



TC04211

Appeal number: TC/2014/03034

VAT – default surcharge – s 59 VATA 1994 – whether reasonable excuse – whether time-to-pay agreements in place – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NASSAH SERVICES LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN N. DENT
 MR NIGEL COLLARD**

Sitting in public at Bedford Square, London on 8th October 2014

Mr N. Betts (Accountant) for the Appellant

Mr M. Ratcliff (HMRC Appeals Unit) for the Respondents

DECISION

The Appeal

- 5 1. The Appellant (“the Company”) appeals against default surcharges imposed pursuant to s 59 VAT Act 1994 in respect of its VAT periods 10/11 in the sum of £5,300.44 and 01/13 in the sum of £2,965.30.

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.

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—

20 (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 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.

30 (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—

(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

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

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).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

15 (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.

(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

25 (b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

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

30 (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.

(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.”

35 3. Section 71 VAT Act 1994 construes “reasonable excuse” for the purposes of Section 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—

5 (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.

10 (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.”

Evidence

4. The Tribunal had received an extensive bundle of documents including bank statements, correspondence and submissions from both sides.

15 5. Mr Hassan, Director of the Company, gave evidence that he had done everything he could to keep the Company going. No-one could have anticipated the recession, and the slow down in business was outside his control. 70% of the Company’s business was with two customers.

20 6. He said he was mindful of his responsibilities and that he had kept in touch with HMRC about his difficulties in payment

Appellant’s Case

7. For the Company, Mr Betts submitted that the Company raised two grounds of appeal:

25 (1) *There was a reasonable excuse for the late payments*, being that in December 2011 the amount of VAT was due in the sum of about £35,000 and the bank was overdrawn by £49,000. If the Company had paid the VAT they would have significantly risked not being able to pay the wages and their sub-contractors. This would have had serious repercussions on site as workers would have refused to carry out further work. This would have jeopardised
30 winning further work from their major client, and risked forcing the Company to wind up. It wasn’t until the Company received £22,140 on 9.12.11 and £78,660 on 12.12.11, money long overdue, that they were in a position to make payment in full. In respect of the period 01/13, cashflow was again the problem, but since the money never came in, the Company was forced to enter into a
35 payment plan with HMRC. The company was owed significant money from their clients, particularly from one client, Charter Construction. They had taken all necessary steps to recover the money from the client short of threatening court action. The Appellant was claiming that there was unforeseeable

misfortune outside their control, and the Directors took all necessary steps that would have been expected from a mindful and competent business person. The banks had not been supportive to the Company. The Return for 10/11 had been filed late because of administrative issues, but the Company did not have the money in any event.

(2) *Time-to-pay arrangements (“TTPs”) ought to have been agreed by HMRC for both periods.* The company has previously discussed payment plans but HMRC have refused on the basis that the Company was constantly late in paying their VAT and were behind with other taxes. The Business Support Line of HMRC is not genuinely supportive. TTP arrangements should have been agreed for each of the quarters. The telephone logs showed that there had been contact by the Company.

Respondents’ Case

8. For HMRC Mr Ratcliff submitted as follows:

9. The company had had time to come to terms with the recession. Scrutiny of the bank statements and schedules showed that the Company had sufficient funds available to pay the VAT for each of the quarters in dispute but had chosen not to do so. The Company had not approached HMRC to request a TTP Arrangement prior to the due date for either of these quarters.

10. The Company has a long history of defaults. There were nine defaults between 10/08 and 01/13. The Company was paying late 50% of the time.

11. The Company had only requested a TTP Arrangement for the 01/13 quarter on 21.03.2013 in response to a warning letter dated 18.03.2013. This was after the due date for payment.

12. TTP Arrangements are decided on the merits, are meant to be a “one off”, and are not open ended. The Company had entered into TTP Arrangements on previous occasions, and was therefore aware of the process. No application had been made in respect of either of the quarters under appeal until after the due date for payment.

13. The insufficiency of funds is not a sudden non-payment by a normally reliable customer. The Appellant has stated in its appeal that slow payment by customers is a regular occurrence.

Consideration and Conclusions

14. We take in turn the two grounds of appeal.

15. *Reasonable excuse* – We are sympathetic to the severe trading conditions that the Company, in common with most businesses in the construction sector, has faced over the last few years. However, in order for the cash flow problems to amount to a reasonable excuse (within the meaning of ss 59 & 71) the insufficiency of funds is not itself adequate. The Company has helpfully provided details of its banking position at the relevant times. Our conclusion is that the problems were general trading

5 conditions in the business sector at that time. We note that the Company had sufficient funds within its overdraft facility at the time of the 10/11 quarter to make payment of the VAT but chose not to do so, as it would have significantly risked not being able to pay the wages and sub-contractors. We found that the Appellant had used the VAT receipts within the business and had consequently been unable to fund the quarterly payments as and when they fell due. We draw the Appellant's attention to what Nolan L.J said in the case of *Customs and Excise Commissioners v Salevon [1989] STC 907*. "It seems to us that the reasonable businessman, who took proper account of his obligations to pay tax, would have anticipated the need to pay out significant sums each quarter. What was required was additional working capital for the business. It cannot be right that the Exchequer should be placed in the position of the provider of last resort of the Appellant's working capital".

15 16. The Appellant had been in the default regime for several years and ought to have been aware of the risk of late payment. The Appellant did not make any payment towards the outstanding liability for either quarter.

17. The Return for the 10/11 quarter was late in any event

20 18. *Time-to-pay arrangements ("TTPs") ought to have been agreed by HMRC for both periods* – The Appellant had had an opportunity to speak to HMRC about the problem prior to the due date of payment for each of the quarters, but had failed to do so. The Appellant was fully aware of the availability and procedure for agreeing a TTP Arrangement. There has to be a request made prior to the due date, and this was not done. We therefore find that there was no TTP arrangement in place for either of these quarters under appeal.

25 19. We considered proportionality, but in the light of the decision of the Upper Tribunal in *The Commissioners for HMRC v Total Technology (Engineering) Limited [2012] UKUT 418* we found that the default surcharge regime is proportionate and that the surcharge imposed in this case was itself proportionate. The decision in the appeal to the Upper Tribunal in *Hok Limited [2012] UKUT 363 (TCC)* confirmed that the Tribunal could not discharge the penalty on the grounds of fairness. This Tribunal is bound by that decision.

30 20. 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.

40 **JOHN N. DENT**
TRIBUNAL JUDGE

RELEASE DATE: 31 December 2014