



TC05001

Appeal number: TC/2015/02425

Value Added Tax – Default Surcharges for late submission of Returns and payments – periods extending from 12/07 to 09/12 – whether reasonable excuse or mitigation appropriate– No – Value Added Tax Act 1994 – Surcharges totalling £14,801 confirmed – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEVIN AND CAROLINE CLARKE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE KENNETH MURE QC
MEMBER: TONY HENNESSEY FCA**

**Sitting in public at Royal Courts of Justice, Belfast, on Tuesday
16 February 2016**

Mr Gerard Kelly, FCA, for the Appellant

Mr Dermot Ryder, Officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

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1. This appeal is by Mr & Mrs Clarke, as partners of their former restaurant business, Oysters, against the imposition of VAT default surcharges now totalling £14,801 and relating to periods from 12/07 to 09/12. Shortly after that the business was transferred to a limited company. The essence of the appellant's defence was that of *reasonable excuse*, relying on Mrs Clarke's ill-health and depression. This condition had been occasioned by her duties as her late mother's carer and work commitments relating to the partnership business. The Respondents, HMRC, have taken cognisance of this by cancelling two surcharges for 12/09 and 03/10 relating to the period shortly before Mrs Clarke's mother's death in February 2010 and, also, a third period 03/09, relating to the circumstances of an unsuccessful claim before an Industrial Tribunal by a former employee of the partnership.

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The Law

2. Copies of the relevant legislation were produced, viz Sections 59, 70-71 and 83 VATA 1994, together with the Regulations prescribing the manner for submission of Returns including the electronic system.

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The Evidence

3. **Mrs Caroline Clarke** was the only witness. She was able to deal with all the relevant matters arising. She explained that she and her husband had been in partnership trading as "Oysters", a restaurant business, throughout the relevant period. She handled the general management of the business, dealing with marketing, suppliers, staff matters, book keeping including wages, PAYE and VAT. Her husband attended to the restaurant's customers. They employed a staff of about seven, two full-time the others part-time. Their accountant dealt with "only" preparation of the annual income tax Return and annual accounts.

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4. Mrs Clarke explained that she had had previously extensive business experience in a management role, but that she had been made redundant. Her husband had experience of the bar and restaurant trade. Mrs Clarke had an elderly mother who suffered from Chronic Obstructive Pulmonary Disorder, which had become acute from about 2008. She would be hospitalised regularly for about a week, then required intensive home-care which Mrs Clarke provided. Mrs Clarke's mother had required surgery for a blood clot in the summer of 2008 and thereafter her health problems had become acute.

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5. Mrs Clarke acknowledged very candidly that she was conscious that she had been "falling behind" in dealing with VAT matters. Other matters including PAYE returns had been dealt with satisfactorily. VAT, however, required greater time and concentration, Mrs Clarke explained. She had not appreciated possible liability to surcharges until she received the relative notices and correspondence from HMRC.

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6. Copies of the papers in the Industrial Tribunal proceedings at the instance of a chef employed by the partnership were produced. While the Claim was dismissed, Mrs Clarke found the experience time-consuming and upsetting. She recollected the hearing as being “terrifying”.

5 7. Mrs Clarke experienced depression which she considered referable to the demands of the business upon her, caring for her dying mother, and the Industrial Tribunal proceedings. She had suffered from depression at an earlier stage, when she had lost a child in pregnancy.

10 8. Returns had to be made electronically from about 2010. The appellants’ then accountant, a Mr Maguire, realised that VAT matters had been neglected, but he himself was then seriously ill with a brain haemorrhage. He had been an independent practitioner and in about December 2013 transferred his practice to another firm.

15 9. Mrs Clarke’s account was not challenged in cross-examination. She accepted that following on her mother’s death in February 2010, she was not functioning because of depression. Bankruptcy proceedings had been threatened by HMRC. She stressed the she and her husband never intended to avoid paying VAT. Indeed, Mr Ryder confirmed that all substantive VAT liabilities had been paid and that only the matter of default surcharges was outstanding.

20 10. We noted the terms of two medical certificates relating to Mrs Clarke (p70 and 122). These confirmed her account of suffering from depression in both 2012 and earlier in 2001/02.

11. Mr Kelly did not call Mr Clarke as a witness. In fact Mr Clarke indicated to us that he agreed with his wife’s account and its sufficiency he and adopted it.

Submissions

25 12. We heard in turn from Mr Ryder and Mr Kelly. At the outset Mr Ryder expressed his sympathy for Mrs Clarke’s personal difficulties. HMRC had acknowledged that by withdrawing the default surcharges for three periods. However, the responsibility to submit Returns and make payments timeously was a joint one, incumbent on both Mr and Mrs Clarke. While Mr Clarke worked
30 “on house”, his responsibilities as a taxpayer extended to dealing with VAT matters timeously. Once Mrs Clarke had become conscious of her lapse in attending to these, she should have addressed the problem, possibly engaging her accountant to deal with these. Mrs Clarke did admit that she became aware that the Returns were late, yet thereafter there were further defaults. These continued over an extended period from
35 early 2010 when her mother died and the Industrial Tribunal proceedings had been concluded.

40 13. In the circumstances, having cancelled the three default surcharges noted, there was no *reasonable excuse* or other factor explaining away the other defaults. Mr Ryder moved us to uphold the surcharges now totalling £14,801 and dismiss the appeal.

14. In reply Mr Kelly confirmed that he did not challenge the calculation of the total of the surcharges as being £14,801. However, he considered that the appellants had a *reasonable excuse*. There was, he submitted, a unique set of circumstances viz Mrs Clarke's health, her mother's illness and care needs, the demands of managing the business, including preparation for the Industrial Tribunal hearing, and additionally the illness latterly of the appellant's former accountant, Mr Maguire. All these had to be viewed in the context of Mrs Clarke's depression. In the circumstances he moved us to dismiss all the remaining surcharges.

Decision

15. We should state at the outset that we accept as entirely credible and factually accurate Mrs Clarke's account of the circumstances giving rise to the default surcharges. This, of course, was not challenged by Mr Ryder and is confirmed by the terms of the two medical certificates. Also, there is no question that the appellant's substantive VAT liabilities have not been settled. The appeal relates simply to liability for the default surcharges over an extended period. The arithmetical calculation of the total being £14,801 is agreed too.

16. The issue for us to determine is whether the penalties should be mitigated and in particular whether there is a *reasonable excuse* within the context of the relevant legislation justifying the dismissal of the appeal. We refer to Section 71(1) VATA. The surcharge for three periods during which Mrs Clarke's stress was particularly acute, have been waived, of course. Mr Kelly in his submission did not seek to differentiate the circumstances of any particular periods: he moved us to dismiss all default surcharges *en bloc*.

17. Notwithstanding, in our deliberations we did consider whether any of the remaining periods giving rise to surcharges could be viewed individually. However, we concluded that there were no distinct factors which might enable us to do this and liability to all the remaining surcharges had to be considered collectively.

18. Mrs Clarke's depression was caused or contributed to by more than one factor. She had duties as her dying mother's carer, and her management responsibilities became more onerous because of the Industrial Tribunal claim. However, Mrs Clarke was aware of having neglected the firm's VAT matters. She failed to address that. She could, for instance, have referred VAT to the firm's accountant. Furthermore, her husband had a joint responsibility to oversee the firm's tax affairs. It was a cash business and there should not have been any funding problems – even if this were strictly relevant.

19. We are conscious of the strict rules governing what constitutes a *reasonable excuse* in the context of Section 59. In particular insufficiency of funds does not qualify. Nor does reliance on a third party ordinarily. While we have a degree of sympathy for Mrs Clarke given her personal predicament, we do not consider that the remaining surcharges should be cancelled. In the circumstances we confirm liability to the remaining default surcharges totalling £14,801 and dismiss the appeal.

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.

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**KENNETH MURE, QC
TRIBUNAL JUDGE**

RELEASE DATE: 1 APRIL 2016

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