



TC03402

Appeal number: TC/2013/06812

VAT – default surcharge – reasonable excuse – claim of mistaken belief as to submission – no supporting evidence produced – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GEORGE GALLAGHER METALS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD J MANUELL

The Tribunal determined the appeal on 24 January 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 11 September 2013 and HMRC's Amended Statement of Case dated 14 November 2013 (with bundle of documents).

DECISION

1. This determination has been prepared following the Appellant's request for full findings following the promulgation of the standard short form determination usual in default paper appeals. In reality having heard no live evidence from either side there is little which the Tribunal can usefully add, nevertheless a full decision is required to enable an application for permission to appeal to the Upper Tribunal to be considered.

2. The Tribunal decided that the Appellant had shown no reasonable excuse for the late payment of VAT for the accounting period ending 04/13, which was due by 7 June 2013 (if electronic). It was admitted that payment was made late. The surcharge penalty imposed at the rate of 2% was £1,938.37.

3. The provisions in the VAT legislation relating to default surcharges are found in section 59 Value Added Tax Act 1994 ("VATA 1994") and can be summarised as follows to the extent they are relevant to this appeal. A taxable person is regarded as being in default if he fails to make his VAT return for a VAT quarterly period by the due date for that quarter or if he makes his return by that due date, but does not pay by that due date the amount of VAT shown on the return as payable in respect of that period. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default surcharge regime, so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates, on an ascending scale.

4. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). This is provided for in subsection (7) of section 59 VATA 1994, which is as follows:

"(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).

5. It is, of course, sub-subsection (b) on which the Appellant seeks to rely. It is clear from the language of sub-section (7) that the burden is on the Appellant to establish that it has a reasonable excuse for the late payment(s) in question.

6. In relation to late payment of VAT the reasonable excuse provision in section 59 VATA 1994 must be applied subject to a limitation which is relevant in this appeal. Section 71(1) VATA 1994 is as follows:

5 (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.

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.

7. The Appellant contended in summary that its staff member had believed that the VAT return had been submitted in time. The VAT return was resubmitted as soon as
15 the error was discovered, i.e., when no direct debit for the figure shown in the return was processed. The penalty would adversely affect the company's finances.

8. HMRC submitted that the Appellant had entered the default surcharge regime with attendant written warning for the period 07/12 onwards. All VAT returns
20 successfully filed on line are acknowledged. The Appellant had been using the system for a considerable time and so should have been familiar with the receipt of an acknowledgment as proof of a successful submission. The surcharge was correctly calculated and imposed.

9. The Appellant's appeal has insurmountable problems. The late payment was not disputed. It was not suggested that there was any reasonable excuse defence
25 available for any previous VAT default during the surcharge period in question. Thus the Appellant was correctly in the 2% surcharge regime. This indicated the recent history of late payment, and the need for additional care to avoid the stringent penalties which can be incurred once the default surcharge regime bites. Full and clear guidance as to the online filing system is provided by HMRC. Indeed, the
30 evidence available showed that the Appellant has been using the system for long enough to be familiar with it, including the need to receive a confirmation of a completed filing, despite the Appellant's claim to the contrary. No supporting evidence was produced by the Appellant about the alleged attempted in time filing. No evidence was produced to show that the error was caused by any external factor,
35 let alone (to give a simple example) an unexpected or unforeseeable one. It was a mistake which should not have been made had sufficient care been taken.

10. The level of penalty has been fixed by parliament and the Appellant has failed to show that the penalty in all the circumstance is disproportionate in law: see *Total
40 Technology (Engineering) Ltd v Revenue and Customs Commissioners* [2012] UKUT 418 (TCC). The Tribunal has no power to mitigate penalties of this type. The appeal must be dismissed.

11. 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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**RICHARD J MANUELL
TRIBUNAL JUDGE**

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RELEASE DATE: 10 March 2014