TC02627

Appeal number: TC/2011/05540

VAT – default surcharges –reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PRIME & CO **Appellants**
(a partnership comprising Andrew Stevenson and Elizabeth Stevenson)

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
TERENCE BAYLISS

Sitting in public in Birmingham on 7 December 2012

Andrew Stevenson, partner in the Appellant firm, for the Appellants

Harry Jones, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal relates to default surcharges totalling £6,761.69 imposed in respect of late payment of VAT for the periods 02/08 to 11/10 inclusive.

2. The Appellants claim to have a reasonable excuse for the defaults, based on an insufficiency of funds attributable to events outside their control, namely two burglaries at their business premises and a long history of incompetence, mismanagement and unlawful acts on the part of HMRC and its predecessor body HMCE. In this decision, "HMRC" refers to both bodies.

The facts

3. The history of the Appellants' VAT default record is long. The defaults originally arose as a result of burglaries at their business premises in 1993. An account of the history of matters up to September 2000 was contained in a decision of the VAT and Duties Tribunal released on 5 April 2001 (VATD No. 17166). In that decision, the VAT and Duties Tribunal allowed the Appellants' appeal against a large number of VAT default surcharges for periods up to 05/99.

4. In the 2001 decision, it was made clear that a very significant part of the reason for the Appellants' defaults was the unhelpful, uncooperative and, at times, incompetent action of HMRC. There were difficulties in establishing the correct state of the Appellants' VAT account with HMRC due to the destruction of the Appellants' records and HMRC's inability or unwillingness to provide full and accurate information. The actions of the bailiffs of HMRC's Debt Management Unit were particularly highlighted, the Tribunal observing that "most if not all of the distraints were for greater amounts than have turned out to be due at the times when they were distrained for".

5. The Appellants' VAT problems led to a number of other difficulties. Because they were unable to piece together their VAT account, they were unable to produce audited accounts for either the Law Society or their bankers. Their overdraft facilities were badly affected. They had to meet business expenses (including making payments to HMRC's bailiffs which were subsequently found to have been excessive) using personal credit cards and premature encashment of personal investments. Long term personal financial planning for retirement was completely undermined.

6. Following the Tribunal decision in April 2001, it was agreed that the Appellants' VAT account should be revised again on the basis of that decision, in order to provide a firm agreed starting point going forward. In spite of extensive correspondence, it was not possible to reach agreement. We note however that by 2002 the parties were only some £2,000 apart and therefore we do not see why it should not have been possible to produce audited accounts with an appropriate reserve or contingency to cover the difference, which would have unlocked the bank problems.

7. In fact arguments over the draft VAT account carried on. The Appellants had been able to file their VAT returns and pay on time, by and large, from 2001 up to 2007. Mr Stevenson explained they had only managed this by expanding the business and using the corresponding increasing cash flow to keep up – just – with the current VAT liabilities.

8. Mr Stevenson said it was only when the recession started to bite in 2008 that this tactic failed. Levels of work dropped off and from period 02/08 the Appellants were unable to pay their VAT due to the cumulative effect of the previous 15 years' financial damage, ultimately attributable to HMRC's mistakes, incompetence and worse over the intervening period. He relies on the principle enunciated in *HMCE v Steptoe* [1992] STC 757 (Court of Appeal).

9. There is no dispute as to the calculations underlying the surcharges which HMRC say is due or the lateness of the payments. The sole issue is whether the Appellants have a reasonable excuse for the delays.

10. The defaults in question were for periods 02/08 up to 11/10, resulting in total surcharges of £6,761.69.

The law

11. We do not set out the legislation in full as there is no dispute between the parties as to its content or effect.

12. The relevant part of section 59 Value Added Tax Act 1994 ("VATA 94") provides as follows:

> "(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) 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
> >
> > (b) there is a reasonable excuse for the return or VAT not having been so dispatched,
>
> he shall not be liable to the surcharge…."

13. The sole issue is whether, in the light of section 71(1)(a) VATA 1994, the Appellants are able to satisfy this Tribunal that there is a reasonable excuse for the late payment of the VAT. Section 71(1)(a) provides as follows:

> "(1) For the purposes 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…"

14. This provision was considered in *Steptoe* and the following gloss was placed upon it:

> "If the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the taxpayer's default, then the taxpayer might well have reasonable excuse for non-payment, but that excuse would be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds."

Discussion and conclusion

15. We note that the burden lies on the Appellants to satisfy the Tribunal that they have a reasonable excuse for the late payments.

16. In a situation where the Appellants had been able to make the appropriate payments of VAT broadly on time over the period from 2001 to 2007, it will be extremely hard for them to establish that they have a reasonable excuse, largely referable back to the events before 2001, for a new chain of defaults commencing at the start of 2008.

17. We acknowledge that HMRC did not perform well after the 2001 decision. However the only outstanding issue with HMRC during that period was the agreement of a running account – on which the parties were only some £2,000 apart as early as 2002. On that basis, we see no reason why the Appellants should not have been able to prepare audited accounts, even with such a provision, in order to unlock bank facilities at a much earlier stage.

18. Therefore whilst we have a great deal of sympathy for the Appellants on account of their earlier treatment at the hands of HMRC, we do not find it possible to satisfy ourselves that the necessary causal link has been established between those earlier events and the defaults which started in early 2008. If follows that we do not consider the Appellants have a reasonable excuse for the defaults and the surcharges must therefore be upheld.

19. The appeal is 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 4 April 2013