



TC03664

Appeal number: TC/2013/09496

Value Added Tax – Default Surcharge – whether reasonable excuse due to hardship and illness – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALAN CAMP ARCHITECTS LLP

Appellant

- and -

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

Respondents

**TRIBUNAL: DR KAMEEL KHAN
MR NICHOLAS DEE**

Sitting in public in Bedford Square, London on 25 March 2014

Alan Camp, Partner and Anna Turrent, Office Manager, appeared for the Appellant.

Rita Pavely, Presenting Officer, assisted by Femi Ojo, HMRC Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. This matter concerns the Default Surcharge Liability for the period 07/13 in the sum of £8,893.86
2. The question for the Tribunal is whether the Appellant had a reasonable excuse and in particular whether an insufficiency of funds on the facts of this case constitutes a reasonable excuse pursuant to s71(1)(a) VATA 1994.

10 Background facts

- (1) The Appellant is a firm of architects employing approximately 40 people and based in South East London.
- (2) Over the past years, the profitability of the practice has fluctuated given the difficult economic condition. At present, the company is back in profits and growing successfully.
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- (3) The partnership operated with a bank overdraft facility which had been reduced from £500,000 to £250,000 and then to £150,000 in the relevant periods. There was time to pay arrangements in place which allowed the practice to survive in the periods when cash flow was low. One of the reasons for the financial difficulties is the haphazard manner in which clients pay their invoices. While clients are given 30 days to settle their invoices, in many cases payment would be over 60 days late. This impacted directly on the partnership's cash flow, resources and staffing.
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- (4) In 2013, time to pay arrangements was not offered by HMRC. This made matters difficult given the reduction in the overdraft facility, the difficult economic conditions and the fact that time to pay arrangements were not available.
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- (5) The partnership's taxation affairs and VAT returns were prepared and submitted by the office manager, Anna Turrent, who had suffered a prolonged illness. She was off work for the period April 2012 to 2013 and returned only intermittently.
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- (6) One of the reasons for the late payment of the VAT is that the office manager did not realise that the VAT payments for the relevant period amounting to some £69,000 had been underpaid by approximately £9,000. This was clearly an error and may well be attributable to her illness. On realising the error, the payment was immediately paid but the surcharge had already been incurred. The due date for the payment was 7 September but the final payment was made on 22 November which resulted in the surcharge being incurred.
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- (7) The surcharge was actually reduced to £8,893.86 due to a recalculation by HMRC given that other payments for that quarter were made on time.

Legislation

Value Added Tax Act 1994 (VATA 1994)

5 Section 59 – the default surcharge

- (a) Section 59(1)(b) provides that a taxable person is in default if payment of VAT is made late;
- (b) Section 59(4) provides that if a taxable person is in default for a prescribed accounting period then they are liable to a surcharge of the amount of a prescribed percentage;
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- (c) Section 59(7) provides for the commissioners or on appeal the Tribunal setting aside the surcharge if the VAT shown on the return was despatched at such time and in such manner that it was reasonable to expect that it would be received at the appropriate time or the Appellant had a reasonable excuse for the late payment;
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- (d) Section 71(1) (b) provides that reliance on a third party is not a reasonable excuse.

Submissions by the Appellant

3. The Appellant said several factors came together and when taken collectively would provide a reasonable excuse for the late payment. The factors which the Appellant outlined which all contributed to the late payment being made were as follows:

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- (1) The bank reducing the overdraft facility in September 2012 which was 12 months before the late payment was made. It was explained that the bank manager did not have power to increase the overdraft, which had been reduced to £150,000. This created enormous cash flow difficulties for the Appellant partnership. There was a temporary increase in the overdraft facility for a short period but this was not available at the time the late payment was made.
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- (2) The Appellant explained that several clients paid their invoices late. In particular an invoice for £39,000 was due to be paid into the client account which would have been used for the payment of the VAT. However that payment was made late. The payment which was due in August was actually paid on 9 September by cheque, which took several days to be cleared and which showed up as having been paid on 9
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- September.

- 5 (3) The office manager (Anna Turrent) was ill in the period between April 2012 and September 2013. The Appellant suggested that her illness may have contributed to her oversight in making accurate payments. She had understood that the payment to be made was £60,000 when in fact the payment due was £69,000 and this was simply an error which resulted from a mis-communication between herself and the VAT adviser who had prepared the returns.
- 10 (4) The partnership had taken on extra staff as the business started to recover and this gave rise to further demands on the partnership's cash flow. With decreasing revenue coming in from clients and increasing salary obligations the partnership found itself in cash flow difficulties at this time. Additionally, the business had suffered significantly as a result of the recession and was not completely out of that difficult economic period.
- 15 (5) The Appellant partnership suggested that all of these factors coming together created as it were the "perfect storm" which meant that they incurred a Default Surcharge in the period 07/13.

Submissions by the Respondents

- 20 (1) The Respondents say that the main argument presented by the Appellant as a reasonable excuse is lack of funds and in this case lack of funds does not present a reasonable excuse. The Respondents draw reference to the Notice of Appeal where the reasons for the lack of funds were not explained in any full or detailed manner.
- 25 (2) The Appellant was familiar with what had to be done in the event that they could not pay. They should have contacted HMRC to discuss a payment plan but this was not done. Further, the Appellant say that they were due an overpayment of Corporation Tax of £30,000 which HMRC explained was in fact only £21,000 and which was used to be set against previous tax liabilities. This meant that only £100 was overpaid and therefore this money was not available to pay the VAT liability.
- 30 (3) HMRC do not accept that the recession caused problems which provided a reasonable excuse since all businesses were affected and this was a moral hazard of doing business at the time. Further, the Appellant do not dispute that the payment was late and acknowledged that it was late as a result of an error in the calculation of the VAT liability.
- 35 (4) There were four earlier Surcharge Notices which explained fully the penalties which would arise on further late payments. It was not correct to say, as the office manager suggested in a telephone call to HMRC on 22 November 2013, that she was unaware of the Default Surcharge for 04/13. The back of the Default Surcharge Notices lays out the law and rates of
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surcharge and explains that further penalties will be levied on late payments.

- 5 (5) HMRC also point out that in July 2013 the Appellant was on the cash accounting system which meant that VAT was only to be paid when payment was received so the fact that there were late payments made by clients would not have impacted in the way described by the Appellant.
- 10 (6) The Appellant had not contacted the business payment or advice helpline with regard to this payment even though they knew they were going to be paying late. This should have been done and arrangements made for the late payment.

Discussion and Conclusion

15 4. A lack of funds can provide a reasonable excuse in certain circumstances. The late payment by clients, if unexpected, may well provide a reasonable excuse in the facts of some case. However, where the late payment is reasonably foreseeable and could have been avoided by proper planning and due diligence, then it does not provide a reasonable excuse.

5. In this case there is no reasonable excuse.

20 6. While the Tribunal sympathises with the Appellant partnership and the difficult trading conditions in which they found themselves, this is a case where the late payment was due to simple human error. It is accepted that there were other factors which contributed to the final difficulties in which the partnership found itself. However, these difficulties, such as the reduction of the overdraft facility, the withdrawal of the time to pay arrangement and the illness of the office manager some one year earlier were not factors which caused the payment to be late.

25 7. The company was already suffering financial difficulties and came under pressure from the recession. There were companies which were already paying their invoices late and which the Appellant knew to be the position. These were not unforeseen problems. All trading companies were experiencing the same difficulties and it was a moral hazard of doing business at the time.

30 8. The partnership was entitled to be paid on time as explained in their invoices. There is an obvious risk, at the time of economic difficulties, that customers might delay in making the payments and it would have been expected that the Appellant would have made adequate contingent arrangements in advance. It is not a reasonable excuse if the partnership finds itself in financial difficulties and such arrangements
35 were not made.

9. The office manager became ill and this may well have provided a reasonable excuse but her illness was one year before the late payment was made. Further, she explained that the late payment was made due to error, a miscalculation of the amount of VAT due. This error was not due to her illness.

10. HMRC have explained that the Appellant was on the cash accounting system in April 2013 which meant that they were only liable to pay their VAT when their invoices were paid. This means that some of the arguments presented by the Appellant would fall out and in particular the argument that they were unable to pay because their clients had not paid would not be a valid argument in the circumstances.

11. It would have been sensible for the office manager or another senior person at the partnership to have made contact with HMRC to seek advice on whether there were options available to them to make payments late. Perhaps if this was done, HMRC would have taken a more sympathetic line and the Appellant would have had grounds for showing they acted in a reasonable and diligent manner. In the circumstances the Appellants do not have a reasonable excuse and the appeal would accordingly be dismissed.

12. 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: 30 May 2014