



TC04280

Appeal number: TC/2014/05913

VAT - PENALTIES - DEFAULT SURCHARGE - RELIANCE ON THIRD PARTY- WHETHER REASONABLE EXCUSE - NO - VAT ACT 1994 SECTIONS 59 and 71 - WHETHER PENALTY PROPORTIONATE - YES - APPEAL DISMISSED.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TQ PROPERTY LAWYERS LTD

Appellant

- AND -

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

**TRIBUNAL: JUDGE JENNIFER TRIGGER
MR NOEL BARRETT**

Sitting in public at Alexandra House, Manchester M3 2JA on 13 January 2015

Mr O'Grady for the Respondents

The Appellant was not represented

The Tribunal file showed that the Appellant had been given timeous notice by the Tribunal of the hearing date of 13 January 2015. As no-one was in attendance to present the Appellant's case we directed the Clerk to make enquiries.

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The Clerk was able to ascertain from their telephone conversation with the Appellant that Mr Iain Tenquist, Manager, who had been dealing with the appeal on behalf of the Appellant was not on his way to the hearing. The Appellant did not know whether anyone else was to attend. It seemed unlikely to us there being no satisfactory response from the Appellant.

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We considered the evidence and decided there was sufficient information for us to proceed with the appeal. Furthermore, we decided that it was expedient to do so having regard to the length of time that this appeal had been outstanding and to the fact that the Appellant had received notice of the hearing but had failed to attend or arrange representation. This was of particular import in our opinion because the Appellant was a firm of lawyers who would understand the importance of either attending the hearing or applying for an adjournment, but had failed to do either. In the interests of justice we decided to proceed having regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 2 and rule 33.

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DECISION

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1. This is an appeal by TQ Property Lawyers Limited ("The Company"), against a default surcharge totalling £5,697.08 under Section 59 of the Value Added Tax Act 1994 ("VATA 94"). The Respondents ("HMRC") had imposed the surcharge on the Company for its failure to pay VAT on time in respect of VAT accounting period 04/14.

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2. Mr O'Grady set out the stance of HMRC at the outset. He referred to the Schedule of Defaults Payment schedule in the appeal bundle. There had been a first default in the period 01/13 and the Company had come within the default regime. There had been 3 further defaults in 04/13, 07/13 and 10/13 so that in 04/14 the surcharge rate was 15%.

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3. The Company did not challenge that it entered the default surcharge regime in 01/13 nor that there had been the subsequent defaults in 04/13, 07/13 and 10/13.

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4. The Company accepted that the VAT due from the Company had not been paid on time. The due date was 7 June 2014 ("The Due Date"), but the VAT had been paid late on 10 June 2014. The reason for the late payment was an error by the Company's cashier.

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5. The cashier believed that as the Due Date was a Saturday payment could be made on the Monday following the Due Date. In the event, the cashier failed to authorize payment on Monday 9 June 2014. This was a further error which was rectified by the cashier on 10 June 2014, when a payment was made to HMRC. Thus the main issue in the appeal was whether the Company had a reasonable excuse within the meaning of Section 59 (7) VATA 94.

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6. The Company maintained that the amount of the surcharge was "harsh". We interpreted that as disproportionate and considered that point also.

7. For the reasons set out below, we decided that the Company did not have a reasonable excuse for its failure to make the payment of VAT on time and that the amount of the surcharge was not disproportionate. Accordingly, appeal was dismissed.

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Legislation

- 10 1. Liability to a default surcharge arises under Section 59 VATA 94. Section 59(1) to Section 59 (6) inclusive provides, so far as is relevant, that a taxable person is in default where HMRC do not receive a VAT return or HMRC have received a return but have not received the amount of VAT shown on the return by the due date. Where a person is in default, HMRC may issue a surcharge liability notice (“SLN”). If, having been served with an SLN, the taxable person defaults again during the period of 1 year, the Surcharge Liability Period (“SLP”), the taxable person becomes liable to a Surcharge. On each subsequent default the SLP is extended for 12 months from the end of the last period of default.
- 20 2. The surcharge is the greater of £30 and a percentage of the outstanding VAT. The percentage increases according to the number of VAT periods in respect of which the taxable person is in default during the SLP. The maximum percentage is 15% where there are 4 or more periods in default for which VAT remains unpaid.
3. Section 59 (7) provides, so far as is relevant, that a taxable person is not treated as in default in respect of any period if the taxable person satisfies HMRC, or on appeal to a tribunal, that in respect of the period:
- 25 “(a) the return or, as the case may be, the VAT shown on the return was dispatched 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
- 30 (b) there is a reasonable excuse for the return or VAT not having been so dispatched,

35 he shall not be liable to the surcharge..... 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).....”

Section 71(1) of VATA 94 further provides, so far as is relevant:

- 40 “ (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 reasonable excuse.....”

The Background

- 45 1. The Company entered the SLP when a SLN was served in period 01/13 because the Company failed to pay the VAT by the due date of 07/03/2013.
2. Once the Company had entered the SLP, the potential financial consequences attached to the risk of further default would have been known to the Company from this point onwards because of the information printed on the SLN that was issued. The notes on the reverse of the SLN issued for 01/13 onwards carried a warning that a VAT return and any tax due had to reach HMRC by the due date. In the event of anticipated difficulties a tax payer was provided with relevant contact details for HMRC and other agencies. Each SLN
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identified how surcharges were calculated and the percentages used in accordance with Section 59 (5) of VATA 94.

3. The Company had a history of defaults following the service of the SLN. In 04/13 the due date was 7 June 2013 but the VAT was paid in two instalments on 8/08/2013 and 4/09/2013. On this occasion the surcharge was 2% but the payment due was caught by the de minimus rule. In 07/2013 the due date was 7/09/2013. Again the VAT was paid by two instalments on 4/10/2013 and 6/11/2013. Likewise in 10/13 the due date was 7/12/2013 and the VAT was paid on 10/12/2013 and 13/02/2014. Each of these defaults extended the SLP so that when a further default occurred in 04/14 the Company was still within the SLP and liable to a VAT default surcharge.
4. The Company had negotiated with HMRC Time to Pay Agreements in 04/13, 07/13 and 10/13. In each case the Agreements were arranged after the due date. Accordingly, the Company was not entitled to any relief under Section 107 Finance Act 2009, which provides for the suspension of penalties during the currency of an agreement for a deferred payment.

Findings of Fact

1. That the Company was in the SLP from 01/13.
2. That on 04/14 the Company failed to pay the VAT due by the Due Date.
3. That the Company failed to dispatch the VAT due on the return at such a time and in such a manner that it was reasonable to expect that it would be received by HMRC within the appropriate time limit.
4. That the Company had no reasonable excuse for the late payment of the VAT.
5. That the surcharge levied was not disproportionate.
6. That the SLN and the SLN extension had been served by HMRC on the Company.
7. That the Company had entered into Time to Pay Agreements with HMRC in 04/13, 07/13 and 10/13 but in each case the Agreement had been reached after the relevant due date.
8. That neither HMRC nor a tribunal had power to reduce the percentage rate of a surcharge which has been levied correctly in accordance with the legislation.

The Reasons for the Decision

1. As the Company had dispatched the VAT due on 10 June 2014 it could not have been received by HMRC by the Due Date and thus the Company could not take advantage of Section 59 (7) (a) of VATA 94.

2. Reliance by the Company on its cashier to make payment of the VAT by the Due Date could not constitute a reasonable excuse. The Company had failed to exercise due diligence. It had been in the SLP since 01/13 and had incurred surcharges after that date. It was incumbent on the Company to ensure that its cashier paid the VAT due by the Due Date which it had not done. Furthermore, Section 71 (1) (b) of VATA 94 specifically excluded reliance on a third party as a reasonable excuse.

3. We were bound by the decision of the Upper Tribunal in (*HMRC v Total Technologies* [2012] UKUT 418 (TCC) which confirmed that the test when considering issues of the proportionality of a penalty was not whether the penalty was harsh but whether it was “plainly unfair” or “without reasonable foundation.” The Upper Tribunal found that there was nothing in the VAT default surcharge regime which lead to the conclusion that its architecture was fatally flawed. It followed that it

was necessary to consider whether an individual penalty failed the test of proportionality in the circumstances of each case. We did not accept that the surcharge was a significant amount for the Company to pay and we did not regard it as disproportionate.

5 4. The Company could not take advantage of Section 108 of the Finance Act 2009 because all the Time to Pay Agreements were finalised after the relevant due date. Therefore, the surcharge levied at 15% in the 04/14 period was correct. We had before us evidence that an SLN and subsequent SLN extensions had been
10 documents had been served on the Company. However, we decided that service had been effected on the balance of probabilities. The Company had accepted that the SLP was effective from 01/13 and had not challenged any of the subsequent defaults until that incurred in 04/14. In 04/14 the Company had challenged the surcharge imposed, therefore, in our opinion, it must have received the SLN extension.

15 5. As neither HMRC nor the Tribunal had power to reduce the percentage rate of the surcharge levied, the surcharge of £5.697.08, which was 15% of the VAT due in 04/14, was to be paid by the Company to HMRC.

20 6. This document contains full findings of fact and reasons for the decision. Any parties dissatisfied with this decision has the 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)”
25 which accompanies and forms part of this Decision Notice.

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**JENNIFER TRIGGER
TRIBUNAL JUDGE**

RELEASE DATE: 10 February 2015