[2017] UKFTT 0490 (TC)

TC05944

Appeal number: TC/2015/07110
TC/2014/06030

VAT – default surcharges

FIRST-TIER TRIBUNAL
TAX CHAMBER

HAVENRIDGE (STEVENAGE) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Elizabeth Bridge

Sitting in public at Fox Court, London on 22nd November 2016

Emmanuel Tannen, Director, and Esther Royde, Accountant, for the Appellant

Mary Donnelly and Paula O-Reilly of HM Revenue and Customs, for the Respondents

DECISION

Background and summary of issues

1. The appeal is against the following default surcharges imposed by HMRC:

Period	Rate	Amount
11/11	2%	£6,586.54
02/12	5%	£15,368.62
05/12	10%	£39,371.72
05/15	2%	£4,073
08/15	5%	£16,244
	Total	**£81,643.88**

2. The Appellant withdrew its appeal in relation to the surcharges in 2011 and 2012. Mr Tannen explained that the directors had been unable to quite get to the bottom of exactly what had happened with the then accountant and, in view of the confusion surrounding this period, had decided not to pursue this element of the appeal further.

3. The Appellant first came within the payment on account ('POA') regime on 1st December 2014 and was notified of this by a letter from HMRC of that date.

4. The Appellant replied to HMRC on 10th December 2014 explaining that it had crossed the threshold for the POA regime only because of an extraordinary transaction and requesting it be removed from the regime.

5. HMRC replied on 17th January 2015 agreeing to reduce the monthly payments to nil in the circumstances.

6. On 28th May 2015 HMRC wrote again to the Appellant with a schedule of monthly payments due under the POA regime and again, when the Appellant responded explaining the position remained as set out in its letter of 10th December 2014, HMRC reduced the monthly payments to zero.

7. Prior to these events, since 2012 the Appellant had paid its VAT by direct debit.

8. It is not possible to pay VAT by direct debit under the POA regime.

9. The Appellant appears to have assumed that when the monthly payments under the POA regime were reduced to zero, this meant that it could carry on accounting for and paying VAT as it had done hitherto, paying by direct debit.

10. HMRC issued a surcharge liability notice dated 8th June 2015 for non-payment of the balancing payment due for the period ended 02/15.

11. HMRC issued a notice of assessment of surcharge in the sum of £4,073 on 24th July 2015 for non-payment of the balancing payment due for the period ended 05/15.

12. The Appellant wrote to HMRC on 1st August 2015 requesting that the surcharge be cancelled on the basis that there had been no default. HMRC replied on 4th September 2015 stating that the VAT must be paid up to date before a review could be undertaken.

13. At this point the Appellant checked with its bank and discovered HMRC had not collected under the direct debit and sought to reinstate this arrangement, writing the HMRC to this effect in its letter of 11th September 2015.

14. Meanwhile, HMRC wrote to the Appellant on 4th September 2015 with a schedule of monthly payments under the POA regime and, once again, reduced the monthly payments to nil at the Appellant's request (contained in same letter of 11th September 2015 mentioned above).

15. HMRC issued a notice of assessment of surcharge in the sum of £16,244 on 20th October 2015 for non-payment of the balancing payment due for the period ended 08/15.

16. The Appellant does not dispute that the payments were made late, but argues that it had reasonable excuse for the default.

Relevant law

17. Section 59(7), Value Added Tax Act 1970 provides that "if a person who would, apart from this subsection, be liable to a surcharge…satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to a surcharge…(b) there is reasonable excuse for the return or VAT not having been…despatched [on time] he shall not be liable to the surcharge".

18. Section 70, Value Added Tax Act 1994 states that "(1) where a person is liable to a surcharge…the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper" but that (i) insufficiency of funds, (ii) the fact that there is no or no significant loss to VAT and (iii) the fact that the taxpayer has acted in good faith shall not be reasonable excuses for these purposes.

Evidence

19. The tribunal considered the papers presented by the parties and heard oral evidence from Mr Tannen.

Submissions

20. The Appellant submitted that it had a reasonable excuse for the defaults, namely that it had not realised that HMRC were not collecting the payments by direct debit in what it viewed as the usual way.

21. The Appellant referred to HMRC's letters of 17th January 2015, 22nd June 2015 and 29th September 2015 – all responses to the Appellant's replies to schedules of monthly payments under the POA regime. These letters stated that:

(1) the monthly payments were reduced to nil;

(2) the company could not be removed from the POA regime until its actual liability fell below £1.8million; and

(3) "Therefore the above named company is not entitled to a 7 day extension for submission of VAT declarations together with any balancing payments and the due dates for submission of future VAT returns and balance payments remains as detailed in the schedule dated [1.12.2014/28.5.2015/4.09.2015] where it states 'balance due'".

22. The Appellant submitted that it was reasonable that it had assumed from these letters that the only changes under the POA regime were those HMRC had drawn its attention to i.e. the withdrawal of the 7 day extension and that it could otherwise continue as it had done before entering the POA regime, effectively paying quarterly by direct debit.

23. The Appellant also referred to its own letter of 11th September 2015 and HMRC's response of 29th September 2015. In its letter, the Appellant addressed two points: the schedule of monthly payments HMRC had issued on 4th September and, what it perceived to be, HMRC's failure to collect the VAT by direct debit since 2015. HMRC responded to the first point but ignored the second.

24. The Appellant submitted that had HMRC responded to the direct debit point at that stage and clarified that VAT could not be collected in this way under the POA regime, the Appellant would have made other arrangements then and might have avoided the subsequent surcharge.

25. The Appellant submitted that a brief note that there was no facility to make payments on account or balancing payments by direct debit "buried in a note below a list of payment options" was inadequate and that it had reasonably assumed that it could continue to pay VAT by direct debit as it always had since, although it was technically within the POA regime, for all practical purposes there was no real change to the way it accounted for VAT.

26. HMRC submitted that the Appellant was within the POA regime and was properly notified of this fact and its implications, including the restrictions as to payment methods, and that it therefore had no reasonable excuse for the defaults.

27. HMRC referred to the notice and enclosures sent to the Appellant on 1st December 2014 when it first entered the POA regime. HMRC submitted that these

made clear that the way the Appellant was to account for VAT going forward was different and that the Appellant should have read all of the information carefully.

28. HMRC submitted that statement:

> "**Please note:** There is currently no facility to make payments on account or balancing payments by the VT Online Direct Debit service"
>
> with the words 'please note' highlighted in bold, was clear.

29. HMRC noted that its subsequent letters agreeing to reduce the monthly payments to nil did not specifically refer to payment methods and the fact that payments could not be made by direct debit. However, it submitted that it should have been clear that these letters were not intended to give exhaustive information about the POA regime.

30. HMRC referred to the surcharge liability notice dated 8th June 2015 and submitted that the Appellant should have realised something had gone wrong at this stage and contacted HMRC to resolve the issue, noting that had it done so it would have avoided the surcharges altogether.

31. HMRC submitted that the Appellant had been sent all the information it needed to understand and comply with its obligations under the POA regime and that its failure to realise that VAT would no longer be collected by direct debit could not be a reasonable excuse. An ignorance of the law did not excuse an individual from a failure to comply with it and the fact that the Appellant had acted in good faith was specifically excluded from being a reasonable excuse by the legislation.

Discussion and conclusion

32. We found Mr Tannen and Ms Royde to be helpful and credible and we appreciate that they were not directly involved in the defaults themselves.

33. The Appellant's appeal is on the ground that its failure to recognise that it could not pay its VAT by direct debit under the POA regime was a reasonable excuse for not making the payments on time.

34. We have considered the arguments and whilst we have some sympathy for the Appellant's representatives we have concluded that the Appellant was correctly notified of the consequences of its entry into the POA regime and specifically, that this notification included a clear statement that the direct debit facility was not available. That the person dealing with this on behalf of the Appellant did not read this document, or that part of it, or take appropriate action it not a reasonable excuse for the default.

35. We have considered separately whether the Appellant was prejudiced by HMRC's failure to respond when it requested the reinstatement of the direct debit. We have concluded that although this was remiss of HMRC, since the due date for the third late payment (which occasioned the second surcharge) was 31st August 2015, by

the time the Appellant raised the point in its letter of 4th September that payment was already late.

36. We dismiss the appeal.

37. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 12 JUNE 2017