



TC03080

Appeal number: TC/2012/08883

VAT default surcharge - VAT not paid due to staff shortages - whether reasonable excuse - no - whether part payment made on time - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KOH SAMUI LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

Sitting in public at Alexandra House, The Parsonage, Manchester on 1 July 2013

The Tribunal determined the appeal on 1 July 2013 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 September 2012 and HMRC's Statement of Case submitted on 19 October 2012, the Appellant having submitted no Reply.

DECISION

The Appeal

5 1. Koh Samui Limited (“the Appellant”) appeals against a default surcharge of £1,217.13, for its failure to submit, in respect of its VAT period ended 04/12, by the due date, payment of the VAT due. The surcharge was calculated at 15% of the amount due of £8,114.20.

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

10 Background

3. The Appellant had previously defaulted on VAT payments in period 01/10 when a VAT surcharge liability notice was issued. Prior to the period subject to this appeal six further surcharge liability notices had been issued.

15 4. 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].

20 5. The Appellant paid VAT on a quarterly basis and usually paid its VAT by direct debit. HMRC may allow additional time for payment when made by electronic means, and pursuant to Regulation 40 (4) of the VAT Regulations 1995 allows an additional seven days after the end of the calendar month when payment would normally fall due together with a further three days when the VAT is collected by direct debit. Limitations apply if the due date falls on a weekend or a bank holiday in which event the due date defaults to the last previous working day.

25 6. The Appellant submitted its VAT return electronically on time on 29 May 2012. Payment was due no later than 7 June 2012 but not received until 13 June 2012.

30 7. Section 59 Value Added Tax Act 1994 (“VATA”) 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. The Commissioners 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 default the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.

8. A surcharge liability notice was issued for £1,217.13 on 14 September 2012.

9. HMRC contend that the Appellant should have been aware of the potential financial consequences of further defaults having been in the default surcharge regime from 01/10 and having defaulted on seven previous occasions.

5 10. 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 : -

10 '(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 –

15 (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

20 (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 ..'

11. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

25 Appellant's Case

12. The Appellant says that the default was due to a lengthy bank holiday, staff shortages and the fact that the employee who normally submit returns and attends to VAT payments was on maternity leave.

HMRC's Case

30 13. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of the initial Surcharge Liability Notice and subsequent surcharge default extension notices. The information contained on the reverse of each Notice states:

35 'Please remember your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.'

14. The requirements for submitting timely electronic payments can also be found -

- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
 - On the actual website www.hmrc.gov.uk
 - On the E-VAT return acknowledgement.
- 5 15. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).
16. Therefore, HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).
- 10 17. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellant did not make any request for a time to pay arrangement.

Conclusion

- 15 18. The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.
19. To decide whether a reasonable excuse exists the Tribunal must take for comparison a person in a similar situation to that of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal should then ask itself, with that comparable person in mind, whether notwithstanding that person's exercise of reasonable foresight, due diligence and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the circumstances which led to the failures.
- 20 20. Due dates for payment of VAT regularly fall on a weekend or bank holiday and the Appellant had the responsibility of ensuring that the VAT reached HMRC no later than the due date and if necessary by arranging payment at an earlier date. Reliance on a third party (the employee who normally has responsibility for VAT and was on maternity leave) is specifically precluded as being a reasonable excuse under VAT Act 1994 s 71 (1)(b). It is in any event the directors responsibility to ensure that payments and returns are made on time. The employee's maternity leave would have been a foreseeable event and therefore it would not be unreasonable to have expected the Appellant to have put in place alternative procedures to cover the employee's absence. A genuine oversight or error is not a reasonable excuse.
- 25 21. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal's view, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 04/12 period.
- 30 22. The appeal is accordingly dismissed and the surcharge upheld.

23. 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.

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MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 26 November 2013