



TC02810

Appeal number: TC/2012/04122

Surcharges for late submission and/or payment of VAT returns – whether return paid or submitted late – Yes. Whether transfer of business from sole trader to limited company with no change of VAT registration number included the transfer of the compliance history and applicable rate of surcharge. No – separate legal entities. Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DRUMKINNON JOINERY & BUILDING LIMITED Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER: PETER R SHEPPARD, FCIS,
FCIB, CTA
CHARLOTTE BARBOUR, CA, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh, EH2 4HH on
Thursday 6 June 2013**

The Appellant was unrepresented

Mrs Elizabeth McIntyre, Officer of HMRC, for the Respondents

DECISION

1. This concerns an appeal by Drumkinnon Joinery & Building Ltd against a decision of Her Majesty's Revenue and Customs to impose a default surcharge of £982.11 for the late submission of the Appellant's VAT return for the period ended 30 September 2011. That amount is 15% of the tax due for the period of £6,547.41.

Legislation

2. VAT Act 1994 Section 59 The Default Surcharge
VAT Regulations 1995 Regulation 6

Case law

3. *Aron Salomon v A Salomon & Co Ltd* 1897 [AC 22]
The Commissioners for Her Majesty's Revenue and Customs v Total Technology Engineering Ltd [2012] UKUT 418 (TCC)

Facts and submissions

4. The Appellant had been notified of the appeal but did not attend. The Tribunal telephoned the Appellant who advised that they had nothing to add to the submissions they had already made in writing and was content for the hearing to go ahead on that basis.

5. The Appellant in correspondence accepted that the payment for the period which is the subject of this appeal was one day late. They claimed that a surcharge of £982.11 for being one day late was a lot of money for a small business to find. The Appellant pointed out that on three occasions including the subject of this appeal they were only one day late in making payment. The Appellant did not offer any reason for these delays or any explanation of why they could not pay earlier.

6. Mrs McIntyre for the Respondents submitted that the decision of the Upper Tribunal in *The Commissioners for Her Majesty's Revenue and Customs v Total Technology Engineering Ltd* [2012] UKUT 418 (TCC) concluded that the level of the surcharge was not disproportionate.

7. Mrs McIntyre took the Tribunal to a "Schedule of Defaults" which the Respondents had prepared and included in the bundle of papers. She explained that the Appellant submitted monthly VAT returns and had defaulted seven times in the periods ending 31 May 2009 to 30 September 2011 inclusive. The first of these was a hand written return and was submitted seven days late as was the accompanying cheque. The returns thereafter were all submitted electronically and on time. Mrs McIntyre explained that where payment is made electronically the due date for payment is extended by seven days after the statutory due date, except where this falls on a bank holiday or weekend, when it is deemed to be the last working day before the extended due date. Even after taking this extension into account payment was made electronically by BACS late in each of the returns for the periods ending

31 March 2010, 31 May 2010, 31 July 2010, 31 August 2010, 30 June 2011 and 30 September 2011.

5 8. Mrs McIntyre briefly explained the Default Surcharge system which is found in the VAT Act 1994 Section 59. This can be briefly summarised as follows:-

10 where a taxpayer fails to submit a return or make payment due on a return within the statutory time limit then the Respondents may issue a Surcharge Liability Notice which specifies a surcharge period which begins on the day of the notice and ends on the anniversary of the last day of the accounting period for which the default occurred unless there have subsequently been further defaults.

15 If a further default occurs within the surcharge period then a surcharge may be levied the level of which is 2% of the tax due and the surcharge period is extended. Further defaults give rise to surcharges calculated at 5% of the tax due then 10% of the tax due and finally rising to a maximum of 15% of the tax due. The surcharge period is extended on each occasion until a complete year of returns is submitted on time.

20 Mrs McIntyre said that the number of defaults made by the Appellant meant that the surcharge rate applicable to the period to 30 September 2011 was the maximum rate of 15%.

25 9. Documents purporting to be copies of the late returns were included in the bundle presented to the Tribunal. On inspection of these the Tribunal noted that the hand written return for the period to 31 May 2009 was addressed to “Stephen John Haworth, Drumkinnon Joinery and Building” whereas the other six late returns were all addressed to “Drumkinnon Joinery & Building Ltd”. Also included in the papers
30 was a copy of a Certificate of Incorporation of a Private Limited Company No. 387476 Drumkinnon Joinery & Building Ltd and this certificate was dated 21 October 2010.

35 10. The Tribunal enquired why it was that the copies of the returns for the periods ended 31 March 2010, 31 May 2010, 31 July 2010, and 31 August 2010 all appeared to be addressed to and completed by a company that was not incorporated until 21st October 2010. Mrs McIntyre could not answer that question at the hearing and the Appellant was not present to assist.

40 11. This turn of events prompted the Tribunal to enquire whether the case of *Aron Salomon v A Salomon & Co Ltd* [1897] applied in that as the returns were dealing with two separate legal entities could the compliance history of Stephen John Haworth be transferred to Drumkinnon Joinery & Building Ltd.

45 12. In answer to this question Mrs McIntyre said that whilst she was not familiar with the ‘*Salomon*’ case she considered VAT Regulations 1995 Regulation 6 applied. This regulation is headed “Transfer of a going concern”. The Tribunal noted that in

the papers there was evidence that when the business had been transferred from Stephen John Haworth to Drumkinnon Joinery & Building Ltd the Respondents had accepted an application for his VAT registration number 853 1132 55 to be allocated for use by the Appellant.

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13. Mrs McIntyre focussed on Regulation 6(3) and in particular sub-paragraph (a). This states:-

10 *“Where the transferee of a business [or part of a business] has under paragraph (1) above been registered under Schedule 1 to the Act in substitution for the transferor of it, and with the transferor’s registration number-*

(a) Any liability of the transferor existing at the date of the transfer to make a return or to account for or pay VAT under regulation 25 or 40 shall become the liability of the transferee

15 *(b)...to (f)”.*

Sub-paragraphs (b) to (f) cover various rights, liabilities and records that might be transferred but none cover the surcharge liability history or the transfer of the rate of surcharge that should apply in the event of a future failure to submit or pay returns on time.

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14. The hearing was adjourned and the Tribunal invited both parties to make written submissions on the following questions by 28 June 2013:

25 (a) In the bundle of papers is a copy of the Certificate of Incorporation of Drumkinnon Joinery & Building Ltd. It is dated 21 October 2010. That being the case why are the VAT returns for the periods ending 31 March 2010; 31 May 2010; 31 July 2010 and 31 August 2010 (pages 42 to 45 of the bundle) addressed to a limited company which was not incorporated until after those dates?

30 (b) When the business was transferred from Stephen John Haworth to the limited company what legislation provides for the default history of Mr Haworth to be inherited by the limited company? In this respect does Regulation 6 of the VAT Regulations 1995 specifically make this provision? Does the decision of the House of Lords in 1897 in the case of *Aron Salomon v A Salomon and Co Ltd* have the effect that notwithstanding the transfer of the VAT registration number the company must be treated as a separate legal entity from Mr Haworth?

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15. In reply the Appellant declined to make any further observations.

40 16. The Respondents replied by saying that the copy VAT returns that suggested that the company had been sent and completed VAT returns before it was incorporated were the result of a computer error. They confirmed that the returns had been sent to Mr Haworth and completed by him. When the Respondents’ computer was interrogated to produce past returns submitted electronically it had printed on

each return the name and address currently on file rather than the name and address that appeared on the return at the time it was submitted.

17. The Respondents also forwarded to the Tribunal their Technical Manual. The following is an excerpt from page 218 of 294 of that Manual:

“36.5 Specimen letter: Notice of cancellation of registration when a VAT registration number has been reallocated

10 Dear

The application for reallocation of your value added tax registration number [enter number] to [transferee] with effect from [date] has been approved. From that date your registration is cancelled, you must no longer issue tax invoices and the registration number previously allocated to you must not appear on any invoices you issue...”

Decision

18. The Tribunal finds that the Appellant’s return for the period ended 30 September 2011 was submitted late. It also finds that the Appellant has not established any reasonable excuse for the late return. The Tribunal agrees with the Respondents argument that the decision of the Upper Tribunal in *Total Technology Engineering Ltd* refutes the Appellant’s argument that the surcharge is excessive.

19. However the Tribunal finds that the Respondents’ calculation of the amount of the surcharge is flawed. This arises from the transfer of the business from Stephen John Haworth to Drumkinnon Building & Joinery Ltd.

20. The Tribunal does not accept the Respondents argument that Regulation 6(3)(a) applies. A potential rate which might apply should a future failure occur is not a liability existing at the date of the transfer.

21. The Tribunal notes that Regulation 6(1)(c) states that

"on the transfer of a business (or part of it) the registration of the transferor... is to be cancelled..."

and then after (d) it says

"...the Commissioners may as from the date of the said transfer cancel the registration under Schedule 1 to the Act of the transferor and register the transferee under that Schedule with the registration number previously allocated to the transferor."

This describes what happened in this case. The registration of Stephen John Haworth was cancelled and a new registration granted to Drumkinnon Building & Joinery Ltd. This is supported by the extract from the Respondents Technical Manual quoted above.

22. The transferor and transferee are separate legal entities. In *Aron Saloman v A Saloman and Co Ltd* 1897 [AC 22] Lord Halsbury LC stated (at 30-31):

5 “... it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

10 So in the Tribunal’s view when the VAT registration of Stephen John Haworth was cancelled his surcharge liability compliance history ceased. A new history commenced on the registration of the separate entity Drumkinnon Building & Joinery Ltd.

15 23. Thus the use by the Respondents of a surcharge liability rate of 15% of the tax due in calculating the surcharge for the period to 30 September 2011 is erroneous as it arises from the compliance history of Stephen John Haworth and not from the compliance history of Drumkinnon Building & Joinery Ltd.

20 24. In respect of the surcharge in response to the Tribunal’s question the Respondents have forwarded to the Tribunal a copy of a letter dated 28 June 2013 sent to the Appellant which included the following paragraphs:-

25 “The above default is to be amended to a non monetary default due to the change in legal entity from sole proprietor to limited company, albeit that the VAT Registration number has remained the same.

I would also advise that the business is no longer within the default surcharge regime as there have been no defaults since this period.”

30 25. The Tribunal agrees with the Respondents course of action and in view of this and for the reasons set out above allows the appeal.

35 26. 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.

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PETER R SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 30 July 2013

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