



TC04591

Appeal number: TC/2015/00562

VAT – default surcharges - section 7 Interpretation Act - cases of Medway and Adplates considered - appellant failed to prove notices not received - no reasonable excuse - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IBOARDOUCH LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE BARBARA KING
BEVERLEY TANNER**

Sitting in public at Leeds on 26 May 2015

Ian Spencer, tax adviser for the Appellant

Nadine Newham of HM Revenue and Customs, for the Respondents

DECISION

The Issue

1. This is an appeal by IBoardTouch Limited (“IBT”) against VAT surcharge penalties of £666.29 for the quarter 05/13 and £13,164.87 for the quarter 08/13.
- 5 2. IBT agree that the VAT return was made late in each quarter and that the VAT was paid late in each quarter. They argue that although they are in default they are not subject to penalties because they did not receive the surcharge liability notice for the period 11/12 and they did not receive the surcharge liability notice extensions for the periods 05/13 or 08/13.
- 10 3. At the hearing Mr Spenser, on behalf of IBT referred to the cases of *Customs and Excise Commissioners v Medway Draughting and Technical Services Limited*; and *Customs and Excise Commissioners v Adplates Offset Limited* QBD [1989] STC 346. Leave was given to the parties to produce further submissions on these cases before a decision would be issued by this Tribunal. A submission has been received
15 from Mrs Newham for HMRC. No further submission has been received from Mr Spenser.

The legislation

4. Section 59 Value Added Tax Act 1994(VATA) sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as
20 being in default if he fails to make his VAT return for a VAT quarterly period by the due date for that quarter, or if he makes his return by the due date but does not pay by that date due the amount of VAT shown on the return as payable in respect of that period.
5. Section 59(4) Subject to subsections (7) to (10) below, if a taxable person on
25 whom a surcharge liability notice has been served -
 - (a) is in default.....and
 - (b) has outstanding VAT for that prescribed period,he shall be liable to a surcharge
6. HMRC may serve a surcharge liability notice on the defaulting taxable person,
30 which brings him within the default regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. A new default, made within the surcharge liability period, gives rise to a default surcharge being charged. The first surcharge is made at 2%. The percentage increases to 5% for a second default within the period, 10% for a third and
35 15% for all subsequent defaults, within a specified period.
7. Section 59A VATA provides that taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default.

8. Mere insufficiency of funds is not a reasonable excuse but the reason for the insufficiency may amount to a reasonable excuse, if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that tax would become due on a particular date would not have avoided the insufficiency.

5 9. Section 98 VATA 1994 deals with service of notices. Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative.

10 10. Section 7 of the Interpretation Act

(1) Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Evidence

11. Zulfiqir Baig gave oral evidence that he is a chartered engineer who started IBT in 2011. The company was due to complete its first VAT return in November 2012. At that time the company employed a bookkeeper to do the returns and she would have been responsible for the VAT return which was submitted on 8 January 2013. Mr Baig did not know why it was one day late, but he did know that IBT was not in a position to pay the VAT due of £60,728.92.

12. Srinvasah Ram is an accountant who became involved with IBT sometime in January 2013. He gave oral evidence that he works in house for IBT but he is not an employee of the company. He was aware that VAT of £60,728.92 was owing to HMRC in January 2013 but was waiting for a refund of £43,269 from a sister company –SoftOffice to assist in the payment of VAT for IBT. It was not until 8 March 2013 that the refund from SoftOffice was agreed and could be credited to the account for IBT. No attempt was made to pay the balance of £17,459.92 which was still due for VAT from IBT for the period 11/12.

13. On 7 April 2013 IBT filed its VAT return for the period 02/13 in time. This showed a reclaim for VAT of £4,273.01 which was used by HMRC to reduce the outstanding VAT due for the 11/12 period to £13,186.91.

14. On 8 April 2013, through the use of a bailiff, HMRC collected a cheque for £14,408.01 from IBT, which left a credit of £1,221.01 on their account

15. The VAT return for the quarter ended 05/13 was due to be filed by 7 July 2013 but was not filed by IBT until 9 September 2013. In the absence of a VAT return HMRC assessed IBT to £18,612 for 05/13. When the VAT return was filed this

showed that VAT in the sum of £34,535.61 was due for 05/13. The credit of £1,221.01 was applied but this then left £33,314.51 which should have been paid by 7 July 2013.

5 16. On 26 November 2013 IBT paid £93,527.11 and on 27 November 2013 they paid £99,000, by which time further VAT was due on 7 October 2013, for the quarter ended 08/13. The VAT return for this period was filed on 9 October 2013, two days late. The VAT for the quarter 08/13, due on 7 October 2013, was paid off by a final payment made by IBT on 30 December 2013.

10 17. HMRC produced a transaction ledger for the appellant company showing that notices were issued to the appellant company on the following dates:- 18 January 2013, 12 July 2013, 9 September 2013 and 11 October 2013. No contemporaneous copies have been kept of these computer generated letters but sample copies were available. We were told that the whole process of issue is automated.

18. Mrs Newham stated that no letters had been returned by the post office.

15 19. Mr Baig stated that the system for post at IBT was that he would open it all. Before Mr Ram came, Mr Baig would give any letter concerning VAT to his bookkeeper. He thought she then placed the letters in a file, but he had not brought any such file to the hearing.

20 20. After Mr Ram was involved, Mr Baig continued to open all the post and gave anything to do with VAT to Mr Ram.

25 21. Mr Baig could not remember seeing a surcharge liability notice dated 18 January 2013, nor any notice dated 12 July 2013. He was asked about his knowledge of the regulations concerning the payment of VAT and accepted that he relied on his book-keeper and then Mr Ram. Prior to becoming a director of IBT he had been involved in a much larger company where other people were responsible for the payment of the VAT. He thought he knew of the possibility of a penalty being imposed for late payment of VAT but could be no more specific.

30 22. When asked about the notice dated 9 September 2013, Mr Baig had some recollection of the figure of £666.29 being raised as a penalty and thought he had discussed this with Mr Ram but was unsure when.

35 23. Mr Ram stated that he had not seen any of these notices and the first that he knew that IBT was subject to a default surcharge was after he read a letter dated 14 October 2013 from HMRC debt collection office. He telephoned HMRC on 18 October 2013 and made notes on his copy of the letter from HMRC. He then wrote a letter dated 28 October 2013 which was signed by Mr Baig.

24. Mr Spenser produced several letters where there was an inaccuracy. These included letters sent to him relating to clients he did not have, letters received a long time after their supposed issue date and letters which were wrongly addressed. None of the letters produced related to the appellants in this appeal.

25. Mr Ram was concerned that he had not received replies to letters written on 10 January 2014 and 2 February 2014. These letters had gone out in the name of Mr Baig.

Discussion

5 26. We noted that Mr Baig, a director of the company, had given very little thought at the outset as to how IBT was going to pay its VAT on time. The first payment due was not paid in full until three months after it was due and only after bailiffs had become involved. Mr Ram had been brought in to assist IBT with accountancy matters and he telephoned HMRC on 19 February 2013 to discuss the VAT
10 repayment. This was however over a month after the payment was due. Even when Mr Ram knew that the repayment due to the sister company would not meet the total amount from IBT no effort was made by IBT to pay any of the balance outstanding. No bank statements were produced to the Tribunal to show that IBT would have been unable to make any payment towards any of the VAT outstanding.

15 27. IBT had no evidence of problems with their post. There was no evidence that they had contacted the post office to check whether any post had been delayed or not delivered. We noted the evidence produced by Mr Spenser and accept that there are occasions when post from HMRC is incorrectly addressed, incorrectly dated or there is some other error in it. On balance we find that many of these letters turn up, albeit
20 some time later, because they have been returned to HMRC. That has not happened in respect of any of the notices which IBT say they did not receive.

28. We find it is less likely that the wrong address will have been entered when it has been done by an automated system. On balance, in this case, we find that the letters addressed to IBT and issued on 18 January 2013, 12 July 2013, 9 September
25 2013 and 11 October 2013 were all issued by HMRC to IBT at the correct address noted on the system. Under section 98 VATA and section 7 Interpretation Act the notices are deemed to have been served unless the contrary is proved. The onus thus shifts to IBT to prove that they did not receive them.

29. Mr Spenser submitted that it is difficult to prove a negative. We agree and
30 particularly in the case of a company like IBT who we found showed a lack of care in submitting VAT returns and payments. It appeared to be done when convenient and not when required. Lack of funds may have played a part but that did not explain why VAT returns were late. In his letter of 21 October 2014 Mr Spenser states that as IBT did not receive any of the notices they were unable to act upon them but we find that
35 there was no evidence that if Mr Baig had remembered receiving the letters he would have done anything different.

30. Mr Baig did not come across as someone who was meticulous in his administration. He opened all the post and said he could not recall having seen any of the notices sent out but he had brought no files to show where he kept anything.

31. In January 2013 IBT was in a state of flux as the previous book keeper was about to leave and Mr Ram was brought in to assist with accountancy matters. There no evidence of the filing system concerning VAT at that time.

5 32. Mr Ram did not appear to have a well organised filing system and he did not manage to get all the VAT returns in on time. He was however in the habit of making notes on documents which came to his attention and we were satisfied that had Mr Ram seen any of the notices in issue he would have made a note of them.

10 33. On balance we found that Mr Baig has not shown that the notices were not received by IBT. The contrary indication set out by section 7 of the Interpretation Act has not been proved. In view of this finding the concerns raised by *Medway* and *Adplates* do not arise.

15 34. Lack of funds is not a reasonable excuse. We find that waiting for a refund from a sister company is not a reasonable excuse for the whole amount in default as the refund did not equal it. We find that if IBT wanted to be on 'cash accounting' an enquiry should have been made long before the first VAT return was submitted. Asking about it afterwards does not, of itself, amount to a reasonable excuse.

35. We find that no reasonable excuse has been shown for any of the defaults.

Decision.

20 36. Following service of the surcharge liability notice on 18 January 2013 IBT was in a surcharge liability period from 18 January 2013 to 30 November 2013. They are therefore liable to a surcharge for the defaults which occurred in respect of the periods 05/13 and 08/13. The penalties of £666.29 and £13,164.87 are confirmed.

25 37. Following service of the notices on 12 July 2013, 9 September 2013 and 11 October 2013, the surcharge liability period was extended first to 31 May 2014 and subsequently to 31 August 2014.

30 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.

35 **BARBARA KING**
TRIBUNAL JUDGE

RELEASE DATE: 11 AUGUST 2015

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