



TC03216

Appeal number: TC/2013/05439

VAT – default surcharge – s 59 VATA 1994 – whether reasonable excuse – bank holiday overlooked when instructing bank payment – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RADLEIGH METAL COATINGS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE PETER KEMPSTER
MRS RAYNA DEAN**

Sitting in public at Priory Courts, Birmingham on 7 November 2013

Mr Chris Tyler (director) for the Appellant

Mr Brian Morgan (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant appeals against a default surcharge in the amount of £3,777.44 imposed pursuant to s 59 VAT Act 1994 in respect of its VAT period 03/13.

Legislation

2. Section 59 VAT Act 1994 provides for default surcharges for late submission of VAT returns and/or late payment of VAT.

“59 The default surcharge

(1) Subject to subsection (1A) below, if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

- (a) the Commissioners have not received that return, or
(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

- (a) a taxable person is in default in respect of a prescribed accounting period; and
(b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

- (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
- (b) has outstanding VAT for that prescribed accounting period,
- 5 he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.
- (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—
- 10 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;
- 15 (b) in relation to the second such period, the specified percentage is 5 per cent;
- (c) in relation to the third such period, the specified percentage is 10 per cent; and
- 20 (d) in relation to each such period after the third, the specified percentage is 15 per cent.
- (6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.
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- (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—
- 30 (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or
- 35 (b) there is a reasonable excuse for the return or VAT not having been so despatched,
- 40 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).
- 45 (8) For the purposes of subsection (7) above, a default is material to a surcharge if—

- (a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or
 - (b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.
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- (9) In any case where—
 - (a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and
 - (b) by reason of that conduct, the person concerned is assessed to a penalty under that section,
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- the default shall be left out of account for the purposes of subsections (2) to (5) above.
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- (10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.
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- (11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.”

3. Section 71 VAT Act 1994 construes “reasonable excuse” for the purposes of s 59:

- “71 **Construction of sections 59 to 70**
- (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—
 - (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
 - (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.
 - (2) In relation to a prescribed accounting period, any reference in sections 59 to 69 to credit for input tax includes a reference to any sum which, in a return for that period, is claimed as a deduction from VAT due.”
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Appellant’s Case

4. The late payment was accidental and the company had not intended to default on its liability. It was an unfortunate clerical error that resulted in payment one day late. The company had behaved in good faith throughout.

40 5. The director who had been in charge of administration had retired at the end of March 2013 and had failed to make the young lady who took over responsibility for accounts aware of the necessity to pay VAT on a day before the due date, where the

5 due date fell on a weekend or bank holiday. The due date was 7 May and a BACS instruction was given to the bank on Friday 3 May. Unfortunately, as Monday 6 May was a bank holiday the funds did not arrive with HMRC until 8 May. Thus the one day delay was due to the intervening bank holiday; without that the funds would have been received in time, as expected and intended.

6. The company had had extreme trading problems in the last few years, due to the dire economic situation in the infrastructure industry. The company was at last starting to recover.

10 7. The amount of the penalty was disproportionate to the situation, and was using a sledgehammer to crack a nut. The Tribunal should exercise its discretion and cancel the surcharge.

Respondents' Case

15 8. The company had had some eight previous defaults and thus should have been fully aware of the rules concerning VAT payments. HMRC's website includes an online deadline calculator that factors in bank holidays and weekends to show when payment should be made to avoid a default.

9. The retirement of the director was foreseeable and his replacement should have been adequately trained. Section 71 expressly states that reliance on a third party is not a reasonable excuse.

20 Consideration and Conclusions

25 10. In relation to the alleged severity of the penalty: the Upper Tribunal in the case of *HMRC v Total Technology (Engineering) Ltd* [2013] STC 681 held that the system of VAT default surcharges is not disproportionate in law; and we consider that a penalty of around £3,800 is not disproportionate in amount in relation to a business with annual turnover of around £1 million.

11. The Tribunal has no general discretion to choose to discharge a default surcharge. The Tribunal needs to determine whether there was a reasonable excuse (within the meaning of s 59(7) VAT Act 1994) for the late payment of the VAT for the 03/13 period.

30 12. Section 71(1)(b) VAT Act 1994 provides that "where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse". There was an unfortunate and non-deliberate error of overlooking the extra day required for the BACS payment to clear, due to the Bank Holiday, but that cannot constitute a
35 reasonable excuse within the meaning of the VAT Act. Accordingly, we must dismiss the appeal and uphold the surcharge.

Decision

13. The Tribunal decided that the appeal is DISMISSED

14. This document contains full findings of fact and reasons for the decision and replaces the summary decision notice issued on 14 November 2013. Any party
5 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
10 accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 9 January 2014

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