



**TC03747**

**Appeal number: TC/2013/07110**

*Default surcharges – insufficiency of funds – time to pay agreements not appealable – VATA 1994 s59 & s71 – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JCR SECURITY LTD**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY  
MR JOHN ROBINSON**

**Sitting in public at 45 Bedford Square, London, on 11 June 2014**

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

**Ms Rita Pavely of HMRC London for the Crown**

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## DECISION

1 We were satisfied under Rule 33 that the taxpayer had been notified of the hearing  
and that, given that we were in possession of the taxpayer's written appeal, it was in  
5 the interests of justice to proceed with the hearing. The case concerns, first, an  
application to admit the appeal out of time and, second, appeals against default  
surcharges for the periods 03/13 and 06/13.

2 HMRC did not object to the appeal being admitted out time and, since the appellant  
has not been professionally advised and may not have understood the appeal system,  
10 we decided to accept the application.

### *Facts*

3 The appeal itself concerns the two VAT quarters mentioned, 03/13 and 06/13, for  
which the penalties were £435.95 and £1320.18 respectively, being 2% and 5% of the  
15 tax paid late.

4 The appellant's surcharge history shows that there were previous defaults in periods  
03/12 and 09/12. In the first period, a surcharge liability notice was issued warning of  
the taxpayer's entry into the surcharge regime and the consequence of further  
defaults, namely surcharges at the rates of 2%, 5%, 10% and 15% successively. In  
20 the second period, tax was paid two days late by the Faster Payments System,  
incurring a penalty of 2% - but since the taxpayer had made a time to pay agreement  
with HMRC the penalty was subsequently removed leaving the next default, if there  
was one, to attract the 2% surcharge rate.

25 5 For 03/13 the due date, after adding the concessionary extra seven days for  
electronic payments, was 7 May 2013 and payment was not received until 16 May,  
thus 9 days after the extended deadline, so a penalty at 2% of the tax paid late was  
incurred. In 06/13, the extended due date was 7 August 2013 and payments were  
received on 13 and 16 August, thus 6 and 9 days late, attracting a penalty at the 5%  
30 rate. In both cases, payment was made by the Faster Payments System as before.

6 In the case of 03/13, the appellant had sought agreement by HMRC to delay  
payment by three days and telephoned the VAT office on 2 May; the request was,  
however, rejected by HMRC on 3 May and the appellant was advised to pay as much  
35 as possible by the due date to minimise the amount of the surcharge. For 06/13, the  
appellant claims that HMRC indicated initially before the due date had arrived (the  
date is not given and HMRC have no record of the call) that another time to pay  
agreement spread over four weeks would be possible but, the next day, telephoned the  
company going back on this indication and refusing a time to pay agreement  
40 altogether.

7 We checked whether a refusal by HMRC to make a time to pay agreement is a  
matter which is appealable to the tribunal and we could find no indication that it is.  
The appellant was aggrieved by what is claimed to be HMRC's initial willingness to  
45 make such an agreement for 06/13, and their subsequent refusal to do so the day later;  
the Director of the company, Mr John Roberts, states that he had to remortgage his  
house in order to make the payments that were eventually made.

8 Given that parliament has not made this issue one which the tribunal can deal with, the appellant's remedy is to use, if desired, the official HMRC complaints procedure, which includes if necessary a review of the matter by the independent complaints adjudicator.

5

*Legislation*

9 The Value Added Tax Act 1994 provides:-

*59 The default surcharge*

10 (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

15 (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.

20 (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—

25 (a) a taxable person is in default in respect of a prescribed accounting period; and

30 (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.

35 (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—

40 (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

45 (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.

50 (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—

(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;

(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.

5 (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  
10 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.

(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  
15 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

20 (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,  
25 any surcharge liability notice the service of which depended upon that 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—

30 (a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(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  
35 or extended by that notice.

(9) In any case where—

(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

40 (b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

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

45 (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.

(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.

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

50 (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.

*Conclusion*

10 It is well established that if a surcharge complies with the statutory requirements in the circumstances of the case, it must be upheld and any indulgence or mitigation is a matter for the commissioners alone or, in exceptional cases, for judicial review; parliament has given the tribunal no power to reduce or mitigate default surcharges.

15 11 In so far as the immediate shortage of funds in each of the default periods under appeal was concerned, it is clear from section 71 cited above that we are prohibited from taking it into account, and no overwhelming or exceptional event was suggested as having led to that position. In the outcome, no reasonable excuse within the meaning of the legislation has been established: given the very limited powers which parliament has allowed to the tribunal, we regret that the appeal cannot succeed.

20

*Further appeal rights*

25 12 The taxpayer, not having been present or represented at the hearing of this appeal, is entitled pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to make an application in writing to be received by the tribunal no later than 28 days after this Decision is sent to it for the Decision to be set aside and remade.

30 13 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 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**

**RELEASE DATE: 20 June 2014**

