[2017] UKFTT 0440 (TC)

TC05902

Appeal number: TC/2013/09401

VALUE ADDED TAX – default surcharges and imposition of penalties pursuant to section 63 VATA – appellant not present or represented at the hearing – Tribunal deciding to proceed with the hearing – Tribunal finding that the appellant has failed to discharge the burden of proving that the default surcharges ought not to have been imposed or were excessive or that there was any reasonable excuse for the defaults or neglect – Tribunal satisfied that there was prima facie a liability to penalties for failing to notify HMRC of an under-assessment to VAT – appeal allowed in part – the default surcharges and penalties confirmed except in relation to the penalties for the VAT periods 05/07 to 08/08 inclusive, to which s. 63 VATA did not apply

FIRST-TIER TRIBUNAL
TAX CHAMBER

R T COOPERS SOLICITORS **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
JULIAN STAFFORD

Sitting in public at Fox Court, London on 15 May 2017

The Appellant was not present and was not represented

Ms Akua Adusei, HM Revenue and Customs, for the Respondents

DECISION

1. When this appeal was called on for hearing there was no appearance by or on behalf of the Appellant, R T Coopers, Solicitors ("Coopers"). The Respondents ("HMRC") were represented by Ms Adusei.

2. We instructed the clerk to the Tribunal to telephone Coopers to enquire as to whether there would be an attendance on Coopers' behalf. We were told that Dr Rosanna Cooper (who, according to our papers had had conduct of the appeal on behalf of Coopers and was a partner in, or the proprietor of, Coopers) had answered the telephone call and had said that she had not been aware that the hearing of the appeal would take place on 15 May 2017 and had thought it was listed for a date in July. We were told that Dr Cooper would not be able to attend the hearing on 15 May 2017. She did not appear at the hearing.

3. We assumed that Dr Cooper would have wished the hearing of the appeal to be postponed, but Ms Adusei, for HMRC, submitted that we should continue with the hearing in the absence of Coopers pursuant to our power to do so under rule 33 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules").

4. Rule 33 of the Rules provides that;

> 'If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers it is in the interests of justice to proceed with the hearing.'

5. We enquired whether Coopers had been notified of the hearing. We saw a copy of a letter dated 22 February which had been sent to Coopers notifying them of the hearing on 15 May 2017, at Fox Court at 10:00 a.m., which included the sentence "If you do not attend, the Tribunal may decide the matter in your absence".

6. We were also shown a copy of a letter sent to Coopers by Ms Adusei and dated 28 April 2017. That letter covered a copy of the 3 hearing bundles for the hearing on 15 May 2017, sent to Coopers, and mentioned the date and time of the hearing (10:00 a.m. on 15 May 2017) and the place (Fox Court). Ms Adusei also showed us a copy of an acknowledgement of delivery, signed "Kim".

7. From this evidence, we were satisfied that Coopers had been notified of the hearing.

8. Ms Adusei submitted that we should proceed with the hearing because it was an old appeal.

9. From our papers, it was clear that Dr Rosanna Cooper had authorised the notice of appeal to the Tribunal, which was dated 9 December 2013. It is an appeal against default surcharges and civil penalties imposed, we were told, pursuant to section 63(1)(b) Value Added Tax Act 1994 ("VATA"), which provides (in broad terms) that, where an assessment is made which understates a person's liability to VAT a penalty of 15% of the understated VAT is chargeable.

10. The Schedule of Defaults with our papers indicates that in each quarterly VAT accounting period from 05/06 to 05/11 inclusive (that is, over a period of 5 years), there had been a default, in the sense that all the VAT due had not been paid by the due date.

11. In the periods 05/06 to 02/08 inclusive and 08/08 to 02/09 inclusive, the amounts returned by Coopers had been less that the central assessments for VAT issued, which, we understood from Ms Adusei's submissions, potentially brought section 63(1)(b) VATA into play.

12. However, we note that section 63 VATA was repealed by the Finance Act 2007 ("FA 2007") – see: section 114 and Schedule 27, Part 5(5), FA 2007. FA 2007 also introduced a new penalty regime - see: section 97 and Schedule 24, FA 2007. Paragraph 2, Schedule 24, FA 2007 contains the new provision for a penalty payable on an under-assessment by HMRC, and it applies to income tax, corporation tax and capital gains tax, as well as VAT.

13. Ms Adusei did not mention at the hearing (or in her Skeleton Argument) the fact that section 63 VATA had been repealed and replaced, nor were we told the effect of the replacement by paragraph 2, Schedule 24 FA 2007 in terms of the amount of the penalty chargeable or the conditions for the imposition of the penalty. This is relevant to the penalties issued for the VAT periods 05/07, 08/07, 11/07, 02/08 and 08/08. (Nil penalties apply to the VAT periods 11/08 and 02/09.)

14. Furthermore, although it is clear from the Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 (SI 2008 No. 568) that paragraph 2, Schedule 24 FA 2007 cannot apply to impose liability for a penalty in respect of any tax period for which a return is required to be made before 1 April 2009 (see article 3, SI 2008 No. 568), it appears that the repeal of section 63 VATA was effected by Schedule 27, Part 5(5), FA 2007 and we have not seen (nor were we referred to) any special provision dealing with the time at which the repeal is effective. We therefore assume that the repeal was effective on the date of royal assent to FA 2007, which was 19 July 2007.

15. The total default surcharge amount for which HMRC now contend is £5,426.94 and the penalties HMRC now seek total £1,721, of which £124 relates to the VAT period 08/08. (As stated above, zero penalties are now sought for the VAT periods 11/08 and 02/09.) Penalties of £251, £301, £115, and £125 are sought for the VAT periods 05/07, 08/07, 11/07 and 02/08 respectively.

16. This matter has had a long and tortuous history, for which both parties bear some responsibility. In particular, there was a hearing before Tribunal Judge Berner and Mr Farooq on 26 August 2015 in which the substantive hearing of the appeal was postponed because the issues needed to be clarified. Directions for summary cases to be served by both Coopers and HMRC were made (release date: 1 September 2015) and Judge Berner included, for the benefit of Coopers, an explanation of the basic principles of the default surcharge regime.

17. After several extensions of time, Coopers emailed the Tribunal on 14 December 2016 requesting a further stay of the proceedings pending the outcome of an investigation as to instalment payments of VAT, which payments Coopers say they have made, which have, according to Coopers, not been allocated to specific VAT liabilities in order to reduce the liability for default surcharges and penalties.

18. We were told by Ms Adusei that HMRC have allocated all payments from Coopers which they have a record of having received.

19. We also note that whereas the total amount now in issue is £7,147.94, Coopers mention in their letter dated 8 December 2016 to DMB Campaign Lead, Debt Management and Banking, HMRC, that a demand of £14,540.36 is disputed. In that letter (written shortly before the email to the Tribunal of 14 December 2016), Coopers proposed an investigation at their expense of the payments they claimed to have made which they claimed to have been unallocated. This proposal appears to have been unsuccessful.

20. In the light of this history, we formed the view that for the purposes of rule 33 of the Rules, it would further the overriding objective of the Rules to deal with cases fairly and justly, and would be in the interests of justice, to proceed with the hearing. We therefore did so.

21. We received a Skeleton Argument from Ms Adusei, supported by 3 volumes of documents. In Ms Adusei's submission, the default surcharges totalling £5,426.94 were correctly imposed (reductions having been made by withdrawal and concession) and the penalties totalling £1,721 were due (reductions having been made from the amounts originally imposed).

22. We have not seen any argument from Coopers suggesting that the default surcharges or the penalties are excessive, except the argument about alleged unallocated instalment payments of VAT and we have not seen any evidence supporting that argument.

23. Nor have we seen any argument suggesting that Coopers had a reasonable excuse for the defaults in issue or Cooper's failure to take all such steps as were reasonable within 30 days of the date(s) of the central assessments to draw to the attention of HMRC the fact that the assessments understated Coopers' liability to VAT for the VAT periods concerned.

24. We are satisfied from HMRC's submissions and the evidence supporting them, that the default charges in the amount of £5,426.94 requested by HMRC have been correctly imposed.

25. As to the penalties, although it would be logical to suppose that it was intended that the repeal of section 63 VATA and the coming into force of paragraph 2, Schedule 24 FA 2007 would be effectively simultaneous, our consideration of the legislation (see: paragraphs 12 to 14 above) suggests to us that there was a gap between the repeal of section 63 VATA with effect from 19 July 2007 and the commencement of paragraph 2, Schedule 24 FA 2007 with effect in relation to returns required to be made on or after 1 April 2009.

26. This means, in relation to this case, that penalties under section 63 VATA can only be imposed in relation to central assessments issued more than 30 days before 19 July 2007. On the facts as Ms Adusei presented them to us, this means that penalties under section 63 VATA can be imposed in relation to Coopers' VAT periods 05/06, 08/06, 11/06 and 02/07, but cannot be imposed in relation to the VAT periods 05/07, 08/07, 11/07, 02/08 or 08/08.

27. We confirm the default surcharges. But the penalties are confirmed only in the amount of £805 (being the penalties in relation to the VAT periods 05/06, 08/06, 11/06 (which was actually zero) and 02/07. The appeal is therefore allowed to the extent of the penalties sought to be imposed for the VAT periods 05/07, 08/07, 11/07, 02/08 and 08/08, which total £916, but otherwise it is dismissed.

28. We hereby inform Coopers of the possibility of this Decision being set aside pursuant to rule 38 of the Rules (by reference to rule 38(2)(d) which applies where a party, or a party's representative, was not present at a hearing relating to the proceedings), if, on a reasoned application to this Tribunal, the Tribunal considers that it is in the interests of justice to set this Decision aside.

29. 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 WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 22 MAY 2017