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**TC03576**

**TC/2013/05006**

*Default surcharge – rights of set-off of overpaid tax – reasonable excuse – calculation of surcharges – VATA 1994 s59, s71 & s88 – appeal dismissed in principle*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**IGMUSIC LTD**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MALACHY CORNWELL-KELLY  
                  MR DUNCAN McBRIDE**

**Sitting in public at 45 Bedford Square, London, on 4 April 2014**

**Ms Rachel Thomas and Mr David Levale of the appellant company**

**Mr Philip Rowe of HMRC, for the Crown**

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## DECISION IN PRINCIPLE

### *Introduction*

1 This appeal by IGMusic Limited ('the company') is against four default  
surcharges for the periods 12/11, 03/12, 06/12 and 03/13 for £863.25,  
5 £1,460.55, £1,148.97 and £1,251.27 respectively.

2 There is a history of confusion on the part of the company with regard to  
actual payments of tax – which has evidently not been helped by what  
appears to be unhelpful administration on the part of the Revenue – but  
10 there is no appeal as to the underlying liabilities, and the issue concerns  
whether there is a reasonable excuse, within the meaning of the legislation,  
for the late payments that occurred, and whether the surcharges have been  
correctly calculated.

### 15 *Legislation*

3 The Value Added Tax Act 1994 provides:-

#### *The default surcharge*

59(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  
20 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,

25 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  
30 make any payment on account of VAT.

(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

35 (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.

40 (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  
45 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—

50 (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—

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 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

15 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—

20 (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

25 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

30 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

35 (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—

40 (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 that section,

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

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction

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

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(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.

*Construction of sections 59 to 70*

5 71(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

10 (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.

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*Interest given by way of credit and set-off of credits*

20 81(1) Any interest payable by the Commissioners (whether under an enactment or instrument or otherwise) to a person on a sum due to him under or by virtue of any provision of this Act shall be treated as an amount due by way of credit under section 25(3).

(2) Subsection (1) above shall be disregarded for the purpose of determining a person's entitlement to interest or the amount of interest to which he is entitled.

(3) Subject to subsection (1) above, in any case where—

25 (a) an amount is due from the Commissioners to any person under any provision of this Act, and

(b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,

30 the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners and the person concerned shall be discharged.

(3A) Where—

35 (a) the Commissioners are liable to pay or repay any amount to any person under this Act,

(b) that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable under this Act to or by that person, and

40 (c) by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied,

any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum shall be disregarded in determining whether that sum is required by subsection (3)

45 above to be set against the amount mentioned in paragraph (a) above.

*Facts & Conclusions*

4 As indicated, the taxpayers have had a long battle to try and reconcile  
their VAT payments with their VAT liabilities, beginning with confusion as  
5 to the outcome of a VAT inspection carried out in October 2010.

5 Following a reconciliation of the company's accounts in December 2011,  
it appeared that an overpayment of nearly £6,000 had occurred and the  
company began a series of frequent contacts with the Revenue to resolve it.  
10 Complaint is made that these contacts were handled badly, inconsistently  
and inaccurately, with the result that there was a knock-on effect on the  
12/11 quarter, because by then the company did not want to continue  
making payments and magnify the overpayment situation they were  
satisfied had occurred. We note that the company had the assistance of an  
15 accountant and that its annual turnover was in the region of £300,000.

6 As we indicated at the hearing, an allegation of maladministration by the  
Revenue is not a matter which parliament has given us power to deal with  
and it must, as Mr Rowe correctly contended, be addressed in the first place  
20 to the Revenue Complaints Adjudicator. We are not therefore able to  
adjudicate upon the second of the company's appeal grounds, which states  
that they request "a VAT re-inspection from period 2009 to date in order  
that an on-going dispute between HMRC and ourselves can be resolved  
once and for all".

7 It is common ground, however, that – the company's allegations apart –  
there were actual defaults in timeous payment in the surcharge quarters in  
question and that the company had already entered the default surcharge  
regime when they occurred. That payments were not made in accordance  
30 with the returns – which in most cases were late – is not in dispute. The  
company's argument however is that the correct assessment of the  
surcharges cannot be undertaken without it being established exactly what  
was due from whom and when.

8 It will be seen from section 88 of the 1994 Act, that in principle both the  
taxpayer and the Revenue are entitled to set off amounts due from the one  
to the other. There is, accordingly, some potential force in the company's  
submission if the figures can be shown to substantiate it. Due to an  
administrative error, neither member of the tribunal had received the papers  
40 for the hearing before it commenced and indeed there were no sets available  
when we sat. Mr Rowe helpfully gave up his set (comprising over 120  
pages) for the presiding member of the tribunal to take away.

9 Perusal of these pages makes it clear that there are accounting  
uncertainties to be resolved before a final view can be taken on the issue of  
whether or not the calculation of the surcharges is correct, because if any  
amounts were owed to the taxpayer at the relevant time that fact is capable  
of being material, by virtue of section 59(4)&(5), to the "outstanding VAT"  
for the periods in question. This aspect of the matter was not examined in  
50 any detail at the hearing and, because we had not been able to see the full  
set of papers and digest them, it was not practicable to do so.

10 Since it is admitted that, whatever the precise figures turn out to be, there were chargeable defaults in the periods at issue for which no explanation other than the matters we have mentioned has been advanced, the appeal must in principle be dismissed because there is no ‘reasonable excuse’  
5 within the scope of section 59. The taxpayers are as much responsible for maintaining a correct record of their tax liabilities in a self-assessed tax as are the Revenue, and the alleged failure of the Revenue officers to assist in resolving the confusion cannot therefore be accepted as an excuse for the company not keeping its accounts in order.

10 11 Either party is at liberty to request the appeal to be re-listed before the same tribunal in the event that agreement cannot be reached with regard to the figures and any adjustment needed to the amounts of the surcharges.

15 *Further appeal rights*

12 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The  
20 application must be received by the tribunal no 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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**MALACHY CORNWELL-KELLY  
TRIBUNAL JUDGE**

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**RELEASE DATE: 09 May 2014**

