



TC03064

Appeal number: TC/2013/03392

*VAT – default surcharge – reasonable excuse – payment date
misunderstanding – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FRANCO’S FAMILY RESTAURANT LIMITED Appellant

- and -

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

TRIBUNAL: JUDGE MANUELL

The Tribunal determined the appeal on 13 September 2013 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 May 2013 and HMRC’s Statement of Case undated (with bundle of documents).

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DECISION

1. The Tribunal decided that the Appellant had shown no reasonable excuse for the late payment of VAT for the accounting period ending 01/13, which was due by 28 February 2013. The surcharge penalty imposed was £1,410.35 at the rate of 5%.

2. 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.

3. 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).

4. 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 payments in question.

5. 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:

(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.

5 (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.

6. The Appellant contends that the payment was made on time according to HMRC's website which provided misleading information. According to the Appellant, the website stated that for the accounting period ending 31 January 2013, 10 the deadline for the VAT return submitted on line was 7 March 2013 and the deadline for payment was 7 extra calendar days for payment by electronic means. The Appellant requested that the surcharge be removed. The Appellant did not challenge the fact that it had paid its VAT late for the quarters ending 07/12 and 10/12, nor that it had been notified that it had thus entered the surcharge penalty regime.

15 7. HMRC's position was that the website stated: "**Pay electronically** Paying by electronic transfer gives you an extra seven days to pay, unless you make payments on account or annual returns." The Appellant's interpretation was mistaken.

8. In the Tribunal's view the website information is perfectly clear, and is repeated in the same terms in various places. There has been no change in the position. The Appellant misunderstood. The benefit of the additional seven days is from the last 20 date for filing *and* payment. It is made clear in HMRC's information that funds must be cleared by the due date. Leaving matters to the last moment, as was done here, is always likely to lead to problems. The Appellant had already entered the surcharge regime and so should have proceeded with caution and checked its over generous 25 interpretation with HMRC before taking a gamble with deadlines.

9. 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 Technology (Engineering) Ltd v Revenue and Customs Commissioners* [2012] UKUT 418 (TCC).

30 10. 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 35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

40 **RICHARD J MANUELL**
TRIBUNAL JUDGE

RELEASE DATE: 28 October 2013