit its returns or pay its VAT on time.

*HMRC submissions*

12. In summary Mr Brown submitted:

(1) The surcharges were correctly computed and the surcharge liability notices reflecting these were properly served on the appellant at the address (namely the flat) which HMRC had on their records.

(2) It is clear that the appellant actually received the surcharge liability notice for the period 03/21.

(3) There is insufficient evidence that the appellant's accountant notified HMRC of the change of address from the flat to the house and that this had been confirmed to the accountant over the phone in late 2020. HMRC have no records of any telephone conversations between the appellant (or its agent) other than the records of the calls in May 2021 and November 2021. There is no record of any call in April 2020. Any failure by the appellant's agent cannot be considered to be a reasonable excuse. Nor can the shortage of funds.

(4) HMRC are entitled to attribute payments to liabilities as they think fit unless the appellant had specified the liabilities against which the payments should be made. Payments had been made against the earliest defaults, in absence of any specific amount which could be clearly identified as being attributed to a specific liability.

*Appellant's submissions*

13. In summary FB submitted:

(1) He did not actually receive any of the surcharge liability notices other than that for the period 03/21 which he only received because he had gone back to the flat to carry out some redecoration works.

(2) He had been told by his accountants, who he had asked to contact HMRC to change the business address from the flat to the house, that the accountants had done this in April 2020.

(3) Having received the notice for the period 03/21, he phoned HMRC and told them of his change of address. After that date he received letters to the house from debt collectors acting for HMRC. HMRC therefore must have had his new address of the house on their records.
(4) HMRC are clearly confused about his address. In May 2023 they sent one letter to the flat, and a second letter to the house. And this appears to be before the date (23 June 2023) on which HMRC acknowledge that the house was the correct business address.
(5) Given that the telephone calls which he made to HMRC in 2020 were during Covid, it is unsurprising that HMRC have no records given that the HMRC officers were probably working from home and failed to record them. It is highly unlikely that both he, and his accountants, are both lying when they say that they made these calls to HMRC.
(6) He accepts that both payments and returns were made late. Basically, this was because of Covid which affected his accountants to such an extent that they could not file the returns on time, and that he was making insufficient money to pay the VAT on time.

*Our view*

14. It is clear from the case of *Customs and Excise Commissioners v Medway Drafting* [1989] STC 346 that "the whole scheme default surcharges dependent on service of the surcharge liability notice….".
15. The postal rule set out in section 98 VATA 1994 and section 7 Interpretation Act 1978, is in essence that service of a surcharge liability notice will be validly made if it is posted to the appellant's business address and will be deemed to have been effected unless it is proved otherwise.
16. The issue in this appeal is the address to which HMRC have sent the notices. They have sent them to the flat, but by the time that the first notice relevant to these defaults was served (in respect of the period 12/19) the appellant had moved to the house.
17. We would point out to the appellant that the notices can be validly served even if they do not come to the actual attention of the appellant. Provided HMRC can establish that they were served on the correct business premises, then that is enough even if the appellant was not actually aware of them.
18. As far as primary liability is concerned, we are satisfied with HMRC's evidence that the surcharges were correctly calculated. We are also satisfied that they were entitled to attribute payments of a disparate nature against the appellant's earliest liabilities.
19. It is clear to us that HMRC's record keeping as regards the address of this appellant has been somewhat unsatisfactory. This is demonstrated by the fact that even though HMRC's records show that it was not until 23 June 2023 that they accepted the change of address from the flat to the house, well before that, in May 2023, they were able to write to the appellant at the house.
20. Furthermore, on 23 May 2023, they sent two letters to the appellant one addressed to the flat and one addressed to the house.
21. Indeed, it was the appellant's unchallenged evidence that following the telephone conversation with HMRC on 21 May 2021, he received a number of letters from debt collectors instructed on behalf of HMRC, which were sent to his then correct address at the house. We ask ourselves how those debt collectors would have known about this address had HMRC not told them of it. There was no evidence provided by HMRC that the debt collectors would have used their own initiative and ascertained the appellant's address from independent sources.
22. We are not persuaded that the appellant's accountants either contacted HMRC or successfully notified them of the appellant's change of address. We do not dispute that the accountants may have told FB that they had done so. But there is insufficient evidence for us to infer that this was indeed done. Furthermore, we are not persuaded by FB that he, himself, had spoken to HMRC before 21 May 2021 and told HMRC of the change of address. Had he

done so, we have no doubt he would have referred to it in his telephone conversation with HMRC on 21 May 2021. He does not. He refers only to his accountant trying to change the address. We think it is more likely that his conversation with HMRC, which he thought had happened before the 21 May 2021 phone call, in fact took place after it. And it was following the prompt by HMRC's adviser on that call that he subsequently telephoned HMRC, spoke to the appropriate person, and told that person of the change of address.

23. This evidence has persuaded us that certainly with effect from that date, HMRC knew that the business address of the appellant was the house, and not the flat, even if their formal records were not adjusted to record this.

24. Accordingly, the surcharge liability notice for 09/21, was not properly served on the appellant as it was not sent to the correct address. Nor was it actually received by the appellant. We find this as a fact.

25. However, the situation is somewhat different for the notice for period 03/21. We have evidence that that notice was delivered to the address which HMRC had on their records at that time. It is clear from the contents of the telephone conversation between FB and HMRC on 21 May 2021 that the appellant's accountants had not changed that address and that the flat, at that stage, was still on HMRC's records as the appellant's address.

26. Given that one notice had been successfully delivered to the flat, we infer that the previous notices had also been sent and delivered to the flat. And thus, successfully served under the postal rule. The fact that they did not come to the attention of FB does not matter as far as successful service is concerned. He has not been able to show to us that they were not so served at that address.

27. We therefore find as a fact that the notice for the period 03/21 was properly served on the appellant.

28. So, the question is then whether the appellant has a reasonable excuse for the default in that period.

29. The test of whether or not there is a reasonable excuse is an objective one. 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? (See *The Clean Car Co Ltd v C & E Commissioners* [1991] VATTR 234.)

30. The reasonable excuse must apply to the failure to submit the return or pay the VAT on time. The appellant's evidence is that the reason why this return (and indeed other returns) was not submitted on time was because of failings by his accountant due to Covid. And indeed, the reason why the tax was not paid on time was because of a shortage of funds due to Covid.

31. Unfortunately for the appellant, both of these reasons are statutorily prohibited from being a reasonable excuse by dint of section 59(7) VATA 1994 (see [7] above).

32. FB submitted (in shorthand) that he did not know of the defaults because HMRC had not sent him the appropriate notices. But that is not an excuse for failure to submit the returns on time in the first place. We have no doubt that FB knew of his statutory filing requirements. Furthermore, there is no evidence that even if he had actually received the notices, he would have filed the return for 03/21 on time. Indeed, to the contrary. He knew of the notice for that period but did not file his return for 09/21 until nearly a fortnight after the due date.

33. We find therefore that for the period 03/21, the appellant has no reasonable excuse for failing to submit its return on time.

*Conclusion*

34. Our conclusion is that for the period 03/21, a valid surcharge liability notice was properly served on the appellant and it has no reasonable excuse for its default in that period.

35. However, for the period 09/21, we find that no valid surcharge liability notice was properly served on the appellant.

## DECISION

36. We therefore dismiss the appellant's appeal against the surcharge for period 03/21 but allow it in respect of the period 09/21.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

**NIGEL POPPLEWELL**
**TRIBUNAL JUDGE**

**Release date: 16th JULY 2024**