TC04277

Appeal number: TC/2014/03462

VAT – default surcharge – whether late payment of VAT – Yes – whether reasonable excuse – No – Sections 59 and 71 VATA

FIRST-TIER TRIBUNAL
TAX CHAMBER

A ALEXANDER & SON (ELECTRICAL) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MRS CHARLOTTE BARBOUR, CA, CTA

Sitting in public at George House, 126 George Street, Edinburgh on Monday 12 January 2015

Appellant Company:- Messrs J K & S M Alexander, Directors

Respondents:- Mrs E McIntyre, Officer of HMRC

DECISION

1. In this appeal the Appellant company was represented by two of its directors, Mr J K Alexander and his son, Mr S M Alexander. The latter addressed us on behalf of the company. HMRC was represented by Mrs McIntyre.

2. This is an appeal against a default surcharge of £10,017.12 calculated at 15% in respect of late payment of VAT for the Period 12/13. Mrs McIntyre agreed to introduce the subject-matter of the appeal, setting out the salient aspects, and so explaining to Messrs Alexander the issues which they should address.

3. Mrs McIntyre referred firstly to the Default Schedule at p22/23 of the Bundle. It sets out late payments of VAT due in five earlier Periods from 06/12 to 06/13. No penalty had been imposed on the first default in 06/12. For 09/12 a 2% surcharge had originally been imposed, but this was later withdrawn by HMRC as a time-to-pay arrangement had been negotiated. That withdrawal affected the level of surcharges on subsequent defaults. For 12/12 a penalty for late payment at 5% was consequentially reduced to 2%, being £1,059.91. Then in 03/13 a higher 5% penalty (but reduced from 10%) of £2,628.40 was charged. A further increased penalty of 10% (reduced from an original 15%) was imposed for late payment in 06/13, being £7,379.40. Then in Period 12/13, the subject of this appeal, a 15% surcharge, £10,017.12 was imposed for late payment.

4. Mrs McIntyre then referred us to a copy of the taxpayer's belated cheque at p8. While dated "28-01-14", before the due date of 31 January, HMRC's records did not record its receipt until 19 February 2014. For some unexplained reason it was not credited to the Appellant's tax liabilities until 17 March 2014, about four weeks later. (See p55.) As payment was made by cheque, that had to be received and also cleared before 31 January 2014. By contrast an electronic payment may be made several days later.

5. Mrs McIntyre stressed that there was no evidence to confirm posting of the cheque on 28 January 2014, and she was unaware of any postal delays then. The *onus* of proof rested on the taxpayer, she insisted. A simple certificate of postage would have sufficed. The time-to-pay agreement was only in respect of Period 9/12.

6. In response Mr Alexander Junior acknowledged the accuracy of the Schedule of Defaults in relation to earlier late payments. However, he maintained that the cheque for Period 12/13 had been posted on 28 January 2014 although he had no proof of postage. The Appellant company, he explained, then operated a franked mail system. He could not identify who could speak to the processing of the cheque. Previously cheques sent to HMRC had been received and processed timeously. He thought it curious that HMRC's records indicated receipt on 19 February yet they did not allocate payment to the company's account until 17 March 2014 (p55). The cheque (p8) had the Appellant company's VAT registration number recorded on it. All this, Mr Alexander argued, indicated an internal difficulty and deficiency in HMRC's

systems. That, he continued, transferred the *onus* of proof onto HMRC to demonstrate that payment was in fact made late.

7. On the view that the cheque had been posted on 28 January, Mr Alexander continued, it should have been received by 1 February and cleared by 7 February 2014, which would, he added, have been on time. (In fact we would observe that it would have been timeous only if made electronically: here the payment was made by cheque.)

8. At this point Mr Alexander Senior added that he believed that there had been a time-to-pay agreement in effect covering the late payment for Period 12/13. There had in fact been an earlier time-to-pay agreement covering 09/12 and also, he thought, extending to PAYE liabilities.

9. On the matter of time-to-pay agreements Mrs McIntyre insisted that such arrangements had not extended to the liability for Period 12/13. Such an agreement was a short-term measure and negotiated in respect of particular debts, not general indebtedness.

10. In her substantive reply on behalf of HMRC Mrs McIntyre referred us firstly to the provisions of Section 59 VATA, which imposed default surcharges for late submission of a Return and/or payment of value added tax due. The percentages of the surcharge increased on subsequent defaults. While the surcharges cannot be mitigated, they may be excused in the event of a *reasonable excuse* being demonstrated. Shortage of funds did not ordinarily give rise to a *reasonable excuse* unless there were exceptional causal factors involved.

11. She noted too that the default surcharge system was not objectionable as being disproportionate: *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC).

12. Notwithstanding the lack of an explanation for HMRC's delay in crediting the cheque to the Appellant company's account, the *onus* of proof of prompt payment remained incumbent on the Appellant, Mrs McIntyre insisted. That burden had not been discharged. Accordingly, she submitted, the appeal fell to be dismissed and the default surcharge should be upheld.

13. In his concluding remarks Mr Alexander stressed that the main issue was that the burden of proving late payment in the present case had been transferred to HMRC. There had been no explanation for their delay in allocating payment to the Appellant company's account. This was indicative of an internal error in HMRC's systems. Whenever the Appellant company had experienced difficulty in making prompt payment, it had contacted HMRC immediately.

Conclusion

14. Having reviewed the evidence and arguments we consider that the *onus* of proof of postage on 28 January 2014 remains on the Appellant. That in our view has not been discharged. Indeed, had the cheque been posted first class on that date, it seems

unlikely that, having been received, it could also have been "cleared" by 31 January 2014, the due date for payment. (We observe that HMRC suggest that six days should be allowed for postal transit and cheque clearance.)

15. There is no "proof of postage" slip or other such documentary record available. The evidence of Mr S M Alexander was of his understanding and (we accept) genuine belief that the cheque and other items would have been posted by an employee or officer of the company on that date. However, he could not speak personally to this, nor could he identify who might have been immediately responsible.

16. That said, we note an unexplained delay in HMRC's processing of the cheque. Their records show its receipt on 19 February 2014 (after the due date for payment) yet it was not credited to the Appellant's tax account until 17 March 2014, some four weeks or so later. (HMRC's letter of 14 March 2014 at p12 of the Bundle, to the effect that payment of the tax was then outstanding – para 3 – was incorrect.) Mrs McIntyre could not explain that delay. Mr Alexander argued that this transferred the *onus* of proof in respect of the date of receipt of the cheque onto HMRC. While we appreciate the significance of this point, we do not share that conclusion. We consider that the *onus* remained on the Appellant company.

17. This appeal relates to delays in payment. No criticism otherwise is made of the Appellant company – its Returns are prompt, accurate, and ultimately payment is made. In the past it has negotiated time-to-pay agreements with HMRC. Their practice, we are advised, is that such agreements have to be negotiated in respect of individual liabilities. A "blanket" postponement would not (ordinarily) be granted. Mr Alexander Senior seemed to believe that such a more flexible arrangement had been made in respect of the company's PAYE liabilities. However, we note (p25) the records of HMRC of telephone calls when the scope and extent of time-to-pay arrangements were discussed in July and September 2012, shortly before the Period in question. The gist of these, we consider, tends to confirm Mrs McIntyre's understanding.

18. On the narrative provided to us we do not consider that a *reasonable excuse* arises. We appreciate that a business such as the Appellant's will be subject to cash-flow problems, but that is a difficulty with which all tax-payers have to cope. We do have a degree of sympathy for the Appellant company but in the whole circumstances we consider that the appeal falls to be dismissed and the surcharge upheld.

19. 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.

KENNETH MURE
TRIBUNAL JUDGE

RELEASE DATE: 10 February 2015