



TC03602

Appeal number: TC/2014/00577

*VAT – default surcharge – s 59 VATA 1994 – whether reasonable excuse –
Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PRESTIGE DEVELOPMENTS (PARK HOMES) LTD Appellant

- and -

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

**TRIBUNAL: JUDGE PETER KEMPSTER
MRS SHAMEEM AKHTAR**

Sitting in public at Priory Courts, Birmingham on 8 May 2014

The Appellant did not appear and was not represented

Mr David Wilson (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant appeals against a default surcharge imposed pursuant to s 59
5 VAT Act 1994 in respect of its VAT period 06/13.

2. The Appellant did not appear and was not represented. Prior to commencement
of the hearing the Tribunal's clerk telephoned the Appellant using the telephone
number stated on the notice of appeal but there was an "unobtainable" signal. The
Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of
10 the hearing (there was on file a letter dated 29 May 2013) and considered that it was
in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure
Rule 33.

Legislation

3. Section 59 VAT Act 1994 provides for default surcharges for late submission of
15 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—

20 (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,

25 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.

30 (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

35 (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.

40 (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.

5 (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

10 (b) has outstanding VAT for that prescribed accounting period, 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.

15 (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—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

20 (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

25 (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.

35 (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—

40 (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

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

45 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).

5 (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

10 (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.

(9) In any case where—

15 (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,

20 the default shall be left out of account for the purposes of subsections (2) to (5) above.

(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.

25 (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.”

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

30 “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

35 (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.

40 (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.”

Appellant's Case

5. The Appellant's grounds of appeal were stated in its notice of appeal, which cross-referenced a letter to HMRC dated 8 October 2013:

- (1) The deadline for filing the VAT return was missed because of:
 - 5 (a) a change of staff and location;
 - (b) having set up a new process in the SAGE accounting package; and
 - (c) staff holidays.
- (2) The company was normally compliant, and the position had been rectified and new procedures were in place.
- 10 (3) The surcharge was a material amount of money to a small business.

Respondents' Case

6. Mr Wilson for HMRC submitted as follows.

7. The 06/13 return and payment were due electronically no later than 7 August 2013; the return had been filed on 12 August and the VAT paid electronically on 17 August. The company should have been additionally vigilant to its tax responsibilities if it was changing its accounting procedures. Staff holidays were a normal feature of running a business. The VAT was not paid until five days after the return was belatedly filed on 12 August.

Consideration and Conclusions

- 20 8. We consider the Appellant's grounds of appeal give rise to two issues:
- (1) Was there a reasonable excuse (within the meaning of the VAT Act) for the late payment of VAT?
 - (2) Is the surcharge disproportionate?
- 25 9. We accept the Appellant's explanation of why the return was filed late but we are not satisfied that this constitutes a reasonable excuse (within the meaning of the VAT Act). But in any event, after the filing error had been discovered and the return filed (late) on 12 August there was still a further, unexplained five day delay until payment was made. We have no evidence of any reasonable excuse for the delay in payment.
- 30 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 approximately £970 is not disproportionate in amount in relation to a business with annual VATable turnover of around £3 million. Neither HMRC not the
- 35 Tribunal have any statutory power to mitigate the amount of a surcharge calculated in accordance with the VAT Act.

11. For the above reasons we would dismiss the appeal and uphold the surcharge.

Decision

12. The Tribunal decided that the appeal is DISMISSED

13. This document contains full findings of fact and reasons for the decision. Any
5 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
10 “Guidance to 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: 13 May 2014

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