TC03769

Appeal number: TC/2012/04819

VALUE ADDED TAX*: default penalty surcharge; unexpected departure of group accountant reasonable excuse-no; surcharge disproportionate-no*.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARSDENS CATERERS OF SHEFFIELD LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER HACKING
MS REBECCA NEWNS

Sitting in public at Bedford Square, London on 28 January 2014

Mr Jody Styles, the Group Financial Controller of the Appellant and Mr Nenzat Ekrem, an accountant, appeared on behalf of the Appellant.

Mrs Lynne Ratnett, a Case Presentation Officer of Her Majesty's Commissioners of Revenue and Customs for the Respondents

DECISION

1. This was an appeal against a default surcharge in the sum of £38,724 for the 09/11 VAT period. VAT for that quarter was due to be paid by monthly instalments as the Appellant company was, as a large VAT payer, on the Payments on Account (POA)scheme. The due dates for the quarter were 31/08/2011; 30/09/2011 and 31/10/2011. These payment dates were notified to the Appellant by way of a schedule issued on 7 July 2011 together with a letter of the same date in which it was made clear that companies in the POA scheme were not entitled to the 7 day extension of time allowed for electronic payments.All payments under the scheme are required to be made electronically.

2. All 3 payments were paid late.

3. The August payment was received as a CHAPS payment on 19 September 2011 following a telephone call from the company's director, Mr Gowan on 14 September 2011 promising payment the following day.

4. The September payment was paid by cheque posted on 1 October 2011. The date that this was credited to the account is not known but must have been at least 5 days later allowing for postage delivery and time for cheque clearance. It is not disputed that it was late.

5. The final payment due on 31 October 2011 was dealt with by way of a same day electronic payment made on 07 November 2011.

6. The Appellant's business is a substantial one. It holds a KFC franchise and operates through some 18 outlets. It is said to be profitable.

7. The sum paid late over the 09/11 period amounted to £774,491.94. The Appellant was in the surcharge regime at the time as a result of defaults recorded for the 03/11 and 06/11 VAT periods.

8. The matter advanced by Mr Styles and Mr Ekrem for the tribunal's consideration as constituting a reasonable excuse for the delay in payments was the sudden and unplanned departure from the company of its group financial controller, Ali Imran, on his return from holiday in July 2011. The evidence was that Mr Imran had been ill for some time. The previous delays in payment for the 03/11 and 06/11 periods had apparently resulted from the company struggling to keep up with its responsibilities in the absence, much of the time, of its group financial accountant.

9. The tribunal accepts that the departure of Mr Imran, when it came, was unexpected. However that was in July 2011 and the payments under consideration in this appeal were those which were due in August, September and October 2011.

10. The expression "reasonable excuse" is not defined in the legislation dealing with VAT. It appears in section 59 (7) VAT Act 1994 to relieve the taxpayer from liability to the surcharge if such a reasonable excuse can be established.

11. Section 71 of the same act provides:

> "71 (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct:
>
> (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
>
> (b) where reliance is placed on another 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"

Sub paragraph (a) is not relevant in this instance. Sub paragraph (b) is relevant as reliance by the company's directors on Mr Imran cannot afford, without more, an excuse for the late payments.

12. The Tribunal readily accepts that Mr Imran's departure must have given rise to difficulty. However the company has and had at the material time other accounts staff in its finance section. At no time was it suggested that the regular preparation of the information needed for the VAT return was exclusively the task of Mr Imran. He would no doubt wish to see the return before its dispatch but in his absence there were others who would have been able, in the finding of the tribunal, to deal with this as, indeed, did actually happen.

13. It is the duty of the directors of the company to ensure that the VAT returns and payments are dealt with in a timely fashion. Given Mr Imran's abrupt exit from the company it hardly seems credible that all thought of dealing with VAT departed with him. That would be the sign of a wholly disorganised company. That was not the impression the tribunal had gained of the Appellant.

14. The lack of a definition for the expression "reasonable excuse" means that these words must be given their normal meaning. The Revenue takes the view that it refers to some facts or circumstances which preclude the taxpayer from meeting its obligations because they are, generally, unexpected and outside the taxpayer's reasonable control. That is far from an exhaustive definition but it does indicate the accepted approach to the sort of circumstances which may properly be considered as constituting a "reasonable excuse". The tribunal finds it to be at least a starting point for consideration of what may be a reasonable excuse.

15. In this appeal the steps necessary to put in place arrangements for meeting the company's VAT obligations were inadequate and had remained so for some time. It had apparently been assumed in relation to the October payment that the 7 days grace period allowed for electronic payments would apply equally to a cheque payment. It appears not to have been appreciated that as the company was on the Payments on Account regime all payments had to be made electronically by the dates specified. These are matters of which the company should have been well aware.

16. Regrettably it is clear from Mr Styles' letter of 8 February 2012 (incorrectly dated 2011), which was attached to and formed part of the Notice of Appeal, that even then he did not understand the requirement despite the fact that the Revenue had made quite clear what was needed. The last sentence of the second paragraph of that letter reads:

"In the following two months we have made payment in good faith with a cheque posted on 01/10/11 and a same day transfer ***in line with the normal seven day payment terms."*** (emphasis mine)

17. Two other issues were raised in the Appellant's letter of 8 February 2012.

18. The first concerned the fact that although the first two payments made in the quarter 09/11 had themselves been late HMRC had taken no steps to alert the company of its default. It is said that had it done so the position would have been rectified. To that extent the imposition of the surcharge was unfair. Mr Styles says in his letter:

"I am disappointed that had we been notified earlier, we would have resolved this much sooner as we take payments to HMRC incredibly seriously"

19. Whilst this may appear to be a reasonable point the fact is that HMRC have no obligation to inform taxpayers when they are in default. The taxpayer is expected to know what is required of it and to comply with the law. It may be suggested that this is perhaps unfair. This tribunal is not however able to exercise a supervisory jurisdiction over the activities of HMRC. It cannot therefore substitute what it might, in any given situation, see as being a "fair" decision of its own for a decision made by HMRC. It cannot give effect to taxpayer's expectations (in this case the expectation that the Appellant would be promptly notified of its first and second defaults) however reasonable these may appear if those expectations are not met. It is the responsibility of the tribunal to look at the decision made by HMRC and if it is one which it was entitled at law to make and the decision making process was itself not flawed then it must be confirmed. That the jurisdiction of the First-tier tax tribunal is limited in this way was made clear by the Upper Tribunal in the case of *HMRC and HOK Limited* [2012] UKUT 363 (TCC)

20. The second matter relates to the size of the penalty. It is said to be disproportionate.

21. This appeal was for a time adjourned pending the outcome of an Upper Tribunal appeal in the case of *HMRC and Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) in which the issue of proportionality had been raised. In that case the Upper Tribunal gave detailed consideration to the question whether the surcharge regime was in conflict with European legislation. It was held not to be so. It does remain possible, however, for the question of proportionality to be raised by an Appellant in the context of the application of the surcharge having regard to the particular circumstances of the Appellants appeal. Given that the scheme of the surcharge regime as a whole was found to be lawful it will be an unusual case in

which an appellant is able to satisfactorily contend that it has been disproportionately impacted by the surcharge. The fact that the surcharge is harsh will not by itself suffice. It must be said to be plainly unfair in its application.

22. There was no evidence before the tribunal as to the way in which the application of the surcharge to the Appellant would disproportionately affect the Appellant. What was said, in terms, was that the surcharge was excessive and would have an adverse effect on the company. Those observations would apply to any company in a similar situation and cannot in the finding of the tribunal properly ground an objection to the surcharge on the basis of proportionality.

23. Accordingly the appeal was dismissed.

20. 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.

CHRISTOPHER S HACKING
TRIBUNAL JUDGE

RELEASE DATE: 2 July 2014