



**TC03603**

**Appeal number: TC/2014/01374**

*VAT – default surcharge – s 59 VATA 1994 – whether reasonable excuse –  
Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MAGNO LTD**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE PETER KEMPSTER  
MRS SHAMEEM AKHTAR**

**Sitting in public at Priory Courts, Birmingham on 8 May 2014**

**The Appellant did not appear and was not represented**

**Mr Phil Jones (HMRC Appeals Unit) for the Respondents**

## DECISION

1. The Appellant appeals against a default surcharge imposed pursuant to s 59  
5 VAT Act 1994 in respect of its VAT period 11/13.

2. The Appellant did not appear and was not represented. Prior to commencement  
of the hearing the Tribunal's clerk telephoned the Appellant and a representative of  
the Appellant confirmed that they were aware of the hearing but did not intend to  
appear. The Tribunal considered that it was in the interests of justice to proceed with  
10 the hearing, pursuant to Tribunal Procedure Rule 33.

### Legislation

3. Section 59 VAT Act 1994 provides for default surcharges for late submission of  
VAT returns and/or late payment of VAT.

#### “59 The default surcharge

15 (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

20 (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.

25 (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 make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below  
applies in any case where—

30 (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 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—

5 (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,  
10 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—

15 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

20 (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.

25 (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.

30 (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—

35 (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

40 (b) there is a reasonable excuse for the return or VAT not having been so despatched,

45 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 (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

10 (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—

15 (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,

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

25 (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.”

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

**“71 Construction of sections 59 to 70**

30 (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

35 (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.

40 (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.”

**Appellant’s Case**

5. The Appellant’s grounds of appeal were stated in its notice of appeal:

- (1) The reason for late payment was not because of lack of funds but because of lack of time - there were only limited staff in a small company. The period in question had been very busy and there was also the Christmas break. New procedures had now been put in place so that there would be no further defaults.
- 5 (2) The return in question was the largest amount of VAT the company had ever had to pay, and so the 10% surcharge was on an unusually high amount.
- (3) The company had not had any warning from HMRC that a fine would be incurred for a further late payment; if the company had known that it was on its last chance then it would not have defaulted again.
- 10 (4) The fine was unfair and would hit the company hard. A lower fine of £100 would be more appropriate.

### **Respondents' Case**

6. Mr Jones for HMRC submitted as follows.
7. The 11/13 return and payment were due electronically no later than 7 January  
15 2014 but had not been received until 14 January.
8. The company had also been in default in relation to VAT periods 08/12, 02/13 and 08/13. HMRC's records showed that an SLN had been sent to the company on 12 October 2012 in relation to the first default, and SLNEs had been sent to the company on 12 April and 11 October 2013 respectively in relation to the subsequent defaults.  
20 The company had had the same correspondence address throughout. Thus the company should have been well aware of the consequences of further defaults, including the imposition of escalating rates of surcharge.
9. The due dates for payment were known well in advance. The Christmas break was foreseeable and normal; in any event the payment was not made until the middle  
25 of January.
10. The rates of surcharge were set by statute. The Upper Tribunal had ruled that (a) the surcharge system was not disproportionate; and (b) that the First-tier Tribunal could not entertain arguments as to fairness of surcharges levied in accordance with the legislation.

### **30 Consideration and Conclusions**

11. We consider the Appellant's grounds of appeal give rise to two issues:
- (1) Was there a reasonable excuse (within the meaning of the VAT Act) for the late payment of VAT?
- (2) Is the surcharge disproportionate?
- 35 12. The company should have been aware of its VAT responsibilities and the relevant deadlines. Compliance with those responsibilities was important and adequate procedures should have been implemented. We find, from the evidence of

HMRC's records, that SLN/SLNEs were issued to the company notifying the previous defaults and warning of the consequences of any further default. It may be that, as those notices did not result in a surcharge being payable, the company did not pay sufficient attention to those notices. We conclude there was not a reasonable excuse for the delay in payment.

13. In relation to the alleged severity of the penalty: the Upper Tribunal in the case of *HMRC v Total Technology (Engineering) Ltd* [2013] STC 681 held that the system of VAT default surcharges is not disproportionate in law; and we consider that a penalty of approximately £888 is not disproportionate in amount in relation to a fourth default by the company. The Upper Tribunal in the case of *Hok Limited* [2013] STC 225 held that the perceived unfairness of the amount of a penalty is not a matter within the jurisdiction of this Tribunal. Neither HMRC nor the Tribunal have any statutory power to mitigate the amount of a surcharge calculated in accordance with the VAT Act.

14. For the above reasons we would dismiss the appeal and uphold the surcharge.

### **Decision**

15. The Tribunal decided that the appeal is DISMISSED

16. 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.

**PETER KEMPSTER  
TRIBUNAL JUDGE**

**RELEASE DATE: 13 May 2014**