TC04329

Appeal number: TC/2014/00950

VAT – default surcharge – s 59A VATA 1994 – whether reasonable excuse – No – whether surcharge disproportionate – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FAUN ZOELLER (UK) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
MR LESLIE HOWARD

Sitting in public at Priory Courts, Birmingham on 5 February 2015

Mr Richard Horton (Company Secretary) for the Appellant

Mr Tom Eyre (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("the Company") appeals against a default surcharge in the amount of £86,464.00 imposed by the Respondents ("HMRC") pursuant to s 59A VAT Act 1994 in respect of the Company's VAT period 09/13.

Legislation

2. Section 59A VAT Act 1994 provides for default surcharges for late submission of VAT returns and/or late payment of VAT for traders who are subject to the payments on account ("POA") regime for VAT.

3. Section 71 VAT Act 1994 (so far as relevant) construes "reasonable excuse" for the purposes of s 59A:

> "71 **Construction of sections 59 to 70**
>
> (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."

Appellant's Case

4. Mr Horton submitted as follows for the Company.

5. It was accepted that the VAT was received late by HMRC. It was also accepted that the Company had a history of late VAT payments. Mr Horton had joined the Company only shortly before the default now under appeal and had instituted new procedures to ensure proper compliance with VAT obligations. Although he had been informed by his staff that payment instructions had been issued to the Company's bank on the payment deadline day in sufficient time for funds to be received by HMRC before close of business, it was now accepted that, on further enquiry, there was no clear evidence of that; also, the bank could not state that it had received the payment instructions until the following week (when the instructions were resent). The only explanations were human error by the Company's staff or a fault with the Company's fax machine. On the latter possibility, the Company's IT provider had been asked to attempt to retrieve a record of sending, but that had not proved feasible.

6. The amount of the surcharge was disproportionate, for the following reasons:

> (1) The Company was in the POA regime because of its significant turnover. One effect of that was that the quarterly balancing payment was much larger than the other two monthly payments on account. Thus a default on the balancing payment triggered a disproportionately large surcharge. The

Company was at a disadvantage compared to a trader who was not in the POA regime and thus the surcharge was disproportionate. Further, the ability to gain an extra seven days' grace for electronic payment was denied to POA traders.

(2) The Company sourced its stock from France and Germany, and sold in the UK. Its purchases attracted no input tax but there was output tax on its sales. Thus there were large net VAT payments due, and the surcharge (being calculated as a percentage of the net VAT) was also very large and thus disproportionate.

(3) In the period in question the Company had dealt with an unusually large number of orders for vehicles with cabs as well as chassis. That further increased the amount of the VAT on which the surcharge was calculated.

(4) The Company operated at a loss and, while its parent had in the past been willing to waive or defer certain intra-group debt, a surcharge liability of this magnitude could adversely affect the going concern basis of the Company.

(5) As noted by the Upper Tribunal in *HMRC v Total Technology (Engineering) Ltd* [2013] STC 681, there was no statutory provision for any cap on the default surcharge.

7. He had proposed to HMRC that the surcharge should be recalculated as if the default amount was only one month's overall VAT liability – which would remove the distorting effect of the POA regime – but that had been rejected.

Respondents' Case

8. Mr Eyre submitted as follows for HMRC.

9. In relation to the instructions to the bank, the Company had been invited to obtain confirmation from the bank that the instructions had been received by the bank in good time for payment on the due date. That had not been provided, unlike in relation to a previous default where the bank had confirmed in writing the timing of their instructions. Copies of internal Company emails that had been provided were not conclusive and did not discharge the burden of proof on this point.

10. In relation to the argument that the surcharge was disproportionate:

(1) The Upper Tribunal in *Total Technology* had confirmed that the VAT default surcharge system was not in principle disproportionate.

(2) The Company had a history of late payment, which was why the surcharge was at the rate of 15%.

(3) It was accepted that the Company's VAT liability in the relevant period was higher than normal, but not significantly so – there had been similar peaks in other periods. It was just bad luck that this latest surcharge was triggered for a period with a large VAT liability.

(4) It was possible for a POA trader to elect to pay larger payments on account than the statutory minimum, but no one did so because it would

produce a cash flow disadvantage compared to using the "one twenty-fourth" standard method.

(5) The method of calculation of the surcharge was stipulated by the VAT Act and there was no statutory permission for HMRC to adopt an alternative calculation as proposed by the Company.

Consideration and Conclusions

11. We do not accept that there was a reasonable excuse for the late payment, within the meaning of s 71. As has been said many times by this Tribunal and the predecessor VAT Tribunal, a trader who leaves payment of VAT liabilities until the last possible moment must accept the consequences of any unanticipated delay. There is no satisfactory evidence that the bank had been instructed in sufficient time for the deadline to be met. Mr Horton had researched that point diligently but even the Company's own staff appeared to be unclear as to what exactly had occurred.

12. We also do not accept that the disputed surcharge was "disproportionate" in law.

(1) The Upper Tribunal decision in *Total Technology (*which is binding on this Tribunal) is clear that the general system of s 59 surcharges is not disproportionate.

(2) We have considered whether the fact that the disputed surcharge arises under s 59A rather than s 59 is material. Section 59A is in point because the Company is within the POA regime by virtue of being a large payments trader. We have the considered the differences between the surcharge implications for POA traders and for other traders – in particular, the points made by Mr Horton for the Company concerning the particular effects of the s 59A regime for a POA trader (see [10] above) – but our conclusion is that the rationale of the decision in *Total Technology* applies equally to s 59A surcharges incurred by POA traders. Any differences, which in any event are not major, derive from the fact that the VAT payments cash flow pattern of a POA trader will be different from that of a normal quarterly-payments trader. That is an inevitable consequence of some traders being required to make POAs (or balancing payments) monthly. We consider that, for the same reasons as set out by the Upper Tribunal in relation to s 59 surcharges, the general system of s 59A surcharges is not disproportionate in that there is nothing in s 59A "which leads us to the conclusion that its architecture is fatally flawed" (per *Total Technology* at [99]).

(3) On the particular surcharge assessed on the Company, the Upper Tribunal stated (at [99]):

> "In our judgment, there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are, however, some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair

> for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged)."

We have noted the points made by Mr Horton concerning the quantum of the surcharge but we conclude that (a) there was nothing significantly unusual or unpredictable about the Company's trading in the relevant period; and (b) the main factor for the size of the surcharge was simply that the Company had been a serial defaulter (in the periods prior to Mr Horton's appointment). We conclude that the disputed surcharge is not disproportionate in amount, in the sense examined in *Total Technology*.

13. For the above reasons we would dismiss the appeal.

Decision

14. As communicated to the parties at the conclusion of the hearing, the Tribunal decided that the appeal is DISMISSED.

15. 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: 18 March 2015