



TC05379

Appeal number: TC/2015/05466

VAT default surcharges - appellant sought to deduct vat due on its returns against input tax that had been refused by HMRC as tax related to transactions connected with fraudulent evasion of vat - also refused on appeal to the tribunal - appellant claimed decision to dismiss was under appeal - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX**

EUROTRADE (W) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER IAN ABRAMS**

**Sitting in public at Alexandra House, Parsonage Square, Manchester on 26 February
2016**

Mr Piyush Metha Director of the Appellant Company

Mr Barry Sellars, Officer of HM Revenue and Customs, for the Respondents

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DECISION

The Appeal

- 5 1. This is an appeal by Eurotrade (W) Limited (“the Appellant”) against default surcharges totalling £41,822.42 imposed by HMRC, for the Appellant’s failure to submit, by the due dates, payment of VAT due.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making the late payments.

Background

- 10 3. The Appellant was incorporated on 3 January 2003 and registered for vat with effect from the same date. The main trading activity declared on the VAT I was “importing and exporting fancy goods electronic items toys etc”.
- 15 4. The Appellant has been in the default surcharge regime from period 07/09 onwards having defaulted on VAT payments in periods 07/09, 10/09, 04/10 07/10, 10/10, 10/11, 04/12, 01/13, 04/13, 07/13 and 10/14
- 20 5. The company was on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires the Appellant to furnish VAT returns and pay the outstanding VAT on or before the end of the month following each calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].
6. 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. Section 59 (7) VATA 1994 sets out the relevant provisions:
- 25 “(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –
- 30 (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
- 35 (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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.”
7. The Appellant entered the surcharge regime in respect of period 07/09. The return having been received on time, all of the tax due remained outstanding at the due date.
- 40 The tax was paid late in part by an offset of £12069 against its 04/11 return, in further

part by a payment of £19,813.60 on 29 July 2013 and the balance of £22,257.01 by agreed offset against the Company's 10/12 return on 24 March 2014.

8. The vat payments due for the 10/09, 04/10 and 07/10 periods were also paid by agreed offset against the Company's 10/12 return on 24 March 2014.

5 9. The vat due on the 10/10, 07/11, 10/11 04/12, 01/13 and 04/13 remained outstanding at the date of this appeal.

10. The vat due for period 07/13, due on 07 September 2013, was paid late on 10 September 2013.

10 11. The Appellant wrote to HMRC on 12 August 2009, enclosing its period 07/09 return, acknowledging the payment due but requesting that it be adjusted against its return for period 08/06.

15 12. HMRC, in a letter of 3 August 2009, notified the Appellant of a decision to deny input tax of £261,389 relating to period 08/06, on the basis that the Appellant knew or should have known that the transaction with which the claim was associated was part of an alleged MTIC and connected with the fraudulent evasion of vat. The Appellant having replied on 4 August 2009, was clearly aware of that decision prior to the due date for period 07/09.

20 13. The Appellant subsequently appealed the refusal of input tax decision to the Tribunal as part of a consolidated appeal under references MAN/2007/01178, MAN/2009/0269 & MAN/2009/0253

14. The Appellant continued to make similar requests that its vat be off-set in respect of later periods, but without explaining why there was any expectation of a refund or off-set, to satisfy the tax when due.

25 15. The appeals under references MAN/2007/01178, MAN/2009/0269 & MAN/2009/0253 were heard in November 2013 and were dismissed.

16. On 2 September 2015, following a request by the Appellant on 8 July 2015, HMRC reviewed the default surcharges under appeal but upheld their decision.

17. The Appellant lodged an appeal with the Tribunal on 22 September 2015.

Appellant's Contentions

30 18. The Appellant's grounds of appeal as set out in its Notice of Appeal are:

"We had a case with the Tribunal in November 2013 and the decision (to dismiss the appeal) was made in January 2015.

We have appealed the decision to the Upper Tier. Ref UT/2015/0096

35 The oral hearing is going to take place. We are still awaiting for the hearing date. If we are successful than the said duties and surcharges will not be payable."

19. At the hearing the Mr Mehta, a director of the Appellant Company said that the company's appeal against HMRC's refusal of the 08/06 input claim had been taking too long and that is why they "decided to net it off." He said that in each quarter the company had written to HMRC explaining this, but had received no reply. He said
5 that the company had in any event being paying off the outstanding VAT and at the date of appeal and paid approximately £100,000. He said that it was not an insufficiency of funds which had caused the delayed payments.

20. Mr Mehta accepted that he was unable to provide any evidence of an appeal to the Upper Tribunal against the First tier Tribunal's decision to dismiss the company's input tax claim, saying that matters had been left with the company's solicitors.
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HMRC's Contentions

21. There is a statutory obligation on a person required to make a return, to pay the VAT to HMRC. Regulation 40 of the Value Added Tax Regulations 1995 states that any person required to make a return "shall pay" to HMRC "such amount of VAT as
15 is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return."

22. Until such time as HMRC have accepted and agreed an input tax claim it is not available for set off. In any event the Appellant's appeal against HMRC's decision to reject the it's input tax claim had been rejected by the Tribunal.

20 23. HMRC refer to the Tribunal direction in the case of *R (on the application of UK Tradecorp Ltd) v Customs and Excise Commissioners'* [2005] STC 2008, which held that:

"The right to deduct input tax was a fundamental principle of the common system of value added tax (VAT) established by the Sixth Directive and member states should not
25 adopt measures designed to preserve the rights of the treasury which undermined the right to deduct VAT. However, the right to deduct did not arise as soon as a claim to deduct was duly made. Moreover, the proposition that the claim itself was entitled to the same protection from derogation by national legislation as an admitted or established right to deduct was not correct. It was settled law that there was a critical distinction
30 between an unadjudicated claim to input tax and an admitted or established claim. Until the claim was accepted or established there was no right to payment. The right under art 17 to deduct input tax had to be exercised in accordance with art 18(1) and (2) and might give rise to a refund. However, it was clear that there was no right to a refund unless the right to deduct was exercised in respect of taxes actually due. Furthermore, as a matter of
35 practical common sense, it was incumbent on the taxable person to satisfy the commissioners of his entitlement to a deduction. Fiscal neutrality required that that should be so and that repayments should not be made to a taxable person who had or showed no such entitlement. It was not sufficient merely to make a claim to be entitled or treated by the law as entitled to have the same protection. Accordingly, there was no
40 prima facie duty on the part of the commissioners to repay input tax until the claim had been agreed or upheld. *Capital One Developments Ltd v Customs and Excise Comrs* [2002] STC 479 applied. *Garage Molenheide BVBA v Belgium* (Joined cases C-286/94, C-340/95, C-401/95 and C-47/96) [1998] STC 126 considered."

24. The Appellant should therefore have made payment of the sums due by the due dates.

5 25. The Appellant claims that it has lodged an appeal with the Upper Tier Tribunal, but has not produced any evidence of an application for permission to appeal or the appeal being registered as pending with the Upper Tribunal.

26. Irrespective of the outcome of any appeal to the Upper Tribunal the VAT due in respect of the VAT periods relating to default surcharges under appeal, remained payable.

10 27. The Appellant has been in the default surcharge regime from period 07/09 onwards. When the Appellant first entered the Default Surcharge Regime, included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

15 *“Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.”*

20 28. The Surcharge Liability Notice V160 advised a trader how the surcharges are calculated and the percentages used. Subsequent Surcharge Notices advise the trader of the percentage used to calculate the current surcharge, if one has been issued, and/or the percentage which will be used in calculating the surcharge for any subsequent default.

25 29. The potential financial consequences attached to the risk of a default should have been known to the Appellant from this point on, given the information printed on the Surcharge Liability Notice.

30 30. The requirements for submitting timely electronic payments can in any event be found-

- In notice 700 “the VAT guide” paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

31. The surcharges have therefore been correctly issued in accordance with the VAT Act 1994 s 59(4).

35 **Conclusion**

32. The onus of proof rests with HMRC to show that the surcharges were correctly imposed. If so established, the onus then rests with the Appellant to demonstrate

whether there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

33. The VAT payment for the relevant periods were made late and therefore the default surcharges were correctly imposed pursuant to VATA 59(5).

5 34. The issue therefore is whether the Appellant has a reasonable excuse for the late payments.

35. The proprietors of the Appellant Company were aware of the due dates for payment of the VAT due for the relevant periods. They deliberately withheld payment on the basis that they sought to offset against the VAT due, the earlier disallowed input tax claim in respect of period 08/06. Although they may have disagreed with HMRC's refusal of the claim and appealed to the Tribunal that did not excuse the late payments.

10 36. The right to deduct does not arise as soon as a claim to deduct is made. As stated in *R (on the application of UK Tradecorp Ltd) v Customs and Excise Commissioners'* there is a distinction between an unadjudicated claim to input tax and an admitted or established claim. Until a claim is accepted or established there is no right to payment. It was incumbent on the Appellant to satisfy HMRC of its entitlement to a deduction. It is not sufficient merely to make a claim, to be entitled or treated by the law as entitled to receive payment. Accordingly, there was no prima facie duty on the part of HMRC to repay input tax unless and until the claim had been agreed or upheld.

15 37. The burden of proof is on the Appellant to show that it has a reasonable excuse for the late payment of VAT. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

38. The appeal is accordingly dismissed and the surcharge upheld.

25 39. 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.

35 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 19 September 2016

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