



TC03001

Appeals numbers: TC/2012/726 & 4938

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A.F. BRADSHAW & CO LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE PETER KEMPSTER
MISS SUSAN STOTT**

Sitting in public at Nottingham on 18 September 2013

Mr John Lander & Mrs Jayne Lander (directors) for the Appellant

Mr David Wilson (HMRC Appeals Unit) for the Respondents

DECISION

5 1. The Appellant ("the Company") appeals against default surcharges imposed pursuant to s 59 VAT Act 1994 in respect of its VAT periods 07/11 and 10/11. Pursuant to s 59(8) the VAT periods 01/11 and 04/11 were also "material defaults" and so were considered by the Tribunal.

Legislation

10 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—

15 (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,

20 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.

25 (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

30 (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.

35 (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.

40 (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;
- (b) in relation to the second such period, the specified percentage is 15 5 per cent;
- (c) in relation to the third such period, the specified percentage is 10 per cent; and
- (d) in relation to each such period after the third, the specified 20 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.
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- (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 fact of late payment and the calculation of the surcharges was accepted. However the surcharges were disputed on two grounds.
 - 5. First, since 2010 the Company had faced difficult trading circumstances with contractor customers taking time to pay their bills. The Company had contacted the Respondents ("HMRC") in the past in relation to requesting time to pay but the reaction had been so hostile that the Company felt it was unlikely to achieve any
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- agreement. The Company had a £30,000 overdraft facility which it was occasionally allowed to exceed but only for wages payments and provided customer receipts were expected soon thereafter. Prior to the economic downturn the Company had paid all its tax liabilities on time, and would have continued to do so but for the recession.
- 5 The Company had not preferred trade creditors over HMRC, and the directors had delayed their drawings where necessary. The directors were now refinancing the Company from their own funds. Payment of the surcharge might threaten the future viability of the Company.
6. Secondly, the 10/11 payment had been only a few days late. The amount of the penalty was disproportionate to the delay. The provisions of the VAT Act should not be applied strictly during the worst economic recession in living memory. The case of *Total Technology* (cited below) was distinguishable as the taxpayer there had been in a better position to meet its liabilities than the Company had been.
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Respondents' Case

- 15 7. Section 71 provided that insufficiency of funds was not a reasonable excuse within s 59(7). HMRC had asked for copies of bank statements and debtor analyses to understand the reasons for the insufficiency of funds. It appeared that the bank had been willing to extend the overdraft limit on at least one occasion in the relevant period.
- 20 8. No part payment of the liabilities had been made, even though the overdraft facility would have permitted that. No request for a time-to-pay arrangement had been made before the due dates.
9. The Upper Tribunal in *Total Technology Limited v HMRC* [2012] UKUT 418 (TCC), [2013] STC 681 had held that the surcharge system in s 59 was not disproportionate.
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Consideration and Conclusions

10. The calculations of the surcharges have been accepted and we agree them.
11. We must determine whether there was a reasonable excuse (within s 59(7)) for each of the late payments. Section 71 is explicit that insufficiency of funds cannot in itself constitute a reasonable excuse. We have however considered the reasons for the funds being unavailable. We have sympathy with the Company over the difficult trading conditions it has experienced in 2011 and since, but we must look at the specific reasons for each late payment.
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12. For the earlier periods (01/11 and 04/11) the reason for late payment was solely insufficient funds and, therefore, there was no reasonable excuse (within the meaning of s 59) for the late payments.
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13. In relation to period 07/11, the payment was over a month late due to the general trading position of the Company. That was very unfortunate but falls within

the general case of insufficient funds and, therefore, there was no reasonable excuse (within the meaning of s 59) for the late payment.

14. In relation to period 10/11, the payment was only two days late but no particular reason apart from general business caution has been given why the payment could not have been made within the overdraft limit in time to avoid the surcharge. Accordingly, there was no reasonable excuse (within the meaning of s 59) for the late payment.

15. In relation to the proportionality of the surcharges, we understand the points made by the Company in relation to the purportedly harsh nature of the penalty in the current economic conditions. However, we consider the Upper Tribunal decision in *Total Technology* (which is binding on this Tribunal) is clear that the general system of s 59 surcharges is not disproportionate. On the particular surcharges assessed on the Company we do not rule them disproportionate, given the view of the Upper Tribunal (at [99]):

“In our judgment, there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are, however, some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged).”

Decision

16. The Tribunal decided that the appeals are DISMISSED and the surcharges stand in the amounts assessed.

17. 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.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 24 October 2013