[2016] UKFTT 0540 (TC)

TC05289

Appeal number:TC/2015/05141

VAT – default surcharge – late payment of VAT – whether reasonable excuse for late payment – whether penalty disproportionate – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DENNISON TRAILERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS BEVERLEY TANNER

Sitting in public in Manchester on 18 April 2016

Mr Graham Koppenhol, accounts manager appeared for the Appellant

Mr Barry Sellers of HM Revenue & Customs appeared for the Respondents

DECISION

Introduction

1. This is an appeal against a default surcharge in respect of the Appellant's VAT accounting period 03/15. The Appellant was required to account for VAT by way of payments on account pursuant to section 28 Value Added Tax Act 1994 ("VATA 1994"). We explain the Appellant's obligations to make payments on account in more detail below. It was common ground that a balancing payment of £668,221.35 for period 03/15 was due for payment on or before 30 April 2015. Payment was received by HMRC one day late on 1 May 2015.

2. Subject to the issue of reasonable excuse, the appellant had a previous default in relation to the balancing payment for period 06/14. That caused the default for period 03/15 to fall within a surcharge period for the purposes of the default surcharge regime in section 59A VATA 1994. The rate of surcharge for 03/15 was therefore 2% giving rise to a default surcharge of £13,364 which is the matter under appeal. The grounds of appeal are broadly as follows:

(1) There was a reasonable excuse for late payment in relation to period 06/14 so that there should be no default surcharge for the default in period 03/15, alternatively

(2) In the case of the default for period 03/15 the default surcharge regime gives rise to a disproportionate penalty.

3. The Appellant's case was presented by Mr Graham Koppenhol. He is the Appellant's UK Accounts Manager and he gave evidence on behalf of the Appellant. We also heard evidence from Mr Tom Clayton the Appellant's financial controller. The Respondent's case was presented by Mr Graham Sellers.

The Law

4. The default surcharge regime for traders who are required to make VAT payments by way of payments on account is contained in section 59A VATA 1994. A default arises where HMRC does not receive a payment required to be made in full by the due date. If there is more than one default in respect of payments on account for any one accounting period then the defaults are aggregated and the default surcharge for that period is calculated by reference to the aggregate default.

5. *Section 59A(8) VATA 1994* provides as follows:

" *(8) 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 –*

(a) in the case of a default which is material for the purposes of the surcharge …

(i) that the payment on account of VAT 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 by the day on which it became due, or

(ii) that there is a reasonable excuse for the payment not having been so despatched,

…

he shall not be liable to the surcharge and … he shall be treated as not having been in default …"

6. Section 59A(12) effectively provides that the Commissioners shall be taken not to have received payment by the due date unless by the last day for payment the sum has become available to the Commissioners. In other words cleared funds must be available to the Commissioners by the due date.

7. The meaning of reasonable excuse in this context is well established. In *The Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234 HH Judge Medd QC said:

" *It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?*"

8. Section 71 VATA 1994 provides that an insufficiency of funds to pay any VAT due is not a reasonable excuse and that where reliance is placed on another person to perform any task, neither the fact of that reliance nor dilatoriness or inaccuracy on the part of that person can be a reasonable excuse.

9. Section 28 VATA 1994 makes provision for the Treasury, by order, to provide that certain traders shall make payments on account of their VAT liabilities. Section 28(2A) provides for the Commissioners to give directions to such traders as to the manner in which payments are to be made.

10. The Value Added Tax (Payments on Account) Order 1993 provides that traders with an annual VAT liability of more than £2.3m must make payments on account. Interim payments must be made no later than the last day of the second and third months of each quarterly VAT accounting period. A balancing payment is then made with the VAT return no later than the last day of the month following the end of the accounting period. There is a formula for calculating the amount of the two interim payments.

Findings and Reasons

11. Based on the evidence before us we make the following findings of fact.

12. On 7 April 2014 HMRC wrote to the Appellant stating that the payment on account regime applied to businesses whose total annual VAT liability exceeds £2.3m. It noted that the Appellant's total VAT liability for the year ended December 2013 was £2,324,465. The letter stated that as a result the Appellant was required to make payments on account. It also set out details of the due dates for payment of the payments on account for periods 06/14 to 03/15. For periods 06/14 and 03/15 the details given were as follows:

Period	**Amount Due £**	**Due By**
06/14	96,852	30 May 2014
06/14	96,852	30 June 2014
06/14	Balancing Payment	31 July 2014
03/15	96,852	27 Feb 2015
03/15	96,852	31 Mar 2015
03/15	Balancing Payment	30 Apr 2015

13. On the same date HMRC also wrote to the Appellant with a "Notice of Direction" pursuant to section 28(2A) ("the Notice"). The Notice was addressed to the managing director and directed the Appellant to make payments on account and balancing payments by electronic means. It referred to VAT Notice 700/60 as containing more information about payments on account but specifically stated as follows:

> "**Due Dates for Payment**
>
> Please note that the businesses in the Payments on Account regime are not entitled to the seven day extension to the due date for payments made electronically. If your company was previously granted the seven day extension, this is now withdrawn. Payments on Account must clear to HMRC's bank account by the last working day of the month in which they are due. The balancing payment for the VAT return must be received in HMRC's account on or before the due date indicated on the VAT return."

14. The Notice also contained advice about payment processing times of banks. It advised traders to find out the cut off time applied by banks for initiating payments and that late payments would be subject to default surcharge.

15. Notice 700/60 "Payments on Account" is available on HMRC's website. It states as follows at section 2.4:

"**2.4.1 Due dates for payments on account**

The due dates for payments on account are the last working day of the second and third months of every VAT quarterly period, regardless of your period end dates - we will send you a payment schedule listing all your payment dates. If you are in POA, and submit quarterly returns, you will not get the 7 extra days to pay and submit your VAT return, as described on the How to Pay VAT.

…

2.4.2 Due dates for quarterly balancing payments

Once you are in POA your quarterly balancing payments (see paragraph 1.3) due with your VAT return must also clear to our bank account by the last working day of the month…"

16. Since April 2010 it had been mandatory for all businesses with an annual turnover of £100,000 or more to file VAT returns online and to pay the VAT falling due electronically. In general where a trader makes payment electronically it has an additional 7 days to make payment. However, where a trader is required to make payments on account HMRC do not grant that extension.

17. Mr Koppenhol told us and we accept that he checked the HMRC website. It is likely that was in or about April 2014 although Mr Koppenhol could not say when, and he did not print out the webpage that he had viewed. He subsequently checked again shortly before the hearing and produced a page showing payment deadlines for VAT returns. It states as follows:

"**Deadlines**

…The deadlines for submitting the return online and paying HMRC are usually the same – 1 calendar month and 7 days after the end of the accounting period. You need to allow time for the payment to reach HMRC's account.

Exceptions

The deadlines are different if, for example, you use the VAT Annual Accounting Scheme …"

18. In the event Mr Koppenhol said that the Appellant had continued to follow its established VAT payment practices and followed advice and information provided by HMRC.

19. Mr Koppenhol pointed to the absence of any exception referable to payments on account. He also referred us to another HMRC document which he had identified online shortly before the hearing and which stated "payment by BACS CHAPs etc gives up to 7 extra days for funds to reach our account". Mr Koppenhol submitted that these documents illustrated inconsistencies in HMRC's information to traders when referring to the due dates for payment. Some referred to payments on account whilst others did not.

20. The various dates of payment were not in dispute. For period 06/14 the payments were made on 30 May 2014, 30 June 2014 and 7 August 2014. Mr Sellers suggested that the fact the two interim payments were made on time suggested that the Appellant was aware that the additional 7 days was not available for payments on account. We accept Mr Koppenhol's evidence that this was not the case and that if he had known that the 7 day extension did not apply then the Appellant was in a position to pay and would have paid the balancing payment on time.

21. We also accept Mr Koppenhol's evidence that this was the only time since April 2008 that the Appellant had been late in making a payment, and on that occasion the Appellant had been granted time to pay arrangements by HMRC.

22. It was not disputed that the balancing payment for period 03/15 was due on 30 April 2015 and it was late. Mr Koppenhol initiated the payment using the Appellant's online banking facility at 18.08 on 30 April 2015. Payment was not therefore received by HMRC until close of business on 1 May 2015.

23. The Appellant contends that it had a reasonable excuse for not making the 06/14 balancing payment on time. It did not contend that there was any reasonable excuse for late payment of the 03/15 balancing payment.

24. Mr Koppenhol relied on what he considered were inconsistencies in the information provided by HMRC. We do not accept that there were any such inconsistencies. The specific information provided to the Appellant in the letter and Notice dated 7 April 2014 was clear and left no room for misunderstanding. The 7 day extension did not apply. The information identified by Mr Koppenhol online was plainly more general. Indeed the web page viewed by Mr Koppenhol at the time identifies the existence of other deadlines and gives as an example traders using the VAT Annual Accounting Scheme. We do not consider that HMRC can be criticised for not referring in that web page to the position in relation to payments on account. Nor do we consider that the Appellant could reasonably rely on it in the face of specific information provided directly to the Appellant.

25. Mr Koppenhol suggested that the contents of the Notice were akin to the small print in a contract. For something so significant HMRC should not be entitled to rely on the Notice. We do not accept that submission. The Notice was specifically addressed to the Appellant. It clearly set out the position as to the Appellant's payment obligations.

26. Mr Sellers submitted that when a trader was moved on to a new scheme such as the payment on account regime it would be reasonable for the trader to read available literature which described the scheme. We accept that submission.

27. Taking all the circumstances into account we are not satisfied that the Appellant had a reasonable excuse for late payment of the VAT due for period 06/14.

28. The Appellant's alternative argument was that the penalty was disproportionate and unfair in the particular circumstances of the Appellant. In particular, in the context of a payment which was only one day late as a result of human error by an

otherwise tax compliant trader. Mr Koppenhol relied on the Upper Tribunal decision in *Total Technology (Engineering) Ltd v Revenue & Customs Commissioners [2012] UKUT 418 (TCC)*. He emphasised the need for a proportionate relationship between the penalty and the aim being pursued. He referred to the flaw in the default surcharge regime identified in Total Technology at [93]:

> "93. *There is no maximum penalty*. This, we think, is a real flaw at both the level of the regime viewed as a whole and potentially at the individual level of a taxpayer with a very large payment obligation … But any approach to the analysis must pay due regard to the principle that the absolute amount of the penalty must be proportionate in the context of the aim pursued and in the context of the objectives of the Directive…"

29. The Upper Tribunal went on to say in [93] that there must be some upper limit to a default surcharge, although it did not consider it sensible to suggest where that limit might be. It did not need to because the penalty imposed in that case was £4,260 which was of a wholly different character from the £130,000 penalty set aside by the First-tier Tribunal in *Enersys Holdings UK Ltd v Revenue & Customs Commissioners [2010] UKFTT 20 (TC)*. The Upper Tribunal accepted that a substantial penalty may legitimately be imposed and that the penalty it was considering could not properly be described as "devoid of reasonable foundation" (see *Gasus Dosier-und Fördertechnik GmbH v Netherlands (1995) 20 EHRR 403*) or "not merely harsh but plainly unfair" (see *International Transport Roth GmbH v Secretary of State for the Home Department [2003] QB 728*).

30. The Upper Tribunal in *Revenue & Customs Commissioners v Trinity Mirror [2015] KUT 421 (TCC)* also acknowledged that the absence of an upper limit was a flaw in the default surcharge regime. However at [66] it said that it was only in a "wholly exceptional case" that a penalty would be described as disproportionate. Indeed the Upper Tribunal could not readily identify what circumstances might justify such a finding. It did not endorse a suggestion by counsel that a "spike" in profits in the accounting period of default might constitute exceptional circumstances.

31. At [73] of Total Technology the Upper Tribunal also said that a wide margin of appreciation would be afforded to the State in considering whether a penalty was disproportionate to the gravity of the infringement.

32. Mr Koppenhol relied on [88] of Total Technology where the Upper Tribunal referred to the fact that there was no provision to reduce a penalty where payment was only one day late. However, that was seen as reflecting the aim of the legislation which was to ensure compliance with the obligation to pay by the due date. The real issue was whether on an individual basis the penalty was disproportionate.

33. In the present case Mr Koppenhol submitted that the penalty was disproportionately high given the gravity of the default. We accept the evidence of Mr Clayton that in the year ended 31 December 2013 the Appellant made a loss of some £123,000. In the year ended 31 December 2014 it made a profit of some £413,000. The default surcharge therefore amounted to the profits of approximately 2 weeks of production. In those circumstances it was argued that the penalty was

disproportionately high compared to the gravity of the default. Mr Koppenhol characterised the default as a mistake arising from human error.

34. We are satisfied that the 03/15 balancing payment was late because of a mistake. It involved a simple human error of not initiating the online payment in time for payment to be made. Mr Sellers did not take issue with that characterisation of the default. He relied on a decision in *Garnmoss Ltd v Revenue & Customs Commissioners [2012] UKFTT 315 (TC)* at [12]:

> "We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses."

35. That was said in the context of reasonable excuse and not in the context of proportionality so it is not relevant to this part of our decision. In Trinity Mirror a payment which was one day late led to a default surcharge of £70,906. The Upper Tribunal set out the correct approach to judging proportionality at [63] as follows:

> " 63. The correct approach is to determine whether the penalty goes beyond what is strictly necessary for the objectives pursued by the default surcharge regime, as discussed in detail in Total Technology and whether the penalty is so disproportionate to the gravity of the infringement that it becomes an obstacle to the achievement of the underlying aim of the directive which, in this context, we have identified as that of fiscal neutrality. To those tests we would add that derived from Roth in the context of a challenge under the Convention to certain penalties, namely "is the scheme not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?"

36. At [68] the Upper Tribunal turned to the facts of Trinity Mirror:

> "68. With these observations in mind, we turn to the particular facts of Trinity Mirror's case. Viewed simply in absolute terms, the surcharge of £70,906.44 is large. Its size was dictated by the substantial sum of VAT, £3,545,324, that Trinity Mirror paid late, the surcharge being levied at the rate of 2% for a first default within the surcharge period. Although payment was delayed by only one day, we accept that the scheme of the default surcharge regime is to impose a penalty for failing to pay VAT on time, and not to penalise further for any subsequent delay in payment. That, as we have described, is entirely consistent with the fiscal neutrality aim of the directive. It would not be possible, therefore, in our view, for the fact that the payment was only one day late to render an otherwise proportionate penalty disproportionate."

37. For the same reasons we consider that the fact the payment in the present case was only one day late does not render the penalty disproportionate. Nor does the size of the penalty compared to what we know of Appellant's financial position render it disproportionate.

38. Mr Koppenhol also argued that the size of the penalty was disproportionate because the default occurred in a period when the Appellant had a particularly high level of intra-community purchases and a lower level of domestic purchases. The effect of this was that the input tax credit available to the Appellant was unusually low and the VAT liability correspondingly higher than normal. He roughly estimated

that by eliminating this distortion the penalty would only have been in the order of £4,400.

39. We do not accept that this can be regarded as an exceptional circumstance which makes the default surcharge disproportionate in the particular circumstances of the Appellant's business. There was no suggestion by the Appellant that it was anything other than an incident of the Appellant's usual course of trade. A 2% penalty on the VAT which went unpaid is not in our view disproportionate.

40. We have had regard to the principles outlined by the Upper Tribunal in *Total Technology (Engineering) Limited v Commissioners for HM Revenue & Customs [2012] UKUT 418 (TCC)* and most recently in *Commissioners for HM Revenue & Customs v Trinity Mirror [2015] UKUT 0421 (TCC)*. In the light of those principles and on the facts of the present case we do not consider that the default surcharge operated in any way that could be described as disproportionate.

41. In all the circumstances we must dismiss the appeal.

42. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 2 AUGUST 2016