



TC04859

Appeals numbers: TC/2014/3555 & 5780, TC/2015/480, 2912 & 4395

*VAT – default surcharges – s 59A VATA 1994 - whether reasonable excuses
for late payments*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FOGARTY (FILLED PRODUCTS) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: Judge Peter Kempster
Mrs Maryvonne Hands**

Sitting in public at Nottingham Civil Justice Centre on 27 January 2016

**Mr Hasnain Dharamsey (managing director) and Mr Gerald Tawton (finance
director) for the Appellant**

Mr Philip Osborne (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant (“the Company”) appeals against default surcharges assessed by the Respondents (“HMRC”) in respect of late payment of VAT relating to five VAT quarterly periods. The Company is within the payments on account regime established by s 28 VAT Act 1994. Details of the defaults are given below, arranged by VAT quarter: 02/14, 05/14, 08/14, 11/14 and 02/15.

2. In 2014 the Tribunal determined an earlier appeal by the Company concerning default surcharges relating to the VAT quarters 02/13, 08/13 and 11/13. By a decision issued on 7 October 2014 (“the 2014 Decision”) the Tribunal (Judge Connell and Mr Ratcliffe) allowed the appeals in part. The 2014 Decision gives the background to the Company and its business.

Law

3. Section 59A VAT Act 1994 makes provision for default surcharges for late payment of VAT liabilities by traders within the payment on account regime, and the text of s 59A is stated in the Annex to this decision notice.

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

“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.”

5. Section 108 Finance Act 2009 makes provision for time-to-pay agreements and states (so far as relevant):

“108 Suspension of penalties during currency of agreement for deferred payment

(1) This section applies if—

(a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) [the table includes VAT] when it becomes due and payable,

(b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and

- (c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”).
- (2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—
 - 5 (a) the penalty falls within the Table [the Table includes default surcharges under s 59A VATA], and
 - (b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.
- 10 ...”

Issues common to all or most of the late payments

6. Several issues were common to all or most of the late payments. We deal with them at the outset, and do not repeat them below for each VAT period.

15 ***Company’s belief that timely payment of the balancing payment for a quarter removed any surcharge liability for late payment of payments on account for that quarter***

7. *Company’s submissions* - The Company submitted that it was entitled to rely on a letter from HMRC dated 4 November 2013, from which it had understood that timely payment of the balancing payment for a quarter removed any surcharge liability for late payment of payments on account for that quarter.

8. *HMRC’s submissions* – HMRC submitted that the correct position was clearly set out in HMRC Notice 700/50. It was apparent from the wording of the 4 November 2013 letter that the writer had been uncertain of the position. The matter of that letter had been addressed by the earlier Tribunal hearing, with the result that the letter – to the extent that it contained incorrect information – could not be relied on by the Company.

9. *Consideration and conclusions* – We agree with the conclusion stated in the 2014 Decision (at [78]) and so do not accept there is a reasonable excuse in this regard:

30 “... the Appellant, given Mr Tawton’s knowledge of the POA regime, should not have assumed that Mrs Booker’s letter of 4 November 2013 accurately set out the position with regard to late interim payments.”

Company’s trading position

10. *Company’s submissions* - The Company submitted:
35 (1) The Company had not ignored its VAT obligations. It always put HMRC at the top of its creditors’ list and paid HMRC as much as could be afforded as soon as possible. Loans had been taken out – at onerous rates of interest - specifically to meet payments of instalments of VAT, or as much as the lender

was prepared to advance. The Company had honoured the instalment schedules it had put to HMRC.

5 (2) The Company needed to purchase stock in advance but was then reliant on customer orders which were short-order and fluctuated. The Company was particularly dependent on winter weather conditions, as that impacted the demand for duvets and other products, especially its high-TOG-value ranges. The recent mild winters had adversely affected sales, resulting in significant unsold stocks, special promotions, and discounted prices.

10 (3) The Company had managed to continue trading through the recession, providing employment to 260 people. In 2015 the Company had taken major steps to ensure its continued viability: a restructuring had, regrettably, resulted in some redundancies; the Company's brand had been the subject of a sale and leaseback arrangement with one of its major customers; and existing venture capital funding had been reorganised with a new provider. Manufacturing operations had been brought back from the Far East, which should secure jobs here. Although conditions remained challenging, the business was now sustainable. The Company was now up to date with all its VAT obligations.

15 11. *HMRC's submissions* – HMRC submitted that the Company's problems were not attributable to any unexpected or exceptional event – unlike the circumstances explained at the earlier Tribunal hearing (where there had been a major order for a single customer which tied up working capital). The difficulties faced by the Company were just part of the rough and tumble of commercial life.

20 12. *Consideration and conclusions* –

25 (1) Section 71(1) expressly provides that “an insufficiency of funds to pay any VAT due is not a reasonable excuse”. However, it is well-established that a reasonable excuse may be afforded by the circumstances that cause the insufficiency (as opposed to the insufficiency itself) – see *CEC v Steptoe* [1992] STC 757.

30 (2) While we have sympathy for the difficult trading conditions encountered by the Company, we consider that the VAT payment delays mostly resulted from cash insufficiencies caused by the Company's trading pattern being dependent to a large degree on the British winter weather (and thus customer orders for its products). That is an inherent risk in the business carried on by the Company and the possibility of a fall in orders because of a mild winter was a reasonably foreseeable trading result. Accordingly, we cannot accept the trading conditions of the Company at the relevant time as constituting a reasonable excuse within the meaning of s 71.

Company made (and honoured) proposals that were not rejected by HMRC

35 13. *Company's submissions* - The Company submitted:

40 (1) When the Company was unable to afford a VAT payment Mr Tawton would contact HMRC (usually on the due date) with a detailed proposal for deferred or instalment payments to meet the liability. The proposal represented

the maximum cash that the Company could achieve. The Company had always honoured its proposals.

5 (2) It was accepted that for certain payments HMRC had expressly rejected the proposals. However, on the other occasions HMRC had made no objection, or indeed any response. In those circumstances it was reasonable for the Company to assume that the proposals met with HMRC's approval and thus there was a time-to-pay arrangement ("TTP") concluded.

10 14. *HMRC's submissions* – HMRC submitted that HMRC's call logs did not record some of the conversations Mr Tawton recalled having with HMRC, but those that were recorded were made only on the relevant due payment date and were in the nature of a debtor explaining to its creditor that payment would be late. TTPs were not given freely by HMRC. In particular, HMRC were mindful that granting TTPs to a trader potentially gave that trader a commercial advantage over its competitors who had met their statutory VAT payment obligations. Requests for TTPs were
15 considered in detail by HMRC officers at the appropriate level; it was certainly not a matter that was within the decision authority of the person taking the phone calls from Mr Tawton. Section 108 Finance Act 2009 envisaged a formality of agreement and HMRC always gave written confirmation of the terms of any TTP agreed, and closely monitored compliance with those terms. HMRC had granted TTPs to the Company
20 where considered appropriate – for example, in relation to the balancing payment for the 05/14 period. Otherwise, there were no TTPs in operation for the Company in relation to the periods covered by the appeals.

25 15. *Consideration and conclusions* – We agree with HMRC. The provision for granting TTPs contained in s 108 Finance Act 2009 contains a number of requirements and HMRC would need to satisfy themselves that those were met, quite apart from the exercise of their discretion to grant a TTP in the circumstances of a particular request. The Company was not entitled to assume that a TTP had been created by tacit agreement just because HMRC did not immediately object to a
30 unilateral proposal telephoned to HMRC on the due date for payment. Save as expressly agreed and communicated by HMRC to the Company, there were no TTPs relevant to the matters under appeal.

VAT Quarter 02/14

The late payments

35 16. The first payment on account of £82,991 and the second payment on account of £50,881 were both paid late, and a surcharge of 5% was assessed in the amount of £6,693.

Company's submissions

40 17. The Company agreed the details of dates and amounts stated in HMRC's statement of case. There were no submissions beyond the general points covered at [6 to 15] above.

HMRC's submissions

18. There were no submissions beyond the general points covered at [6 to 15] above.

Consideration and conclusions

5 19. For the reasons given above, we do not consider that the Company has a reasonable excuse (within the meaning of s 71) for the late payment.

VAT Quarter 05/14

The late payments

10 20. The first payment on account was paid in part on time but £66,393 was paid late. The second payment on account of £82,991 was paid late. A surcharge of 10% was assessed in the amount of £14,938.

Company's submissions

15 21. The Company agreed the details of dates and amounts stated in HMRC's statement of case. There were no submissions beyond the general points covered at [6 to 15] above.

HMRC's submissions

22. A TTP had been granted on 4 July 2014 in respect of the balancing payment liability, so only the late payments of the first (in part) and second (entire) payments on account attracted surcharges.

20 23. There were no other submissions beyond the general points covered at [6 to 15] above.

Consideration and conclusions

24. For the reasons given above, we do not consider that the Company has a reasonable excuse (within the meaning of s 71) for the late payment.

25 **VAT Quarter 08/14**

The late payments

25. The first and second payments on account of £86,698 each, and also the balancing payment of £365,051 were all paid late. A surcharge of 15% was assessed in the amount of £80,767.

Company's submissions

26. The Company agreed the details of dates and amounts stated in HMRC's statement of case.

27. The Company had secured a loan of £125,000 specifically for payment of part of the balancing payment and the funds had been received into the Company's bank account in time for the due date of 30 September 2014. Instructions were given to the bank to make the VAT payment to HMRC on 30 September, and the Company was confident that the funds would move the same day. Unfortunately, there was a bank deadline for same day transfers which had expired and so the monies did not reach HMRC until the day after the payment due date. No problems had been encountered previously with same day transfers; there may have been some confusion between "priority payments" and "faster payments". The Company had then recently changed its bank. The payment was only one day late, and a colleague of Mr Tawton was under the impression that a delay of up to two working days was acceptable.

15 *HMRC's submissions*

28. A reasonable trader would have checked with their bank the exact conditions for same day transfers, especially as a new bank was in place. A factsheet on Priority Payments produced by HSBC (and included in the trial bundle) clearly stated "Your beneficiary will normally receive the money by the next day however occasionally this may be within four working days from the time the payment is processed by us ...".

Consideration and conclusions

29. As noted by the Tribunal at the hearing, the instruction to the bank (included in the trial bundle) clearly gives the "instruction payment type" as "priority payment". The Company should have been aware that an instruction to pay HMRC would need to have been given some days earlier in order to ensure receipt of funds on time. This was especially so as the Company had changed bankers. Having left matters to the last possible moment, the Company bore the risk of late payment, which had occurred here. Accordingly, we do not consider that the Company has a reasonable excuse (within the meaning of s 71) for the late payment.

VAT Quarter 11/14

The late payments

30. Both payments on account were paid on time but the balancing payment of £210,234 was paid late. A surcharge of 15% was assessed in the amount of £31,535.

35 *Company's submissions*

31. The Company agreed the details of dates and amounts stated in HMRC's statement of case.

5 32. The Company had secured a loan of £125,000 specifically for payment of part of the balancing payment – the lender was not willing to advance any more. Negotiations had indicated that the funds would be with the Company in time to meet the VAT payment date; however, the lender had not delivered on time and so the payment was late.

HMRC's submissions

33. There were no submissions beyond the general points covered at [6 to 15] above.

Consideration and conclusions

10 34. Having carefully reviewed the email chain between the Company and its lender (included in the trial bundle) we are satisfied that the Company reasonably expected to be in a position to pay £125,000 of the balancing payment on the due date, and its failure to do so was because of an unexpected delay in the lender fulfilling its agreement. Accordingly we conclude that the Company has a reasonable excuse
15 (within the meaning of s 71) for the late payment to the extent (only) of the amount of £125,000.

VAT Quarter 02/15

The late payments

20 35. The first payment on account was paid in full on time but only part of the second payment on account was paid on time, with £38,348 paid late. A surcharge of 15% was assessed in the amount of £4,004.70.

Company's submissions

36. The Company agreed the details of dates and amounts stated in HMRC's statement of case, except that the calculation of the surcharge was not clear.

25 37. There were no submissions beyond the general points covered at [6 to 15] above.

HMRC's submissions

30 38. Mr Osborne submitted that the arithmetical calculation of the surcharge appeared to be in error and should have been for a higher amount; however, HMRC did not ask the Tribunal to increase the amount of the surcharge which would remain at the assessed amount of £4,004.70.

39. There were no other submissions beyond the general points covered at [6 to 15] above.

Consideration and conclusions

40. For the reasons given above, we do not consider that the Company has a reasonable excuse (within the meaning of s 71) for the late payment.

Summary of Conclusions

5 41. As stated above, we find there was a reasonable excuse for the late payment of £125,000 of the balancing payment for the 11/14 quarter, but no reasonable excuse for the other late payments. Accordingly, the assessed surcharges are upheld *except* that the surcharge for the 11/14 VAT period shall be reduced from £31,535 (being 15% of £210,234) to £12,785 (being 15% of £85,234).

10 **Decision**

42. The appeals relating to VAT periods 02/14, 05/14, 08/14 and 02/15 are DISMISSED. The appeal relating to VAT period 11/14 is ALLOWED IN PART, so as to reduce the amount of the surcharge to £12,785.

15 43. 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)”
20 which accompanies and forms part of this decision notice.

**PETER KEMPSTER
TRIBUNAL JUDGE**

25

RELEASE DATE: 4 FEBRUARY 2016

ANNEX
Being the text of s 59A VAT Act 1994

“59A Default surcharge: payments on account

- 5 (1) For the purposes of this section a taxable person shall be regarded as in default in respect of any prescribed accounting period if the period is one in respect of which he is required, by virtue of an order under section 28, to make any payment on account of VAT and either—
- 10 (a) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners by the day on which it became due; or
- (b) he would, but for section 59(1A), be in default in respect of that period for the purposes of section 59.
- 15 (2) Subject to subsections (10) and (11) 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 which—
- 20 (i) begins, subject to subsection (3) below, on the date of the notice; and
- (ii) ends on the first anniversary of the last day of the period referred to in paragraph (a) above.
- (3) If—
- 25 (a) a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period, and
- (b) that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned,
- 30 the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period; and, accordingly, the existing period and its extension shall be regarded as a single surcharge period.
- (4) Subject to subsections (7) to (11) below, if—
- (a) a taxable person on whom a surcharge liability notice has been served is in default in respect of a prescribed accounting period,
- 35 (b) that prescribed accounting period is one ending within the surcharge period specified in (or extended by) that notice, and
- (c) the aggregate value of his defaults in respect of that prescribed accounting period is more than nil,
- 40 that person shall be liable to a surcharge equal to whichever is the greater of £30 and the specified percentage of the aggregate value of his defaults in respect of that prescribed accounting period.
- (5) Subject to subsections (7) to (11) 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 during the surcharge period which are periods in respect of which the taxable person is in default and in respect of which the value of his defaults is more than nil, so that—

5 (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;

10 (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 this section the aggregate value of a person's defaults in respect of a prescribed accounting period shall be calculated as follows—

15 (a) where the whole or any part of a payment in respect of that period on account of VAT was not received by the Commissioners by the day on which it became due, an amount equal to that payment or, as the case may be, to that part of it shall be taken to be the value of the default relating to that payment;

20 (b) if there is more than one default with a value given by paragraph (a) above, those values shall be aggregated;

(c) the total given by paragraph (b) above, or (where there is only one default) the value of the default under paragraph (a) above, shall be taken to be the value for that period of that person's defaults on payments on account;

25 (d) the value of any default by that person which is a default falling within subsection (1)(b) above shall be taken to be equal to the amount of any outstanding VAT less the amount of unpaid payments on account; and

(e) the aggregate value of a person's defaults in respect of that period shall be taken to be the aggregate of—

30 (i) the value for that period of that person's defaults (if any) on payments on account; and

(ii) the value of any default of his in respect of that period that falls within subsection (1)(b) above.

35 (7) In the application of subsection (6) above for the calculation of the aggregate value of a person's defaults in respect of a prescribed accounting period—

(a) the amount of outstanding VAT referred to in paragraph (d) of that subsection is the amount (if any) which would be the amount of that person's outstanding VAT for that period for the purposes of section 59(4); and

40 (b) the amount of unpaid payments on account referred to in that paragraph is the amount (if any) equal to so much of any payments on account of VAT (being payments in respect of that period) as has not been received by the Commissioners by the last day on which that person is required (as mentioned in section 59(1)) to make a return for that period.

(8) 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—

5 (a) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1)(a) above—

(i) that the payment on account of VAT 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 by the day on which it became due, or

10 (ii) that there is a reasonable excuse for the payment not having been so despatched,

or

(b) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1)(b) above, that the condition specified in section 59(7)(a) or (b) is satisfied as respects the default,

15 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).

20 (9) For the purposes of subsection (8) 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

25 (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.

10) In any case where—

30 (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 section 69,

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

(11) 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.

40 (12) For the purposes of this section the Commissioners shall be taken not to receive a payment by the day on which it becomes due unless it is made in such a manner as secures (in a case where the payment is made otherwise than in cash) that, by the last day for the payment of that amount, all the transactions can be completed that need to be completed before the whole amount of the payment becomes available to the Commissioners.

(13) In determining for the purposes of this section whether any person would, but for section 59(1A), be in default in respect of any period for the purposes of section 59, subsection (12) above shall be deemed to apply for the purposes of section 59 as it applies for the purposes of this section.

5 (14) 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.”