TC03661

Appeal number: TC/2013/07571

Value added tax – default surcharge – reasonable excuse – no – Appeal Dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

OPTIONS MAIL ORDER SOFTWARE LTD **Appellant**

- and -

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

TRIBUNAL: DR KAMEEL KHAN
MR MICHAEL SHARP, FCA, FIH, FIOD

Sitting in public in Bedford Square, London on 16 April 2014

Susan Marshall, Finance Manager & Company Secretary appeared for the Appellant

Mr Bruce Robinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Issue

1. This is an appeal against a default surcharge issued on 16 August 2013 in the amount £1,089.15 and relates to the period April to June 2013 (06/13).

2. The Appellant has been in the default surcharge regime from the period 06/11 onwards. As such, to the period subject to this appeal, six earlier Surcharge Liability Notices have been issued. The surcharge under appeal is charged at a rate of 15%.

Background facts

(1) Whistlebrook Limited ("Whistlebrook") purchased Options Mail Order Software Limited ("Options") in January 2013. Options was in financial difficulties and on acquisition its officers were moved to Whistlebrook.

(2) Mrs Marshall, the Finance Director of Whistlebrook, had to train the acquired staff to operate within the practices of the holding company. This took some time and presented a challenge to the new enlarged business and its operation. Mrs Marshall requested that appropriate direct debits to be set up for payment of various creditor invoices including those of HMRC. There were problems connected with making timely payments in the past which resulted in the Options having substantial fines for late payment.

(3) The office manager of the Appellant was given the responsibility for setting up the direct debits and making the necessary arrangements for the timely payment of invoices. However, before the arrangements could be properly made, she gave her notice to leave the Appellant Company in April and it would appear had not set up the appropriate direct debit accounts.

(4) With the acquisition of Options, there was substantial reorganisation of the two companies both in terms of the corporate structure and compliance. This resulted in substantially more work for Mrs Marshall as the Finance Director of the new enlarged group. In delegating the responsibility for Options to her colleague at that company she thought that the direct debits had been set up as instructed but this had not been done. She had therefore assumed that a payment had been made to HMRC on time and given her busy schedule did not have the time to check the payments were made until five days after the due date. By that time it was too late and the penalty had been incurred.

3. The Appellant made the following submissions:

(1) The fine is excessive for the type of default.

(2) In imposing the penalty consideration should be given to the nature of the error and the financial impact which the penalty would have on the company. This has not been taken into account in the imposition of the penalty.

(3) There was no intention to withhold payment; it was an error on the Appellant's part in assuming that a Direct Debit (DD) was in place. This was a genuine employee error and payment was still received on what would have been the DD day, 12 August. The only difference being that the method of payment was by bank transfer and not DD. The Appellant acknowledges that a bank transfer due date should be 7 August. Payment was received on 12 August 2013.

(4) The only lost cost that HMRC would incur would be the administration charge for sending out an automatic default letter – no more than a maximum £10.

(5) Whistlebrook acquired the Options on 17 January 2013 and being aware that they had not always paid their VAT promptly, Mrs S Marshall, requested internally that a DD be set up for the Appellant's VAT payments.

(6) There was an assumption when the 06/13 return was submitted that the DD was in place. On 12 August 2013 it was discovered that no DD was in place and funds for payment of the VAT had not been deducted from the Appellant's account, Mrs Marshall immediately telephoned HMRC to confirm that position. A same day payment was made and a DD for future payments was put in place.

(7) Whistlebrook has an excellent payment record and the Appellant ask that this be taken into account.

Respondents' submissions

(1) The payment was late. The payment should have been received on 7 August and was received on 12 August 2013.

(2) There were several previous defaults since the Appellant had been in the default surcharge regime and therefore should have known the financial consequences of a further late payment. This information would have been given on the Surcharge Liability Notice which was issued. The surcharge is fair and proportionate.

(3) In any event, the Tribunal does not have jurisdiction, as such, to look at the proportionality of a surcharge. The surcharge regime itself is proportionate and HMRC are correct in charging a default surcharge in respect of the late payment for the accounting period 06/13. It is HMRC's

view , they do not agree with the case law in *Total Technology (Engineering) Limited*, a decision of the Upper Tribunal, which states that surcharges in individual cases could be disproportionate and that the absence of an upper limit is a flaw in the system.

(4) The fact that there was no intention to withhold payment does not provide a reasonable excuse.

(5) It is the responsibility of the Appellant Company to make the appropriate payment and submissions of returns. The Appellant Company was taken over some four months before the due date for the period under appeal and there was sufficient time for the appropriate DD mandate to be set up.

(6) The payment record of the Whistlebrook is not a relevant consideration when looking at the default surcharge.

Discussion and conclusion

(1) Options and its Whistlebrook are two different entities. Whistlebrook may have an excellent payment record but the Options have a poor payment record. They are separate entities and it is the Appellant Company's history which must be considered.

(2) It is the responsibility of the directors and officers to submit the appropriate VAT returns and to ensure that payment was made on time. This was not done. As the Respondents pointed out, there was a four month period prior to the due date when the Appellant Company was acquired. This gives sufficient time to confirm whether or not the direct debit mandate had been put into place. The penalty which has been imposed is imposed in law by s59 VATA 1994. There is no discretion in its imposition. It arises once there has been a late payment or a late return. It cannot be compared to the administration charges for the sending out of an automatic default letter. The charge and the percentage are set by statute and the Tribunal has limited jurisdiction, except in cases of a reasonable excuse or special circumstances, to intervene.

(3) The return was received on 9 July 2013 and payment was received on 12 August 2013. The Appellant Company had a history of defaults. There are financial consequences resulting from such defaults and these would have been explained in some detail on the reverse of the Surcharge Liability Notices issued for the late period. The Notice would also have been given a national advice service helpline should the Appellant not have understood the implications of a late payment and arrangements could have been made under the time to pay arrangements if there were financial difficulties in making the payments on time. The payments were clearly late. This was the result of an internal error by an employee, who had not followed instructions to create a DD to make the payment. The Appellant say that there was no intention to withhold the payment or

financial difficulties at the company and that a genuine error had occurred in that they assumed the direct debit was in place. In Notice 700-50 under paragraph 6.3, a genuine error or mistake is not a reasonable excuse for the removal of the surcharge issued in accordance with s59 (4) VATA 1994.

(4) HMRC have said that the Appellant's argument that payment was not received by them any later than if it had been paid by direct debit is not relevant as a direct debit mandate was not actually in place for the period 06/13. This means that the Appellant would not be entitled to the additional three bank working days, as extended to those traders who have set up and pay by direct debit.

(5) The Tribunal notes that internal arrangements for the direct debit had not been put into place by the officer in charge of making the arrangement. Given the poor payment history, one would have expected that the company would have created checks to ensure that the direct debit was in place prior to the due date of payment. It is understandable that Mrs Marshall, a competent finance director, would have had an extremely busy time integrating the new company into the holding group. However, this does not provide a reasonable excuse in the circumstances. It is not unreasonable to have expected the directors and officers responsible for the submission of the VAT of the parent company, having acquired the Appellant, to have ensured that they were aware of the method of payment used by the Appellant when paying their VAT. When the Options submitted their return online, there would have been an acknowledgement which would have shown the date on which payment should be made. This would have indicated that the direct debit payment system was not in place when the return was submitted on 9 July 2013, well in advance of the due date in August. This is a substantial period to be alerted of a mistake and there can be no acceptable reason why this was not picked up.

4. In the circumstances therefore the appeal is dismissed.

5. 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.

DR KAMEEL KHAN
TRIBUNAL JUDGE

RELEASE DATE: 29 May 2014