



TC05420

Appeal number: TC/2016/02625

*VALUE ADDED TAX – Default Surcharge – claimant “slightly late” -
whether penalty proportionate – whether reasonable excuse – no – appeal
dismissed -*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SOUTH LINK LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 26 August 2016 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 04 May 2016 and HMRC’s Statement of Case dated 31 May 2016.

DECISION

1. This is an appeal by the Appellant against a default surcharge of £983.73 which
5 is 2% of the tax due and in relation to the VAT period 10/14. The due date for VAT
returns and payment was 7 February 2015. The VAT return was received before the
due date on 27 January 2015. The Appellant paid their VAT by way of two Faster
Payment Service transactions. The first payment was received before the due date on
10 6 February 2015. The second payment was received after the due date on
9 February 2015. As a result of the late payment a Surcharge Liability Notice was
issued.

The law

2. The relevant legislation includes sections 59-59A (default surcharge); 70-71
15 (mitigation of penalties); 83 (appeal) of the VATA 1994; and Regulations 25, 25A
and 40 of VAT Regulations 1995.

Appellant submissions

3. The Appellant in their Notice of Appeal dated 4 May 2016 stated the following:

20 “As stated in our letters our payment has been made in full and although slightly
late this was not intentional or with any malice purely down to the way the
calendar fell that month along with our payment restrictions with our bank and
taking into account the wages we had to pay our staff.”

4. They further stated:

“The surcharge seems quite excessive and does not seem to take into account
our years of successful payments without any fault.”

25 The Respondent submissions

5. The Appellant entered a default surcharge regime on 12/14 and would have
received the requisite notices which advised a trader on how the surcharges are
calculated and the percentages used. This would have explained the need for
submitting returns on time and making payments of VAT on time. In cases where a
30 taxpayer is unable to make payments on time it is possible to agree a time to pay
arrangement with HMRC.

6. HMRC draw reference to Public Notice 700. The VAT Guide at s.21.3.1
(August 2013) which gives advice on payment. This would have explained that if
payment arrives late there will be a liability to a surcharge for late payment. When
35 the VAT return was submitted on 23 January 2016, the Appellant would have
received an acknowledgement which advises both of the payment due date and for the
Appellant to check with their bank as to the cut off times for making payments by
way of the Faster Payment Service.

7. The Respondents say the Appellant would have been aware of their bank's daily limit and had previously paid their VAT by way of multi payments, which is to say more than one payment.

8. They further contend that the due date for the period 12/15 was a Sunday.
5 Having received a Surcharge Liability Notice for the period 12/14 when the due date was at the weekend, the Respondents would have expected the Appellant to have put measures in place to ensure that the payment reached HMRC's bank account on time but this was not done.

9. In the circumstances the Respondents says that there is no reasonable excuse
10 that a Default Surcharge of £983.73 for the period 12/15 is less than 0.2% of the total value of sales net of VAT of £585,631.00.

10. They also say that the bank account daily payment limits, the payment of wages and the due date on a Sunday were foreseeable situations. The payment of the above was within some element of control of the Appellant. A reasonable and competent
15 business would have put measures in place to ensure that their VAT payment was made on time taking into account these events.

11. For these reasons, the penalty should be upheld.

Conclusion

12. It is well established by case law that a default surcharge regime does not
20 infringe the principal proportionality by imposing the same amount of penalty, even when a payment is late for a short period.

13. A calculation of the default surcharge is not by reference to the number of days a payment is made late but by preference to the number of defaults in a surcharge rolling period which gives an escalating percentage from 2-15% in proportion to the
25 number of defaults in that period.

14. In the decision of HMRC v Trinity Mirror Plc [2015] UKUT 421 (TCC) ("Trinity Mirror") where the Upper Tribunal stated that the default surcharges system as a whole, was a rational and fair scheme. The use of the amount unpaid as the objective factor by which the amount of surcharge varies is not a flaw in the system.
30 It is recognised that there is a possibility that the default surcharge might be disproportionate given the structure of the regime but this is likely to occur only in exceptional cases.

15. The full surcharge in this case for the accounting period 12/15 is not
35 disproportionate and the tribunal finds that it complies with the objectives of the EU legislation.

16. Where the payment falls on a weekend, the taxpayer is expected to make arrangements so that the payment could be made by the due date. The Tribunal would have expected the taxpayer as a reasonable and prudent party to have made the necessary arrangements and ensure that the payment was made by the due date. The

three directors of the Appellant Company bear the ultimate responsibility for the timely submission of the VAT return and any tax due. These directors could have put in place a system which allows for timely payments especially where multi-payments arose in previous VAT accounting periods.

5 17. It is most unfortunate in this case that the Appellant is confronted with this surcharge. Their track record and payment and submission of the VAT return have been outstanding. However the Penalty regime does not distinguish between payments which are one day, one week or one month late. There is a statutory obligation on a person required to make a return to pay the VAT to HMRC on time.
10 Sadly, this was not done in this case and therefore the appeal is dismissed and the Penalty is upheld.

18. 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
15 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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**DR K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 18 OCTOBER 2016

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