



**TC05259**

**Appeal number: TC/2015/06891**

*VAT – Default Surcharge – Payment one day late – Whether reasonable  
excuse – No – Proportionality considered – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GM POLYSTYRENE LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN BROOKS  
SIMON BIRD**

**Sitting in public at Eastgate House, Newport Road Cardiff on 4 July 2016**

**Graham Middleton, director of GM Polystyrene, for the Appellant**

**Anne Rees of HM Revenue and Customs, for the Respondents**

## DECISION

1. GM Polystyrene Limited (the “Company”) appeals against a VAT default surcharge in the sum of £821.80 imposed, under s 59 of the Value Added Tax Act 1994 (“VATA”), as a result of the late payment of VAT for the VAT accounting period ended 31 July 2015. Having heard Mr Graham Middleton on behalf of the Company and Mrs Anne Rees for HM Revenue and Customs (“HMRC”) we dismissed the appeal. Although we gave oral reasons for reaching our conclusion Mr Middleton expressed his dissatisfaction with the decision and indicated that he would consider taking the matter further. We have therefore provided this decision in order to enable him to decide whether to apply for permission to appeal against our decision and to assist him in formulating any such appeal on behalf of the Company.

2. A liability to a VAT default surcharge arises under s 59 VATA if a VAT return or the VAT shown on it are not submitted to HMRC on time. On the first default a “surcharge liability notice” is issued. This carries a warning that a liability to a surcharge will arise if there are any further defaults within the next 12 months (the “surcharge period”). Any late submission of a VAT return or payment of VAT after the issue of a surcharge liability notice will result in a default surcharge at a rate of 2% of the outstanding VAT. This percentage increases with any subsequent default from 5% to 10% and then 15% with the surcharge period being extended by 12 months on every further default.

3. However, where there is a reasonable excuse for either the late submission of a VAT return or late payment of VAT, no liability for a surcharge arises and the default will be treated as not it had not occurred. Although there is not a definition of reasonable excuse in the legislation, it “is a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]), s 71 VATA precludes the reliance on another person from being a reasonable excuse.

4. The legislative provisions to which we have referred are set out in full in the appendix to the decision.

5. In this case the Company had submitted its 07/15 VAT Return, which was due on 31 August 2015, on 20 August 2015. However, payment of the VAT of £8,218.05 shown on that return, which was due on 7 September 2015 was actually paid through the bank using the faster payment service on 8 September 2015 which, although one day late, rendered the Company liable to a default surcharge. As this was the Company’s fourth default the surcharge was calculated at 10% of the VAT shown on the VAT Return, £821.80.

6. The Company’s Notice of Appeal, written by Mr Middleton, states:

The VAT [Return] was submitted on time.

The payment was a few days late.

I needed to know that the VAT was correct before making payment. Unfortunately my bookkeeper was away on holiday. I should have contacted HMRC to tell them. I have recently lost my mother so its been very difficult to focus on everything going on.

We have a payment going out on Friday for this ¼ VAT

7. Mr Middleton told us that he now realised that he should have either contacted the Company's bookkeeper and made the payment on time or HMRC to explain the circumstances before the due date for payment. He explained that he had contacted HMRC in relation to a more recent VAT period and that the surcharge in respect of that period had been suspended. He also said that he would ensure that procedures were in place to ensure that VAT payments were made on time.

8. He explained that his mother had died in April 2015. This had been a particularly difficult time for him. He had been the sole carer for his aunt who had died in October 2014 and, as he had been acting as her attorney, was in the process of dealing with her affairs at the time his mother had died. He explained that it had taken until June 2016 to resolve all outstanding issues in relation to the administration of their estates.

9. Mr Middleton confirmed that he was aware of default surcharge notices being issued to the Company which, notwithstanding his personal circumstances, had been able to continue in business and had submitted its 04/15 VAT Return and paid the VAT shown on that Return on time.

10. Although we do, very much, sympathise with Mr Middleton, the issue before the Tribunal is the Company's appeal against a default surcharge imposed as a result of the late payment of VAT, albeit by one day, in respect of its 07/15 VAT accounting period. It is not disputed that the VAT was not paid on time and therefore, unless there was a reasonable excuse for that late payment, the surcharge must stand.

11. In our judgment a planned holiday by the Company's bookkeeper cannot amount to a reasonable excuse. The VAT return has been submitted on 20 August 2015 and therefore the amount of VAT due would have been known before the expiry of the time in which it should have been made. Also the fact that HMRC suspended a VAT default surcharge in respect of a later period cannot amount to reasonable excuse for the late payment of VAT due for 07/15. Although we took into account Mr Middleton's personal circumstances, we consider that as the Company did continue in business throughout this period and was able to submit the 04/15 VAT Return and make payment on time it cannot amount to a reasonable excuse either.

12. We also considered whether it is proportionate for a default surcharge to be imposed when the VAT for 07/15 was paid only one day late. Proportionality in relation to the default surcharge was considered by the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Trinity Mirror Plc* [2016] STC 352 (a decision that is binding on us) which observed, at [66] that the absence of any financial limit on the level of surcharge may result in a penalty that might be considered disproportionate but this was only likely to occur in a "wholly exceptional case".

13. We do not consider that the present case could properly be described as a “wholly exceptional case”. Therefore, in the absence of a reasonable for the late payment of VAT by the Company for its 07/15 VAT accounting period we have no alternative but to dismiss the appeal and confirm the surcharge in the sum of £821.80.

14. 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.

**JOHN BROOKS**

**TRIBUNAL JUDGE**

**RELEASE DATE: 8 JULY 2016**

### **Appendix**

#### **Legislation referred to in the Decision**

##### ***Value Added Tax Act 1994***

##### **Section 59 Default Surcharge**

(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
- (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.

(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—

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

(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—

- (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,

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—

- (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.

(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.

(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—

1. (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).

(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

- (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—

- (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,

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.

(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.

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

(2) For the purposes 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 reasonable excuse; and
- (b) where reliance is place 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.

(3) .....