



**TC04339**

**Appeal number: TC/2014/01107**

*VAT– default surcharge – s 59A VATA 1994 – whether reasonable excuse – No –  
whether surcharge disproportionate – No – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**STEVE GUEST t/a ALL HOURS DRAIN & PLUMBING SERVICES LTD      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE PAULENE GANDHI  
MR TYM MARSH**

**Sitting in public at Fox Court, London on 12 January 2015**

**Mr Philip Adkins, Agent, for the Appellant**

**Mr Bingham, Officer of HMRC, for the Respondents**

## **DECISION**

1. This is an appeal by Steve Guest trading as All Hours Drain & Plumbing (“the company”) against the surcharge for late payment of VAT of £1,555.87 imposed for the late payment of the VAT for the period 11/12, £1,936.73 for the period 02/13, £1,774.32 for the period 05/13, and £1,410.24 for the period 08/13. The total amount of the surcharges in dispute is £6,677.16.
2. Mr Guest was unable to attend the tribunal hearing due to transport problems however Mr Adkins indicated that he was happy to proceed in Mr Guest’s absence. The tribunal therefore proceeded with hearing the appeal.
3. The only issue in this case was whether there was a reasonable excuse for the company’s VAT not being paid on time.
4. The Tribunal decided that the VAT payment was not paid on time and no reasonable excuse has been put forward for this. The tribunal dismissed the appeal and found the company was liable to the surcharges.
5. The company asked for full written findings of fact and reasons for the decision (a “full decision”) in writing after receiving the short decision, as they are entitled to do. This is that full decision.

### **The relevant legislation**

6. 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.

(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,
- 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—
- (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
  - (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.
- (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

- (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—
  - (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.

Section 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.

**The evidence**

- 7. The evidence is set out in the index to the respondent's appeal bundle but includes the Notice of Appeal dated 13/02/14, and HMRC's Statement of Case undated (with enclosures), and correspondence between the parties.

**The issues**

- 8. It is accepted that the payment of VAT for the periods in question were paid late. The only issue before the tribunal therefore is whether there was a reasonable excuse for the late payment of the VAT due.

**Summary of the company's arguments**

9. Essentially the company's argument is that the VAT was paid late but there was a reasonable excuse for this because the company were paid late by one of their customers, Babcock (which was incorrectly described to us as a government department) who also terminated the contract illegally. There are subsequent civil proceedings being undertaken in relation to the premature termination of this contract. The case of *Customs and Excise Commissioners v Steptoe* [1992] STC 757 is relied upon.

### **Summary of HMRC's arguments**

10. Babcock is a contractor who carried out work for the MOD and was not a government department. The company has been in the surcharge regime since 08/08 and has had long standing cash flow problems. Babcock's failure to pay the company promptly is not unusual so it was not an unforeseen or unusual occurrence. The amount owed by Babcock only amounts to 30% of the VAT owed. Babcock was not the company's only customer. It is therefore not a *Steptoe* type situation.

### **Undisputed facts**

11. The following facts are not in dispute:
  - a) The VAT payment and return was due for the 11/12 period by 07/01/13. The return was received on 21/12/12 but payment was not received until 04/03/14 and 18/03/14.
  - b) For the period 02/13 the return was due by 31/03/13 and payment by 07/04/13. The return was received on 08/04/13 but no payment was made.
  - c) For the period 05/13 the return was due by 30/06/13 and payment was due by 07/07/13. The return was submitted on 05/07/13 but no payment was made.
  - d) For the period 08/13 the due date for the return was 30/09/13. Payment was due by 07/10/13. The return was received on 24/09/13. No payment was received.
  - e) The total default surcharge penalties were calculated as £6,677.16 as this is 15% of the unpaid amount of VAT.
12. For the liability to a surcharge to be removed the company must satisfy the tribunal that either it had a reasonable excuse for late payment of the VAT or that it despatched the return and payment at such a time and in such a manner that it could reasonably expect that both would be received in time by HMRC.

### **Reasonable excuse**

13. Although not bound by *Coales v Revenue and Customs Commissioners* [2012] UK FTT (477) (TC) we find that case is a helpful analysis of reasonable excuse with which we agree. We therefore follow the approach taken in *Coales*.
14. This means that the question the tribunal must ask itself in relation to whether there is a reasonable excuse is the following:

“... was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”.

15. We also take into account that an inability to pay tax due to an insufficiency of funds does not amount to a reasonable excuse (although each case must be decided on its own facts). The reasons for the insufficiency of funds may however amount to a reasonable excuse - *Customs and Excise Commissioners v Steptoe* [1992] STC 757.

### **Discussion**

16. From the oral evidence it is clear that the 11/12 and 02/13 periods are not affected by the contract with Babcock as this contract was not tendered for until April 2013. This means no reasonable excuse has been provided for these two periods.
17. Looking at the 05/13 and 08/13 periods the case of *Steptoe* was relied on by the company to show that there was a reasonable excuse.
18. In our view however the circumstances of the company before us are different from the facts in *Steptoe* where that taxpayer essentially worked for the council (i.e. one customer) who did not pay him on time. That is not the situation here. It is clear from the evidence that the company worked for several different customers. Further we take into account that the payment from Babcock only amounted to a third of the VAT owed which again was a different situation to that in *Steptoe*.
19. The evidence before us does not show that there was anything in the circumstances of the company which was outside of the normal hazards of trade and does not amount, by itself, to a reasonable excuse. The evidence before us shows Babcock consistently paid the company late and there was nothing unusual or unforeseen in the late payment.
20. Further for the 05/13 and 08/13 periods we were not provided with any evidence of an insufficiency of funds at the due date such as bank statements and/or annual accounts which enabled us to form a view of the complete financial affairs of the company. This means we cannot be satisfied that the company has shown that this is a *Steptoe* type of situation.
21. It is clear to us that the company has been in the default surcharge regime since 08/08 and will have been sent information by HMRC about how to make payment, the date by which payment must be received by HMRC, and the consequences of not making payment on time. In our view therefore the company should have been aware of the consequences of not paying their VAT on time yet have done little to resolve the payment of the outstanding VAT before the due date.
22. In our view, a responsible trader, ‘conscious of and intending to comply with his obligations regarding tax’ would have contacted HMRC before the due date to

discuss payment proposals for the periods under question or, in light of the long standing difficulties in paying their VAT, discussed cash accounting.

23. From the oral evidence it was also clear that the company had an investment property valued at around £200,000 with a small mortgage of £7,000. No satisfactory explanation was given as to why this property was not sold to pay the VAT other than Mr. Guest did not want to at that time. Again, in our view, a responsible trader, 'conscious of and intending to comply with his obligations regarding tax' would have taken steps that enabled it to pay its VAT on time.
24. The company may have stuck to their current agreement with HMRC but that does not show that during the periods we are considering the company had a reasonable excuse for not paying their VAT by the due date.

### **Conclusion and appeal rights**

25. In conclusion no reasonable excuse has been put forward for the late payment of the company's VAT for the 11/12 and 02/13 periods and we find for the 05/13 and 08/13 periods there is no reasonable excuse.
26. We therefore dismiss this appeal.
27. 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.

**PAULENE GANDHI  
TRIBUNAL JUDGE**

**RELEASE DATE: 24 March 2015**