



TC05894

Appeal number: TC/2016/04604

VAT – default surcharge

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JESTIC LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Mr Nigel Collard**

Sitting in public at Fox Court, London on 11th May 2017

Mr Benedict Dale, Director of Jestic Limited, on behalf of the Appellant

Ms Akua Adusei, of HM Revenue and Customs, for the Respondents

DECISION

Late appeal

- 5 1. HMRC had no objection to the Appellant lodging its appeal late and the Tribunal granted permission to appeal out of time.

Background and facts

2. The parties agreed the following facts.
3. The Appellant entered the VAT Payments on Account scheme (POA) in
10 September 2014.
4. For the period 12/14 the Appellant paid the instalments due by 28th November 2014 and 31st December 2014 in full and on time, but the balancing payment due by 30th January 2015 was paid late, on 6th February 2015, and the Appellant entered the default surcharge regime and a first default was recorded. HMRC sent the Appellant
15 a surcharge liability notice on 19th February 2015.
5. For the period 06/15 the Appellant Paid the instalments due by 29th May 2015 and 30th June 2015 in full and on time, but the balancing payment due by 31st July 2015 was paid late, on 3rd August 2015, and a second default was recorded. The Appellant was issued with a default surcharge at the rate of 2% on 26th August 2015.
- 20 6. For the period 09/15 the instalment due by 28th August 2015 was paid late, on 18th September 2015, but the instalment due by 30th September 2015 and the balancing payment due by 30th October 2015 were paid in full and on time. A third default was recorded and a default surcharge at the rate of 5% was issued on 20th November 2015.
- 25 7. For the period 12/15 the instalment due by 30th November 2015 was received on time but was £494 short, the instalment due by 31st December 2015 was received in full and on time, and the balancing payment due by 29th January 2016 was received late, the greater part being received on 1st February 2016 and the balance on 27th April 2016. A fourth default was recorded and a default surcharge at the rate of
30 10% was issued on 19th February 2016.
8. The Appellant appeals against the fourth default surcharge for the 12/15 period in the amount of £25,876.

Relevant law

9. The Value Added Tax Act 1994 provides that:

- (1) A taxable person shall account for and pay VAT by reference to such periods at such time and in such manner as may be determined under regulations from time to time (section 25).
- 5 (2) The Treasury may make an order providing that a person of a description specified shall pay, on account of VAT he may become liable for during a prescribed period, amounts determined in accordance with that order (section 28(2)).
- (3) The Commissioners may give directions about the manner in which such payments are to be made (section 28(2A)).
- 10 (4) A person who fails to make a payment he is required to make by virtue of an order under section 28 by the day on which it became due shall be regarded as in default (section 59A(1)).
- (5) If a taxable person on whom a surcharge liability notice has been served is in default in respect of a prescribed accounting period that falls within the surcharge period specified in the notice and the aggregate value of his defaults is more than nil, he will be subject to a surcharge equal to the greater of £30 and the specified percentage of the aggregate value of his default (section 59A(4)).
- 15 (6) The specified percentages are: 2% for the first default during the surcharge period; 5% for the second; 10% for the third; and, 15% for any subsequent defaults (section 59A(5)).
- 20 (7) The aggregate value of the default is calculated by reference to the period, so that if there is more than one late payment during a single period, they are aggregated into a single 'default' (section 59A(6)).
- (8) If a person subject to a surcharge under section 59A satisfies the Commissioners or, on appeal, a tribunal (i) that the payment on account was despatched in such a way that it could reasonably be expected by be received by the due date or (ii) that there is a reasonable excuse for the payment not having been so dispatched, he shall not be liable to the surcharge (section 59A(8)).
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10. Under Regulation 40(2), VAT Regulations 1995, any person required to make a return shall pay such amount of VAT as is payable by him in the period to which the return relates no later than the last day on which he is required to make that return.
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11. In the case of *HM Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 421 the Upper Tribunal considered the question of proportionality. In that case, the taxpayer failed to make the balancing payment of its 06/07 VAT period by the due date. It paid in full one day late. As a result HMRC issued a surcharge liability notice specifying a surcharge period from 31st August 2007 to 1st July 2008. The taxpayer failed to pay its balancing payment by the due date of 30th January 2008. It paid in full one day late. A surcharge of 2% of the late balancing payment was imposed.
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12. The taxpayer argued that the surcharge was disproportionate, under the EU principle of proportionality.
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13. The Upper Tribunal, considering the question of proportionality, found that "it is not enough for a penalty simply to be found to be disproportionate to the gravity of the default; it must be 'so disproportionate to the gravity of the infringement that it becomes an obstacle to [the underlying aims of the directive]'" (para 58). It noted that
5 "the underlying aim of the directive relevant for this purpose was...the principle of fiscal neutrality" to achieve which it was necessary that "tax should be accounted for, and paid, on a timely basis". This was the context in which the question of whether the penalties imposed under the default surcharge regime, in order to ensure collection and deter default, are proportionate, should be viewed (para 60).

10 14. The Upper Tribunal's conclusion in *Trinity Mirror* (paras 65 to 70) was that:

- (1) "the default surcharge regime, viewed as a whole, is a rational scheme...";
- (2) "the use of the amount unpaid as the objective factor by which the surcharge varies is not a flaw in the system...and...is therefore an appropriate, if not the most appropriate, factor...";
- 15 (3) The system "may result in an individual case in a penalty that might be considered disproportionate...[but]...this is only likely to occur in a wholly exceptional case, dependent upon its own particular circumstances...[and]...we cannot ourselves readily identify common characteristics of a case where such a challenge to a default surcharge would be likely to succeed";
- 20 (4) "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"; and
- 25 (5) "the gravity of the default must be assessed by reference to the relevant factors, first that it was a second default, in respect of which Trinity Mirror had been notified by the surcharge liability notice following the first default that a further default within the surcharge period could result in a surcharge, and, secondly, that it was in a substantial sum".

Evidence

15. We were referred to correspondence from HMRC to the Appellant relating to
30 the default surcharge regime.

16. We heard oral evidence from Mr Dale.

Submissions

17. HMRC submitted that the surcharge had been correctly imposed in accordance with the legislation; the Appellant had been notified of the POA system in September
35 2014, of the first default in the 12/14 period and its consequences, in particular that a surcharge would be imposed on the occasion of a further default within the surcharge period, and of each subsequent default and its consequences. The earlier surcharges had been paid. As a result, the Appellant was aware it was in the POA regime and, later, in the default surcharge regime, and of the consequences of each.

18. The Appellant did not dispute these facts, except to note that the notices and letters from HMRC, although addressed to the Managing Director, would in practice have been dealt with in the accounts team and not been read by a director. The Appellant did not submit this as evidence of a 'reasonable excuse' and HMRC noted that it would not constitute a reasonable excuse, citing section 71(1)(b), Value Added Tax Act 1994 (reliance placed on another person is not a reasonable excuse).

19. The Appellant submitted that a surcharge of £25,876 was not proportionate given that the payment was made only one working day late. Mr Dale argued that this case was different from *Trinity Mirror* because the Appellant had only recently entered the POA regime and because of the very different levels of funds involved. He submitted that what might be proportionate for a multi-million pound company was not for a small growing business.

20. When asked, Mr Dale explained that payments required two authorisations, that the finance manager had put the necessary form to obtain the second authorisation on his desk but by the time he had chance to sign it, the bank's 4pm deadline for BACS payments had been missed. He had not realised the late payment would have any consequences. Had he realised, he would have arranged for the payment to be made by faster payment and the surcharge would have been avoided. There had been no intention to pay late or 'do anything wrong'. He had just been busy that day – as he was most days.

21. The business had grown quickly and everyone was incredibly busy. Suddenly the company was in the POA scheme and HMRC provided inadequate support for growing businesses in these circumstances. It was not reasonable to expect letters addressed to directors to be dealt with by them personally. It would be more practically helpful for HMRC to make telephone calls to directors in the event of a default that could have serious consequences.

Discussion and conclusion

22. There is no dispute that payments were made late and surcharges imposed correctly under the relevant law and we accept the facts set out above, as agreed by both parties.

23. The Appellant did not seek to put forward a reasonable excuse for the late payment in the period 12/15 under section 59A(8) VATA 1994.

24. The basis of the Appellant's appeal was that the surcharge of £25,876 was disproportionate given that the payment was only one working day late.

25. This Tribunal is bound by the decision in *Trinity Mirror*. We therefore start from the point that the default surcharge regime is a rational scheme and the penalties imposed under it are not of themselves disproportionate so that, for an individual surcharge to be disproportionate the particular circumstances must be 'wholly exceptional'.

26. In this case, in September 2014 HMRC informed the Appellant that it must come within the POA regime and enclosed details of what this meant including a schedule of the monthly payments to be made and a specific warning that the seven day extension for electronic payments no longer applied. HMRC notified the Appellant after its first default (12/14 period) of the consequences of further defaults in the period ending 31st December 2015. A 2% surcharge was imposed, and paid, after the second default (06/15 period) and HMRC notified the Appellant of the consequences of a further default. A 5% surcharge was imposed, and paid, after the third default (09/15 period) and HMRC notified the Appellant of the consequences of a further default. The 10% surcharge, which is the subject of this appeal, was imposed after the fourth default (12/15 period).

27. The Appellant effectively had four warnings before the final, 10% surcharge was imposed. Whilst the size of the surcharge is undoubtedly significant, looked at in the context of the regime that is rather the point. The rate of surcharge increases with each further default, and with it the level of the deterrent.

28. We found Mr Dale to be honest and credible. We do have sympathy for the challenges facing small and growing businesses and can understand how easily payments can unintentionally be made late when one is occupied with other aspects of running a business. We also understand that, in practice, letters from HMRC may be forwarded to an accounts team to handle without the director reading them carefully. However, it is ultimately the directors' responsibility to ensure the company meets all of its legal obligations, including accounting for and paying VAT.

29. The Appellant was not able to demonstrate that there were any kind of exceptional circumstances that would lead us to depart from the ratio of *Trinity Mirror* as regards the proportionality of the surcharge. The rate of 10% is the one imposed as a penalty for a fourth default. It is a significant sum and is intended to be so as a deterrent to those who have already defaulted three times previously.

30. We therefore dismiss the appeal.

31. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 17 MAY 2017