[2016] UKFTT 0549 (TC)

TC05298

Appeal number: TC/2015/06539

VALUE ADDED TAX – default surcharge – whether trader in default for relevant periods – yes – whether notices served by HMRC – held on facts, yes – s 98 VATA 1994 and s 7 Interpretation Act 1978 considered – whether reasonable excuse for defaults due to circumstances of director – held on facts, no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PN & MMA CONSULTANTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
TYM MARSH

Sitting in public at Reading Employment Tribunal on 18 May 2016

Anu Khanna, Director, for the Appellant

Farah Chaumoo, Appeals and Review Unit, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("PMC") appeals against VAT default surcharges imposed by the Respondents ("HMRC") for the periods 12/13, 06/14, 09/14 and 12/14.

The background facts

2. The evidence consisted of a bundle of documents. In addition, Mr Khanna explained the background, which involved his personal circumstances. Where appropriate, we have treated his explanations as evidence. From the evidence, we find the following background facts; we consider at a later point issues which were disputed.

3. PMC first entered the default surcharge regime in respect of VAT period 06/12. Its normal method of payment has been electronic, via direct debit. For that period, for which the due date was 31 July 2012, PMC's VAT return was received by HMRC on 1 September 2012, and the direct debit payment was received on 5 September 2012. This resulted in the issue by HMRC on 17 August 2012 of a Surcharge Liability Notice (SLN).

4. In respect of period 03/13, the due date for which was 30 April 2013, PMC's return was received by HMRC on 31 July 2013. According to HMRC's records, surcharge document V164 (a Surcharge Liability Extension Notice or "SLNE") was issued on 17 May 2013. Although this default incurred a surcharge at the rate of 2 per cent, no financial penalty was issued, as the surcharge was less than £400. (This was in accordance with HMRC's policy as set out in paragraph 4.5 of VAT Notice 700/50.) The SLNE indicated that a further default would result in a surcharge at the rate of 5 per cent.

5. For period 09/13, the due date being 31 October 2013, PMC's return was received by HMRC on 3 February 2014. Although the surcharge rate was 5 per cent, no surcharge was issued as the amount was less than £400. Again, according to HMRC's records, a SLNE was issued; this stated that a further default would result in a surcharge at 10 per cent.

6. The next default was in relation to period 12/13, for which the due date was 31 January 2014. HMRC received PMC's return on 3 February 2014; in accordance with the electronic system, this was on time. However, PMC's payment of the VAT due was late. According to HMRC's records, they issued a letter containing both an assessment of surcharge and a SLNE on 14 February 2014; the amount of the surcharge at 10 per cent was £442.20, which took account of a credit on their file. Payment of the VAT due was received by HMRC via the telephone payment service on 20 August 2015.

7. The next default period was 06/14; for this period, the due date was 31 July 2014. PMC's return for the period was received by HMRC on 25 August 2014. HMRC's records showed that they had issued a SLNE on 15 August 2014 and had imposed a surcharge based on an assessed amount of tax. This was subsequently

recalculated following receipt of PMC's return. They issued a "supplementary assessment" on 26 August 2014. The rate of the default surcharge imposed was 15 per cent, adjusted to take account of the supplementary assessment.

8. In respect of period 09/14, the due date being 31 October 2014, PMC's return was received by HMRC on 23 May 2015. PMC's payment of tax by direct debit reached HMRC on 28 May 2015. HMRC's records showed that on 14 November 2014, they had issued a letter containing both an assessment of surcharge at the rate of 15 per cent and a SLNE based on an assessed amount of tax. The assessment was recalculated following receipt of PMC's return, and a letter notifying a supplementary assessment and the revised amount of the surcharge was issued to PMC on 26 May 2015.

9. For the remaining default period, 12/14, the due date was 31 January 2015. HMRC received PMC's return for this period on 23 May 2015, and received PMC's direct debit payment on 28 May 2015. According to HMRC's records, they had previously issued a letter containing both an assessment of surcharge at the rate of 15 per cent based on that assessment, together with a SLNE. The amount of the tax assessed was recalculated following receipt of PMC's return and on 26 May 2015 HMRC issued a supplementary assessment together with the recalculated amount of the surcharge.

10. On 9 June 2015, Mr Khanna wrote to HMRC, explaining his circumstances and asking for reconsideration by HMRC of the imposition of what he described as "such hard penalties". HMRC replied on 24 July 2015, informing him that if he wished to request a review of a particular default surcharge levied against PMC, he should specify the periods and provide specific reasons and evidence to show why the returns were not made on time for those periods; any reasonable excuse given should address the reason why the return or payment had not been rendered on time, rather than any subsequent event.

11. On 7 August 2015, Mr Khanna sent an email to HMRC requesting a review, and referring in particular to the surcharges for periods 09/14 and 12/14; he referred to his previous letter, and asked what type of evidence he needed to submit.

12. On 14 August 2015, HMRC's Review Officer wrote to Mr Khanna, referring to the information which he had provided, and to the previous history of defaults as a result of which he should have been aware of the potential financial consequences of failing to render the return and full payment to HMRC by the due date. The Review Officer asked for further information regarding Mr Khanna's bad health.

13. Mr Khanna wrote to HMRC on 7 September 2015, providing further evidence and requesting clarification of all the surcharges levied. On 2 October 2015, the Review Officer replied with her conclusions, referring to the history of PMC's defaults, and finding that there was no reasonable excuse for the late submission of returns for the two periods or the late payments of PMC's VAT.

14. On 30 October 2015, Mr Khanna replied to the Review Officer, setting out detailed information concerning his changes of address, and stating, as in his previous letter, that he had not received any notifications concerning surcharges until April 2015.

15. A second HMRC Review Officer replied to Mr Khanna on 25 November 2015, explaining that PMC was not entitled to a second reconsideration; however, exceptionally, the Review Officer had looked at the information which Mr Khanna had provided in case it would allow agreement to be reached. The Review Officer had been unable to cancel the decision; he understood that PMC had already made a separate application to the Tribunal. (We consider below other matters to which he referred.)

16. PMC's Notice of Appeal to the Tribunal had been sent to HM Courts & Tribunals Service on 30 October 2015.

Arguments for PMC

Mr Khanna referred to his circumstances, to the history of his changes of address, and to the way in which he had learned of the notices concerning the surcharges. We review the factual background below, in the light of both parties' submissions as to factual matters. Mr Khanna stated that if he had been aware of the liabilities, the amounts would not have cumulated as they had done. He accepted that the returns had been late.

Arguments for HMRC

17. Ms Chaumoo specified the VAT periods in respect of which PMC had appealed; these were 12/13, 06/14, 09/14 and 12/14. The total amount of the surcharges was £3,749.55. The surcharges were as follows:

Period	**Rate**	**Amount**
12/13	10%	£442.20
06/14	15%	£822.30
09/14	15%	£1,261.05
12/14	15%	£1,224.00

18. HMRC submitted that there were two issues:

(1) Whether HMRC had issued SLN and SLNE notices; and

(2) Whether PMC had had a reasonable excuse for making payment late.

19. Ms Chaumoo referred to the statutory obligation on a person required to make a return, to make payment to HMRC on time; this was set out in reg 40 of the Value Added Tax Regulations 1995 (SI 1995/2518) (the "VAT Regulations").

20. Liability to surcharges was governed by s 59 of the Value Added Tax Act 1994 ("VATA 1994"). The reverse of each SLN issued, up to and including that for period 12/14, gave details of how surcharges were calculated and the percentages used in determining any financial surcharge, in accordance with s 59(5) VATA 1994.

21. HMRC submitted that the lateness of a return or payment was largely a question of fact, and once it occurred, a surcharge accrued.

22. Ms Chaumoo made legal submissions concerning change of address and deemed delivery of HMRC notices. We consider these below in the context of the factual issues.

23. HMRC requested that the appeal in respect of periods 12/13, 06/14, 09/14 and 12/14 be dismissed and the default surcharges imposed by HMRC be upheld.

Consideration and conclusions

24. Mr Khanna accepted that PMC's returns for the relevant periods had been late. We are satisfied that, as PMC's VAT payments were made through the direct debit system, the consequence of the returns being late was that HMRC had no basis for operating that system in the normal way in relation to the VAT payable for those periods, and that the VAT could not be collected until after the respective due dates for those periods. It follows that PMC was in default for those periods, and that in principle it became liable to default surcharges.

25. The question whether surcharges should be imposed as a result of these defaults is subject to two separate issues. The first is whether the SLN and SLNEs were served on PMC. The second is whether PMC had a reasonable excuse for its defaults.

26. On the first issue, the relevant legislation is s 98 VATA 1994, and s 7 of the Interpretation Act 1978:

> "**98 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."

> "**7 References to service by post**
>
> 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."

27. Without setting it out in full, we describe the effect of s 59(2) VATA 1994. It applies where the taxable person is in default in respect of a VAT period; under s 59(1), that default can be either a late return or late payment. In those circumstances HMRC are given the power to serve a SLN. The effect of s 59(4) is that, once a SLN (or, in respect of later periods, SLNE) has been served, if there is a default in respect of a later period the "taxable person on whom a surcharge liability notice has been served" becomes liable to default surcharge at the relevant percentage of the outstanding VAT for that period.

28. Thus liability to default surcharge only arises if the SLN, and any subsequent SLNEs, are shown to have been duly served.

29. We deal first with the SLN, which took the form of a combined VAT notice of assessment and SLN. According to HMRC's records, the SLN in respect of period 06/12 was issued on 17 August 2012. For PMC, Mr Khanna referred to his changes of address on 3 November 2013, on moving to a rented property, and 3 February 2015. Whatever the position may have been as a result of those changes, there is no evidence before us to suggest any reason why the SLN should not have arrived at the original address in August 2012.

30. Under s 7 Interpretation Act 1978, the SLN is deemed to have been served on PMC. It is for PMC to provide evidence to prove the contrary. In the absence of such evidence, we are bound to find that the SLN was properly served.

31. As indicated in HMRC's Statement of Case, surcharge notices are computer generated by an automated process, so that it is not possible to provide copies of the actual notices issued to PMC. However, HMRC provided us with a series of example SLNs and SLNEs. We are satisfied that the SLN sets out the consequences of further defaults, as well as advice on how to avoid surcharges. We are also satisfied, on the basis of the identification numbers in HMRC's Schedule of Defaults, as to the terms of the letters shown by HMRC's records to have been sent to PMC's address.

32. Accordingly, we find that as a result of the SLN, PMC was on notice as to the consequences of further defaults.

33. In relation to period 03/13, HMRC's combined notice of VAT assessment and SLNE was issued on 17 May 2013. As this also preceded Mr Khanna's first change of address, the position is the same as that for period 6/12. There is no evidence to suggest that this letter was not received by PMC. (As HMRC did not seek a surcharge because it would have been less than £400, PMC has not sought to appeal in respect of this period.)

34. PMC's next default was for period 09/13. Again, the consequent surcharge was less than £400, so that HMRC did not seek a surcharge. The combined notice of VAT assessment and SLNE was issued on 15 November 2013. Mr Khanna explained that he and his family had sold their property and moved to a rented property on 3 November 2013; did this affect the position?

35. In their Statement of Case, HMRC submitted that, in contravention of reg 5 of the VAT Regulations 1995 (SI 1995/2518), notification of PMC's change of address to the family's third property was not issued to HMRC until 30 April 2015.

36. In his response to HMRC's Statement of Case, Mr Khanna accepted that this was the case, but referred to the mail forwarding service put in place for each of the changes of address.

37. He attached various documents to his response. Among these was a copy of an email from Royal Mail dated 9 January 2015 setting out the information which he had submitted in his application for a Redirection.

38. From this, we note two points. The first is that the "old address" was Mr Khanna's second address, ie the rental property. The second is the identification of the "Residents"; these were Mr Khanna, Mrs Khanna, and Miss Khanna. There is no mention of PMC as a resident.

39. We conclude from this that Mr Khanna has not provided evidence in support of his statement that he put in place a forwarding arrangement on moving from his original address to the second property, which he referred to as having been rented. We also conclude that there was no forwarding arrangement in place in respect of correspondence addressed to PMC, as it had not been included in the list of "Residents". Although we have no evidence as to the form of any redirection which may have been put in place on the change of address from the first property to the second, we have no reason to suppose that such a form would have been completed on any different basis.

40. We appreciate that Mr Khanna may well have thought of himself and PMC as the same person. However, for legal and many practical purposes this is not correct. As PMC is the registered taxable person, HMRC is required to address all formal communications such as SLNs and SLNEs to it rather than Mr Khanna. He is the director of PMC, and for this reason the subsequent correspondence from HMRC has been addressed to him in that capacity.

41. The result is that, until formal notification of PMC's change of address was given to HMRC on 30 April 2015, HMRC had no reason to send correspondence to PMC at any other address than that shown on their records, namely the property sold by the Khanna family in November 2013. (We have seen no evidence to suggest that any notification of the first change of address was given to HMRC, and therefore arrive at this decision on the basis that no such notification was given.) Further, there was no arrangement in place for correspondence addressed to PMC to be forwarded, whether to the second property occupied by the Khanna family or to their third (and current) property.

42. With the exception of the document issued by HMRC on 26 May 2015, all the surcharge documents issued by HMRC were issued before that formal notification.

43. On the basis of the evidence, we are satisfied that the SLN and the subsequent SLNEs with assessments were properly served on PMC.

44. We note Mr Khanna's submission that he was not aware of the various notices until documents were delivered by Mr Woodger, a Collector from HMRC's Debt Management and Enforcement Unit. It is not clear on the evidence when Mr Woodger provided these documents, but in the hearing bundle there are copies of enforcement letters left by him on 8 and 14 April 2015. (Ms Chaumoo explained that the documents provided by Mr Woodger were warning letters relating to the debt owed to HMRC, and not to the issue of notices. We accept that explanation.) However, the question is not whether Mr Khanna (and thus, through him, PMC) was aware of the notices; instead, as we have explained, it is whether the relevant documents were properly served on PMC as specified by the relevant legislation.

45. A particular point arose in respect of period 12/13. Mr Khanna referred to funds having been withdrawn by HMRC under the direct debit arrangement and then repaid. We are satisfied that the reason for this was that the direct debit failed, because there were insufficient funds in the account to cover the full amount to be debited.

46. In relation to the change of address, Mr Khanna said at the hearing that he had twice asked his accountant to notify HMRC of the change. Ms Chaumoo's response was that the accountant had only been dealing with direct tax matters. She produced copy print-outs from HMRC's records which showed that there was no entry relating to the second change of address; the "previous address" shown on the print-out was that of the first property. We accept that evidence, and her statement that if there had been a change of address, it would have shown on this record.

47. Mr Khanna referred to a change in HMRC's system to provide reminders. However, as Ms Chaumoo explained, the system enables taxpayers to set up reminders; it does not amount to the introduction by HMRC of an automatic reminder system notifying taxpayers of their defaults.

48. We find that, whatever steps may have been taken by Mr Khanna's accountant, no formal notification of change of address was given to HMRC in the manner required for VAT purposes. Ms Chaumoo pointed out that the information as to change of address was given by Mr Khanna to HMRC in the course of a telephone call which HMRC had made to him. Ms Chaumoo explained that the official method of notifying a change of address in relation to VAT was to use a form VAT 484.

49. Mr Khanna raised the subject of HMRC possibly providing notices of default by email. Although we can see that such a system might present certain advantages, whether or not there may be disadvantages, this is not the basis on which HMRC currently operate the VAT regime. Their reason for using post for such purposes is that s 98 VATA 1994 contains specific provisions to establish when documents are to be deemed to be served when they are posted.

50. We have dealt with the first issue raised by PMC's appeal. We turn to the second: did PMC have a reasonable excuse for its defaults?

51. In his letter to HMRC dated 9 June 2015, Mr Khanna explained the circumstances. He had bought a dilapidated house in March 2014; this required major

re-work. The construction had begun on 20 June 2014 and was completed on 28 February 2015. He had been involved in arranging the provision of all the high value items, which had involved dealing with between 15 and 20 vendors. At the same time, he had started commuting to Leeds for Monday to Friday every week, for work-related reasons. This had continued until January 2015. The situation had been compounded by his being diagnosed with auto-immune disease; he had had to undergo several screenings and tests and visit three different consultants.

52. As a result, he had had very limited time at home over the weekends, during which he had to attend to maintenance for his car as a result of his long-distance commuting, deal with issues arising from the construction work so that this could continue during the week, and also attend to household chores. This had been against the background of his health issues. He described himself as having stopped living because of the commuting and the house construction.

53. HMRC's response in their letter dated 14 August 2015 was that his working away from home and construction of his house were foreseeable events, and therefore alternative arrangements should have been put in place to meet PMC's VAT obligations. They requested evidence concerning Mr Khanna's bad health.

54. Following his correspondence providing that information, HMRC were not satisfied that his medical appointments, some of which were after the periods in question, would have prevented him from taking steps before or after the appointments to submit PMC's returns and payments by the due date.

55. We have considered whether Mr Khanna's circumstances amounted to a reasonable excuse for PMC's defaults. Without referring specifically to other authorities, we consider that for circumstances to amount to a reasonable excuse, they must be exceptional and unexpected. We accept that Mr Khanna was under considerable pressure as a result of his commitments, both in respect of work and in dealing with matters concerning the construction work on the third property, and that he was subject to various health problems. However, we are not satisfied that his circumstances were exceptional, nor do we think that they can be characterised as unexpected, given that they continued for a relatively lengthy period. We agree with HMRC's view that they did not prevent him from taking steps to ensure that PMC complied with its VAT obligations. Mr Khanna had an accountant dealing with his other tax affairs, in relation to direct tax matters; he did not lack advice or help, and it would have been open to him to seek advice and help concerning VAT matters had he chosen to do so.

56. Thus we are not satisfied that PMC had a reasonable excuse for its defaults.

Outcome of PMC's appeal

57. As we are satisfied that PMC was in default for the periods under appeal, that the SLN and the SLNEs were duly served, and that PMC had no reasonable excuse for its defaults, we have no alternative but to dismiss PMC's appeal and confirm the surcharges as set out in the table at paragraph 17 above.

Right to apply for permission to appeal

58. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 22 JULY 2016