



TC03113

Appeal number: TC/2012/05176

VAT – default surcharge – senior partner ill – new book-keeper- errors by book-keeper and accountant- no reasonable excuse – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ROY EDWARD MYERS
and
JANET MARGARET COSER
- and -**

Appellant

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

Respondents

**TRIBUNAL: JUDGE DAVID S PORTER
LESLIE BROWN**

Sitting in public at King's Court, North Shields on 11 November 2013

No one appearing for the Appellant

Mrs Rosalind Oliver, an inspector of taxes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. Roy Edward Myers and Janet Margaret Coser (the Appellants) failed to attend the hearing. Judge Porter asked the Clerk to telephone Mr Myers to enquire if he and Mrs Coser would be attending. He was advised that they would not be attending the hearing. Judge Porter decided to hear the case in the absence of the Appellant under rule 33 of the Tribunal Procedure Rules (First-tier Tribunal) (Tax Chamber) Rules 2009 as the Appellant had been advised as to the date of the hearing and it was in the interests of justice to proceed with the hearing.
2. By a letter dated 18 April 2013, Roy Edward Myers and Janet Margaret Coser (the Appellants) appealed against a surcharge of £13,944.11 for the VAT period 12/11 on the basis that the Senior Partner had been ill for a long period of time and that a new book-keeper had been employed to assist with the returns. Unfortunately the book-keeper did not know how to make the returns and an error of £43,000 arose for the two VAT periods 06/11 and 09/11, which had given rise to a tax assessment of £92,960.78 for the period 12/11. The Respondents (HMRC) submitted that the Appellants did not have a reasonable excuse as the reliance on a third party and a shortage funds are specifically excluded from being a reasonable excuse under section 71 of the Value Added Tax 1994 (the Act) and the appeal should be dismissed.
1. Mrs Rosalind Oliver, an Inspector for HMRC, appeared on behalf of HMRC and produced a bundle of papers and some speaking notes.

25 **The law**

4. Section 59A of the Value Added Tax Act 1994 provides:
- (1) for the purposes of this section a taxable person shall be regarded as in default in respect of any prescribed accounting period if the period is one in respect of which he is required, by virtue of an order under section 28, to make any payments on account of VAT and either:-
- (a) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners by the day in which it became due or
- he would, but for section 59 (1A), be in default in respect of that period for the purposes of section 59.
- ...8. If a person who, apart from this subsection, would be liable to a surcharge under ... (section 59) ... satisfies the Commissioners or, on appeal, the tribunal-
- (a) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1) (a) above-
- (i) that the payment on account of VAT was dispatched at such a time and in such a manner that it was reasonable to expect that

it would be received by the Commissioners by the day on which it became due, or

(ii) that there is a reasonable excuse for the payment not having been so dispatched

5 or (b)

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

10

5. Section 118 (2) of TMA 1970 provides:

(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a time limit if he did it within such further time, if any, as the Board or the Tribunal or officer concerned may have allowed: and when a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased...

15

20

The facts.

6. Mrs Oliver told us that the Appellant had been in the default surcharge regime since 12/09. By 06/10 a surcharge of £821.83 assessed at 2 per cent had arisen.

25 However, the surcharge for that period and the periods 09/10, 12/10, 03/11 and 06/11 had all been reduced to nil as the Appellants had applied for and been given time to pay arrangements. The Notice of Assessment of Surcharge for the period 12/11 was issued on 17 February 2012 as the return was received two days late on 9 February 2012. The surcharge of £13,944.11 was calculated at 15 per cent.

30

7. The Appellants wrote to HMRC on 15 February 2011 and stated:-

"...Our businesses are in Redcar, Saltburn and Whitby in the North East of England, one of the main employers in the area Corus was closed with 1600 jobs lost as well as the jobs in the service and construction industry. "Ogradys" is a hotel which caters for Contractors and due to the down turn in the economy and loss of jobs we are experiencing a down turn in our businesses. Our business in Whitby is very seasonal and with the severe weather towards the back end of last year the whole town was basically closed for two months. We were greatly affected by the severe weather which we all experienced with the parties being cancelled, no one in the hotel rooms as it was impossible to get to the town." (We assume that 'Ogradys' is the hotel at Redcar).

35

40

45

In their letter of 27 February 2012 the Appellants asked for a review of the decision. and stated:-

5 " The North East is not enjoying the best of economic times over the past 3 to 4 years and our town (Redcar) especially was hard hit when Corus (the local steel works) closed its doors. We have in the past 3 months seen a gradual upturn in business.

10 The reason for the late return on this one occasion was the Senior Partner fell ill, a new bookkeeper was appointed and the result was that the last two quarters were reported incorrectly with incorrect book- keeping. We sat down with our accountants who also missed the errors and rectified the situation. The input catch up cost us dearly. We have been honest in our disclosure to you, we found the errors and these resulted in this return being late and exploding from £53,000 to £93,000 over night. We do not have that kind of money at present, we are working extremely hard to get the money to you and I have written a proposal to Mr Clancy, who sent us a letter previously, asking for time to pay.

15 I have also looked at a Company Voluntary Arrangement with a firm called Churchill's, I do not want to go down this path, I believe I can pay the £93,000 in full and also our return dated 30/04/2012 coming up..... I therefore would like to formerly lodge a request to appeal the surcharge of £13,944.00."

20 8. HMRC replied by way of review on 20 March 2012 and refused to allow the appeal. HMRC accepted the Appellants' letter in response of 18 April 2012 as their appeal.

25 **The submission by Mrs Oliver.**

30 9. The Appellants have stated that the Senior Partner was ill and errors by the bookkeeper, along with the failure of the accountant to notice those errors, meant the return for the quarter ending 31/12/2011 had to incorporate adjustments for the previous two returns and that increased their liability for the period in question by £43,000. HMRC take the position that these do not amount to a reasonable excuse as reliance on a third party is specifically excluded under section 71(1) (b) of the Act.

35 10. It should be noted that without that £43,000 adjustment the liability for for the period would have been approximately £50,000, but the Appellants had not paid that amount by 2/05/2012 some three months after the due date. The Appellants had given details of ongoing financial problems, but had not indicated anything beyond problems facing other businesses. HMRC would expect a business to be aware of the due dates, and manage their finances in order to pay on time. An Insufficiency of funds does not amount to a reasonable excuse under section 71(1) (a) of the Act and the appeal should be dismissed.

40 **The decision**

45 11. We have considered the law and the facts and have decided that the Appellants do not have a reasonable excuse for failing to pay the VAT due for the period

12/11 on time and we dismiss the appeal. Unfortunately the Appellants have chosen not to attend the Tribunal so that we can only decide the case on the evidence before us. No formal diagnosis has been supplied as to the Senior Partner's illness either as to its timing or its extent. Nor do we know what effects, if any, it has had on his ability to attend to the VAT affairs of the business. Furthermore, the Appellants have been in the Surcharge Regime since 12/09 and, as evidenced by their applications for 'Time to Pay Agreements' in previous periods, are fully aware of the fact that they could have requested a further time to pay for the period 12/11. Without further evidence as to the illness of the Senior Partner and the errors of the accountants we accept Mrs Oliver's contention that section 71 subsections (1) (a) and (b) apply and we dismiss the appeal.

12. The hearing having taken place in the absence of the Appellant, the Appellant has a right to apply for this decision to be set aside pursuant to Rule 38 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). The Appellant has a right to apply for permission to appeal against this decision pursuant to Rule 39 of the Rules. 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 4 December 2013