TC03588

Appeal number: TC/2012/07083

VAT – Default surcharge – late Returns and payments – whether reasonable excuse – No – Section 71 VATA 1994 – Appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PENRITH BUILDING SUPPLIES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE QC
MR JOHN DAVISON

Sitting in public at Carlisle on Tuesday 8 April 2014

Mr John Taylor, for the Appellant

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

1. The Appellant company was represented by Mr John Taylor, its internal accountant. Its directors, Mr Dudson and Mr Lund, were both present and gave evidence on various salient matters in the course of the hearing. Mrs McIntyre appeared as Presenting Officer for HMRC.

2. It was agreed that Mrs McIntyre should open the hearing by explaining HMRC's stance. She explained that the initial difficulty arose in relation to the Period 09/06. While a payment of £21,056.96 had been made on 7 November 2006, a Return had not been received (according to HMRC) until 16 June 2008. As a consequence an estimated assessment of £18,919 was issued. The £2,137.96 excess payment by the Appellant was set against its liability for Period 12/06.

3. Mrs McIntyre observed that a surcharge was incurred in the event of either the late submission of a Return or a late payment of VAT. She referred to the Schedule of Defaults at p10-14 of the Bundle. Before the 09/06 Period there had been five failures in respect of late Returns and/or payments (see p10) and it may reasonably be inferred that the Appellant's directors were familiar with the default regime. Subsequent to Period 09/06 there had been a late payment, but timeous Return, for 03/07, a late Return for 09/07, then both late Returns and payments for 12/07, 03/08, 06/08, 09/08, 12/08, 03/09, thereafter late payments but timeous Returns for 09/09 and 12/09, and finally both late Returns and payments for 12/10, 03/11, and 06/11.

4. Mrs McIntyre explained the system of graduated surcharge rates all as set out in the Schedule. The total of the surcharges due was, she calculated, £41,452.83.

5. In reply on behalf of the Appellant Mr Taylor accepted the figures in the Schedule of Defaults. In respect of the payment of £21,056.96 made on 7 November 2006 he suggested that since an excessive payment had been made timeously for Period 09/06, there was no reason for the Return not to have been sent at the same time to HMRC. However, he conceded that there was no documentary evidence to support this.

6. Mr Taylor explained that shortly thereafter a dispute had developed with HMRC as to whether the Appellant company was up to date with payments of VAT. The Appellant's directors believed that it was, but HMRC disagreed. Mr Taylor explained that following on a change of premises a refund of tax due to the Appellant had not been received. Then as a deliberate course of action, as he explained, the Appellant had delayed submission of its VAT Returns to provoke a response from HMRC, with a view to resolving their differences. Indeed, one of HMRC's officers, Mrs Scott, had visited the Appellant. Mr Taylor claimed also that he had called a telephone number on HMRC's official website, but this was disputed by Mrs McIntyre. She explained too that surcharges and penalties cannot be superseded if HMRC are contacted only after the due date for payment.

7. According to Mr Taylor this dispute continued for an extended period. Certainly the record shown in the Schedule of Defaults extends for nearly five years after Period 09/06. However, apart from Mr Taylor's and the Appellant's directors' comments, there was no record of correspondence which might ordinarily have been expected to have been exchanged, nor was there even any formal internal record.

Mrs McIntyre produced during the hearing a VAT audit report of a visit on 12 June 2008 by Mrs Scott. Mrs Scott, it seems, stressed the need to submit duplicate Returns, but otherwise the terms of this report do not assist in clarifying the course of the dispute between the Appellant and HMRC or its merits.

8. Mrs McIntyre produced also during the hearing an "Historical Ledger Print", bearing to have been produced as at 30 July 2012. She considered, however, that it set out HMRC's record as at the end of 2006, at about the date of the penultimate entry. It confirms the payment of £21,056.96 for Period 09/06 timeously on 7 November 2006. The excess of £2,137.96 over the estimated assessment was credited to the Appellant's benefit.

9. The arithmetical calculation of the surcharges was accepted by Mr Taylor. The record of the dates of submission of Returns and of payments shown in the Schedule of Defaults was not disputed. As matters of fact we consider them established. However, we do not consider that further Findings-of-Fact can be made, in particular in respect of the Return for 09/06 having been submitted at about a date before November 2008. We explain this in our conclusion.

10. Having exhausted the evidential aspects of the appeal we invited Mrs McIntyre and Mr Taylor in turn to make their final submissions.

11. Mrs McIntyre noted that the Appellant's representatives believed that their payments of VAT were up-to-date. If that were the case, they may have, she speculated, some basis for complaint about HMRC's officials and procedures. That, however, was not the matter before the Tribunal, she argued.

12. In Mrs McIntyre's view, the origin of the difficulty was the Appellant's failure to submit a Return for 09/06. There was no evidence to establish that a Return was made before November 2008. Further, as a deliberate choice, the Appellant's directors had not submitted quarterly Returns. Whatever the motive for that, and notwithstanding their frustrations with HMRC, the Appellant's directors were still under a legal obligation to submit Returns. There was no *reasonable excuse* for these failures, she argued. HMRC is dependent on the submission of Returns for the administration of VAT. There was no record of any attempt on behalf of the Appellant to contact HMRC to negotiate matters and, in particular, to have surcharges suspended.

13. Accordingly Mrs McIntyre invited us to dismiss the appeal.

14. In conclusion on behalf of the Appellant company Mr Taylor submitted that there was no logical reason for the Return for 09/06 to have been submitted late. A sufficient payment to meet the liability had been made. He was adamant that the Appellant company's officers only became aware of the failure to submit the Return in June 2008.

15. The whole circumstances were unusual, he argued. The circumstances of the payment in November 2006 were unclear. There had been no indication from HMRC that the Return for 09/06 had not been received timeously. The company's officers were unaware of the estimated assessment for the Period 09/06 issued on 17 November 2006. The visit by Mrs Scott on behalf of HMRC had to be "provoked" by the taxpayer's own actions. (He noted the terms of Mr Dudson's letter of

16 January 2012) at p31/32 of the Bundle.) He referred also to his discussions with HMRC's Debt Management Section, in particular with Miss Wadey, noted in his letter of 16 December 2011 (p29/30).

16. In short, Mr Taylor concluded, the circumstances were unusual and insufficient effort and consideration had been shown by HMRC in making contact with the Appellant to explain its alleged failures.

Conclusion

17. Essentially the issue before the Tribunal was whether there was a *reasonable excuse* for the various failures in the submission of Returns and making prompt payment of VAT due. We are unable to make any finding of fact that a Return for 09/06 was made at or about a date before November 2008. Given that a (more than) sufficient payment was made to meet the tax liability due on 7 November 2006, we accept that there was no reason not to have submitted the Return timeously. We appreciate that this appeared to be the genuine belief of the Appellant's officers, and we note their sense of frustration over this. On the other hand we have noted the lack of any correspondence thereanent or other supporting records. On the balance of probabilities were are unable to find that an earlier Return was made before November 2008.

18. Moreover, we do not consider that the Appellant's directors had a *reasonable excuse* for their subsequent failures in submitting Returns and in making payments. It was a deliberate and admitted course of conduct to prompt a "reaction" from HMRC. Such a course of conduct was misconceived in our view.

19. The calculation of surcharges due and as set out in the Schedule of Defaults was not challenged. The Historical Ledger Print produced by Mrs McIntyre during the hearing records accurately the receipt of £21,056.96 on 7 November 2007 for the Period 09/06, and that irrespective of the matter of the date of the Return. There is no "knock on" effect in relation to subsequent payments of VAT liability. The element of excess payment made on 7 November 2008 is duly credited. Each of the subsequent defaults falls to be considered independently, and on that basis (whether because of a late Return and/or payment) the Default Surcharges bear to have been duly incurred.

20. The total sum sought of £41,452.83 is, of course, substantial for a relatively small business. It is in our view regrettable that the dispute between the parties has been so protracted. We must say that we found each of the Appellant's witnesses candid and straightforward. We fear that there may be some basis for their complaints. Notwithstanding, whatever grievance the directors of the Appellant company had, it did not provide a *reasonable excuse* for their delays and failures in VAT compliance. However, it may be that some share of criticism falls to be made of the officers of HMRC involved and, perhaps, in a failure to coordinate their roles.

21. For these reasons we dismiss the appeal.

22. 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 QC
TRIBUNAL JUDGE

RELEASE DATE: 15 May 2014