[2016] UKFTT 724 (TC)

TC05453

Appeal number: TC/2016/02579

TYPE OF TAX – VAT DEFAULT SURCHARGE – WHETHER £150,000 THRESHOLD APPLIES – NO – WHETHER LOSS OF DIRECTOR REASONABLE EXCUSE – NO

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIRIMI SALONS LIMITED Trading As THE RED SALON **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN HYDE
MRS SHAMEER AKHTAR

Sitting in public at Birmingham on 26 September 2016

Mr Pedley for the Appellant

Mrs Skipper, Officer of HMRC, for the Respondents

DECISION

1. The appellant appeals against a surcharge liability notice of £479.90 in respect of the late payment of VAT due for the VAT period ending 06/14.

The Facts

2. We find the facts in this appeal as set out below.

3. The appellant is a hairdressing and beauty treatment company and registered for VAT in June 2008. There were until early March 2014 three directors of the company, Michelle Usher, Richard Turvey and Simon Boast. The business has for all relevant periods a turnover of around £150,000 a year and three employees.

4. The three directors were professional hairdressers or beauticians. The directors divided the administration of the business between them, Mr Turvey being responsible for sales and marketing, Ms Usher for purchasing and Mr Boast for what were described as statutory duties, accounts and staff issues including VAT compliance. Mr Boast kept the VAT files at his home rather than the premises.

5. In the period up to March 2014, the business relationship between Mr Boast and the other directors deteriorated and in March 2014 Mr Boast telephoned Ms Usher to say he was leaving the business. After that call there appears to have been no further contact with Mr Boast.

6. In the absence of witness evidence from the appellant's it is difficult to identify precisely what happened between Mr Boast leaving and the submission of VAT returns for 03/14 and 06/14. We have been told by Mr Pedley that some data was available to the business on the Sage system and some records were retrieved from Mr Boast but we do not know what. There was no evidence that anyone from the business tried to retrieve the VAT records from Mr Boast or that anyone contacted HMRC in the period from Mr Boast's departure to the due date for the relevant VAT returns and payments.

7. Mr Pedley was able to say that at the end of March the remaining directors decided to outsource VAT compliance. There then followed a period of advertising and interviewing and so on to decide whom to appoint. Mr Pedley's business, Bookkeeping Birmingham was appointed towards the end of April 2014.

8. On 2 July 2014 Mr Pedley wrote to HMRC saying that they were are the returns for 03/14 and 06/14 were due and that they hoped that the returns and payments would be made within 7 to 10 days. The 03/14 return was received and payment made on 24 July 2014, 78 days late. The 06/14 return was received on 5 September, 29 days late and payment made on 28 August 2014, 21 days late.

9.

10. The appellant has been late in paying its VAT and submitting its quarterly VAT returns in as set out in the schedule to this decision. The appellant pays by the faster payment service and so the effective due date for payment is seven days after the statutory due date.

11. The appellant entered the VAT surcharge regime when it was served a default surcharge liability notice in respect of a first default being late in its payment of VAT in period 03/13. When the appellant was late in paying 06/13 a 2% penalty was due but, being under £400, in accordance with HMRC practice, no penalty was levied by HMRC. When the appellant was late in paying £2,500 of the VAT due in respect of period 03/14, a penalty of 5% was due but again, the penalty being under £400, no penalty was raised. The appellant was late again in paying and, this time, in submitting its VAT return in respect of period 06/14. On this occasion a penalty of 10% was due, the £400 concession not being applicable. Accordingly HMRC issued a surcharge liability notice under section 59(4) Value Added Tax Act 1994 on 5 September 2014 for £486.70 reduced to £479.90 on adjustment following submission of the returns.

12. It is common ground between the parties that the appellant was in default as set out in the schedule and, absent any defence as discussed below, the 06/14 default surcharge would be payable.

13. The appellant requested an internal review which on 18 March 2016 confirmed the original decision. On 5 May 2016 the appellant appealed this decision. This appeal was served late but HMRC did not take any point on this at the hearing.

The legislation

14. Section 25 Value Added Tax Act 1994 imposes a statutory obligation on a person required to make a return and to pay the VAT to HMRC in accordance with regulations. Regulation 40(2) of the Value Added Tax Regulations 1995 provides that;

> "(b) any person required to make a return shall pay to the Controller such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return."

15. Section 59 of the Value Added Tax Act 1994 provides that where a VAT registered trader is late in filing its return or does not pay the VAT due it is in default and is liable to pay a surcharge. The surcharge payable is a percentage of the VAT due, escalating from 2% to 15% depending on the number of successive defaults by the taxpayer. Where, as is here, there are three defaults following the initial default, the percentage is 10%.

16. Section 59(7) provides;

> "(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal, that in the case of a default which is material to the surcharge-

(a) …

(b) there is a reasonable excuse for the return or VAT not having been so despatched.

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 (and accordingly) , any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served)"

17. Section 71 (1) provides;

"(1) For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct-

(a) ….

(b) where reliance is placed on any other person to perform a task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse"

18. HMRC Notice 700/50 on default surcharge provides at paragraph 4.2;

"Special arrangements are in place if your taxable turnover is £150,000 or less to help when you first have difficulties paying your VAT on time. You will be sent a letter offering help and support rather than a Surcharge Liability Notice the first time you default"

19. The effect of paragraph 4.2 is that where applied a default is waived.

20. Mr Pedley for the appellant made two arguments, that HMRC should have applied the £150,000 threshold and that the departure of Mr Boast was a reasonable excuse. The appellant has also in its original appeal and correspondence with HMRC raised points concerning the nature of the review conducted by HMRC and HMRC's refusal to engage in alternative dispute resolution but these were not pursued by the appellant in the hearing.

The £150,000 concession

21. On the £150,000 argument, Mr Pedley argued that it was unreasonable of HMRC to refuse to apply this concession to the default for the period 03/13. If that had happened then the first default would be 06/13 and the percentage applying to 06/14 would be 5%, resulting on a penalty of less than the £400 concession.

22. Mr Pedley pointed out that the guidance was not clear how HMRC would calculate the £150,000 turnover. Having applied a mechanical test at the outset, HMRC should review the position afterwards and apply a fair calculation. Mr Pedley now understood that HMRC used the VAT turnover for the preceding year ending on the last day of the period in default, here being the periods 03/12 to 12/12 inclusive. In the case of the appellant this came to £151,440, just over HMRC's threshold. Mr Pedley produced accounts for the appellant showing that its statutory turnover for the

three years ending 31 October 2011, 2012 and 2013 to be £148,114, £145,906 and £143,776 respectively, all under £150,000. Mr Pedley also produced to the Tribunal calculations as to alternative methods of using VAT turnover figures all of which produced a turnover below £150,000. Thus the average turnover for the periods 03/13 to 06/14 inclusive was £147,354.78 and the average for all periods from 12/11 to 12/14 inclusive was £149,109.62.

23. Finally Mr Pedley argued that refusal to apply the £150,000 concession when the difference in turnover was less than 1% was unfair. In a business so small, just bad weather or a director working an extra Saturday could breach the turnover limit.

24. HMRC argued that it was a matter of policy that the £150,000 was calculated on the previous year's VAT turnover and that policy must be adhered to. At the hearing HMRC explained the calculation as being based on the VAT turnover for the preceding year ending on the last day of the period in default, here being 06/12 to 03/13 producing a turnover of £151,015. In their statement of case HMRC calculated the turnover by reference to the preceding year ending on the last day of the period prior to the period in default being 03/12 to 12/12 periods and producing a turnover of £ 151,440. However, nothing turns on the point in this instance.

Reasonable excuse

25. The appellant's second argument was that there was a reasonable excuse for the failure to pay the VAT and file the 03/14 and 06/14 returns, namely the sudden departure of Mr Boast and the other directors' reliance on him for VAT compliance.

26. This ground applies not only to 06/14 but also to the earlier period of 03/14, Mr Boast having left in March 2014. If we find that there was a reasonable excuse for 03/14 then, in accordance with section 59(7) that default is to be treated as not having taken place. The effect of this is that the default percentage applicable too 06/14 is reduced from 10% to 5% and the penalty is reduced to below the threshold of £400.

27. HMRC argue that there is no reasonable excuse for the following reasons;

(1) It was a business decision to allocate responsibilities between the directors with the inherent risk that this brought;

(2) The appellant could have used the VAT payment deadline calculator to identify that the last date for payment for 06/14 was 7 August 2014; and

(3) The due date for payment of the 06/14 return was five months after Mr Boast left the business, so the remaining directors had sufficient time to familiarise themselves with the VAT position

Decision

28. The application of the £150,000 threshold is unclear and it is entirely possible to construct an alternative calculation that would result in 03/13 default being waived by HMRC. It is also easy to feel sympathetic to the appellant where they fail to get the

relief because of a statistical oddity where other methodologies would have produced a favourable result.

29. However, this concession is not found in the VAT legislation or regulations and there is no statutory requirement to apply any methodology. The Tribunal accepts HMRC's evidence that this methodology is applied consistently – albeit we were given two different calculations which is clearly unsatisfactory. Accordingly, aside from the question as to this Tribunal's lack of jurisdiction that arises in reviewing HMRC's exercise of discretion, the Tribunal can find nothing wrong with a policy that applies a rolling VAT turnover methodology to work out if a business has a turnover of less than £150,000. This may produce borderline cases for and against taxpayers but, HMRC having applied their policy, we can find no grounds to interfere.

30. We therefore dismiss the appellant's argument that the £150,000 concession did apply or should have been applied.

31. As to the appellant's second ground of appeal, that there was a reasonable excuse, this ground applies not only to 06/14 but also to the earlier period of 03/14, Mr Boast having left in early March 2014. If we find that there was a reasonable excuse for 03/14 then, in accordance with section 59(7) then that default is to be treated as not having taken place. The effect of this is that the default percentage applicable too 06/14 is reduced from 10% to 5% and the penalty is reduced to below the threshold of £400.

32. The onus of proof rests with HMRC to show that the surcharges were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate whether there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

33. We are satisfied that the Tribunal has shown that the surcharges were correctly imposed. The question then arises as to whether the appellant has discharged its burden of proof as to there being a reasonable excuse.

34. We note in passing that section 71(1)(b) does not determine the issue. HMRC did not rely on it for the very good reason that Mr Boast, as a director of the company is not a third party for these purposes. The appellants must nevertheless show that their excuse was reasonable, that is to say one that is objectively reasonable in the circumstances.

35. As regards the period 06/14 we do not accept that there was a reasonable excuse. In the five months between Mr Boast leaving and the due date there was sufficient time to reconstruct the appellant's VAT affairs sufficiently to file the VAT return and pay the VAT. Responsible directors of a business, even if they had allocated responsibility for VAT to a director who had left suddenly, would be aware that VAT was due every quarter and would have taken steps to regularise the business within five months.

36. As regards the 03/14 return, the position is more balanced as the appellant only had some five or six weeks. In our view, there might in principle have been a

reasonable excuse for the late filing and payment of the 03/14 return. However, we do not accept the appellant has demonstrated the facts necessary to discharge its burden of proof. The absence of any witness from the appellants made it very difficult to establish the facts. For example, we have had no evidence as to the efforts made to retrieve the papers from Mr Boast, which absent any evidence to the contrary we have to assume were complete. Further, there was no evidence the appellants tried to contact HMRC during this period. We also note that many of the difficulties experienced by the appellant are due to the actions of a director of the appellant, Mr Boast. Accordingly. we do not accept that there was a reasonable excuse for failing to file the VAT return and pay the VAT for the period 03/14.

37. For the above reasons we dismiss the appellant's appeal.

38. 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.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 26 OCTOBER 2016

Schedule of returns and payments

Period	Due Date	Date Return received	Date payment received	Amount paid late	Tax on return	Rate %	Amount £
03/13	30.04.13	24.04.13	9.05.13	3,899.53	3,899.53	0	0
06/13	31.07.13	10.07.13	31.07.13 21.08.13	0 2,500	5,075.74	2	0
03/14	30.04.14	24.07.14	24.07.14	4,569.82	4,569.82	5	0
06/14	31.07.14	05.09.14	28.08.14	4,799	4,799	10	479.90

5