



TC01831

Appeal number: TC/2011/02333

Default Surcharge – late payment of tax – suggestion caused by illness – no real evidence- no reasonable excuse – question whether penalty for following period disproportionate – jurisdiction – not disproportionate in sense of “not merely harsh but plainly unfair” – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAD DOG CASTING LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: Judge Judith Powell
Richard Thomas**

Sitting in public at 45 Bedford Square, London WC1 on 28 September 2011

Mr Peter Hooper, Adviser, for the Appellant

Mr Hugh O’Leary Officer with HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal against default surcharges for the periods 8/10 (the 3 months
5 to 31st August 2010) and 11/10 (the 3 months to 30th November 2010).

2. In respect of the period 8/10 the Appellant says it has a reasonable excuse for
late payment of tax because of the illness of the director and only person authorised to
make payment. If the Appellant can demonstrate it has a reasonable excuse for the
late payment of tax then we can allow the appeal for this quarter which would have an
10 effect on the rate of default surcharges for subsequent periods.

3. In respect of the period 11/10 the Appellant says that if the rate of surcharge is
10% (which it will be unless we allow the appeal against the surcharge for the
immediately preceding period) it is excessive and disproportionate whereas if it is
reduced to 5% they will withdraw their appeal. There was some suggestion that they
15 were also appealing against the surcharge for 11/10 on the grounds that they did not
have the necessary funds to pay on time but they did not pursue that argument in front
of us.

4. We heard the evidence in respect of the period ending 8/10 and concluded that
the Appellant did not have a reasonable excuse for its failure to pay the tax on time.
20 We announced our conclusion at the end of the hearing about that quarter and the
Appellant asked us to consider the issue of proportionality in respect of the period
ending 11/10. We carefully listened to what Mr O'Leary had to say on behalf of
HMRC about our jurisdiction to hear the argument about proportionality (which he
argued we did not have) and his submission that if we did have jurisdiction the
25 penalty itself was not disproportionate. We reserved judgement to consider these
issues.

The period 8/10 and the excuse for late payment

Facts

30 5. The Appellant's business was to provide extras for films. At the time the tax
was due for the 8/10 quarter the only person able to authorise payment by the
Appellant was Mr Yazdanian who is a director of the Appellant company.

6. Mr Hooper explained he was not present at a meeting of the Appellant
35 Company held on 6 October when it seems that Mr Yazdanian was taken ill nor did he
know the nature of the illness and he did not have any medical evidence about it. Mr
Yazdanian was not present to give evidence. Mr Yazdanian was unable to authorise
payment (he was the only person with the necessary authorisation codes) until 8
October which mean that the payment could not be made on the due date of 7
40 October.

The Law

7. The effect of section 59(7) Value Added Tax Act 1994 is that if the Appellant
5 can show it has a reasonable excuse for its failure to pay the tax for 8/10 on time its
appeal will succeed and the penalty will not be payable. This will also have the effect
of reducing the penalty payable for the following quarter.

Our Decision

10 8. It is of course possible for illness to be a reasonable excuse for late payment of
tax in some circumstances. However in this case we were given only a very scanty
account of Mr Yazdanian's illness and it was quite impossible for us to conclude that
his illness gave the Appellant a reasonable excuse for its failure to pay tax on time in
15 this case. We were not given any details of the nature of the illness. We accept that
Mr Hooper had tried without success to get medical evidence and no one who was
present at the meeting when Mr Yazdanian was taken ill was available to elaborate on
what happened. We accept that a book keeper (who has now left the company) told
the director that she had spoken to someone at HMRC who told her that the penalty
20 would not be imposed since the tax was only one day late but because no trace of this
conversation can be found by HMRC within its records and the book keeper was not
present to elaborate we cannot accept that this was what she was told.

9. We dismissed the appeal against the surcharge for the 08/10 period. No issue of
proportionality was put forward for that period.

The period 11/10 and proportionality

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Facts

10. The Appellant's turnover increased significantly during the period ending 11/10
because the company won a new contract in connection with a film that required a
30 large number of extras. The company faced cash flow issues at the time the VAT was
due to be paid and the Appellant was unable to make payment on time. Mr Hooper
was very straightforward in explaining that the company knew when the VAT was
due to be paid and had chosen to allocate its funds in a way which left it unable to pay
the VAT on time and we accept what he said. He did not pursue any argument that
35 the Appellant had a reasonable excuse based on an underlying cause for its inability to
pay. We accept that the directors were influenced in making their decision to pay the
VAT late (and use available funds to pay other tax liabilities) because of the
conversation their then book keeper reported to them as having had with HMRC (that
the penalty for 8/10 would be waived) and their belief that the surcharge penalty
40 would be based on 5% rather than 10% of the unpaid tax for the 11/10 quarter. The
VAT was paid in stages and the final amount was paid some 69 days late. Part
(£101,345.78) was paid within 14 days of the due date, a further amount (£81,697.12)
was paid on 8 February a further amount (£70,000) was paid on 17 February and the
balance (£40,000) was paid on 17 March.

Submissions

11. The Appellant's submission is simple. The penalty is disproportionate to its
5 underlying purpose of encouraging taxpayers pay on time in relation to a case such as
this where the tax due for a single quarter is unusually high compared with the
average taken over a year.

12. Mr O'Leary spoke from notes about the question of the Tribunal's jurisdiction
to hear this submission but was not able to elaborate upon them; in essence he
10 submitted that the decision of the Tribunal in *Energys Holdings UK Ltd v Revenue
and Customs Commissioners* [2010] UKFTT 20(TC) (which decided it did have
jurisdiction) was wrong and was not binding upon us. If, contrary to what he said
about jurisdiction, the Tribunal did have jurisdiction to consider proportionality then
15 he submitted that the present case could be distinguished from *Energys* (where there
was a delay of one day caused by a human error in timing) since in the present case
there was a 69 day delay before the tax was paid in full and the failure to pay tax
resulted from a conscious decision of the taxpayer to pay other liabilities first. He
noted there was neither a prior agreement between the Appellant and HMRC to pay
20 late or any record of the payment problems being discussed between them before the
due date. He agreed that although every conversation between taxpayers and
HMRC's National Advice Service about default surcharges are supposed to be
recorded it is always possible for the occasional conversation to be missed. He added
that because it is also their usual practice to ask any taxpayer who asks for a penalty
25 to be waived to write in with a formal request to that effect setting out the facts it is
unlikely that someone at the Service waived the penalty for the 8/10 period over the
phone without making a record of the conversation.

Our Decision

13. We conclude it is unlikely that any conversation between the book keeper and
30 HMRC resulted in an agreement to waive the 8/10 penalty. We moved on to consider
the issue of proportionality.

14. It is not disputed that if we have jurisdiction to hear the proportionality
argument then there are only two outcomes. One is that we dismiss the argument in
which case the appeal fails and the penalty is payable in full. The other is that we find
35 that the penalty is disproportionate and allow the appeal on that ground in which case
no penalty is payable. We do not have power to mitigate the penalty as, perhaps, the
Appellant was inviting us to do.

15. We read the Respondents written submissions on the question of
proportionality. Mr O'Leary was frank in saying that he could not elaborate on these
40 and Mr Hooper confessed that he struggled to follow them. We found the
submissions focussed mainly on the question of our jurisdiction to consider whether
the system as a whole was flawed rather than whether, whilst accepting that the
system itself was not flawed, we might consider the proportionality of an individual
penalty. There was some passing reference to jurisdiction in individual cases and in

this context to the Human Rights Act as well as the status of the tribunal as an "appropriate court or tribunal" but as I have already said Mr O'Leary was not able to expand upon this argument.

5 16. We considered the cases to which the written submissions referred and particularly to the cases of *Barnes v Hilton Main Construction* [2005] EWHC 1355 (Ch) *Enderbey Properties v HMRC* [2010] UKFTT 85(TC) *Energys* and *Greengate Furniture Ltd Customs and Excise Comis* [2003] V&DR 178. We found the following extract from *Energys* the most relevant particularly on the question whether the tribunal could consider the proportionality argument in respect of an individual
10 penalty.

15 “[55].....Taken together, the observations of the tribunal in *Greengate Furniture* too show that it was considering both the system and the penalties imposed on the individual appellant. Its comment that ‘there may be cases where a surcharge does meet the test in *Roth*’ is in my view incapable of being read in a way which is consistent with the proposition that only an attack on the whole system will suffice. Of course, the system is not irrelevant to the enquiry since its objective is an important factor, perhaps the most important factor, but I am satisfied that it is open to me to consider the individual penalty without having first concluded that the system, as a whole, is disproportionate.”

20 17. We note that the decision in *Energys* is not binding upon us. We took particular note of what the President said in *Energys* that

25 “[69] I am quite willing to accept – indeed experiences of its operation tells me - that the default surcharge regime, by and large, produces a fair penalty, or at least one which is not obviously disproportionate to the offence albeit that I have particular misgivings about the absence of any correlation between the period of the delay and the amount of the penalty. But as I have indicated, the penalty imposed in the case is in my view wholly disproportionate to the gravity of the offence - it is, as Simon Brown LJ put it in *Roth* ‘not merely harsh but plainly unfair’ and I am not persuaded, in the absence of any justification of it that it can be saved by the State’s margin of appreciation. It is in my view one of those exceptional cases which the tribunal had
30 in mind in *Greengate Furniture*.”

18. We respectfully agree with the conclusion of the Tribunal about our jurisdiction and consider that we can look at the individual penalty and determine whether it does meet the test in *Roth* that it is not merely harsh but plainly unfair.

35 19. In *Energys* the tribunal remarked

40 “[61]....A pertinent question to ask is whether, if the penalty were not determined mechanically but by a court or tribunal with the power to set any monetary penalty it chose without statutory constraint, that court or tribunal, exercising ordinary judicial discretion would impose a penalty of as much as £130,000 for an error of this kind. In my view the answer is obvious: it is unimaginable that such a high penalty would be imposed. Taking the penalty imposed in this case in isolation though against the background of the public interest in the prompt payment of taxes it seems to me that it is an inescapable conclusion that it is disproportionate”.

45 20. In this context we considered the facts of the present case. The penalty, calculated at the 10% rate is just under £30,000. This penalty is calculated with reference to the entire amount of tax unpaid on the due date and it is irrelevant that

5 some of the unpaid tax was paid at different times after that date and that only some
of it remained outstanding for 69 days. The amount of the penalty charged here is
less than the amount in *Energysys* (as is the amount of unpaid tax) but importantly, the
reason for the late payment is different; the Appellant made the deliberate decision to
10 delay payment and use its available funds to pay other liabilities. This shows that the
Appellant regarded the penalty as something they were prepared to incur so that they
could use available monies elsewhere. If the purpose of the surcharge is to encourage
taxpayers to pay on time it failed in its objective in this case. Whether the Appellant
would have taken the same decision if it had been clear it was 10% remains a matter
15 of conjecture. This is not a case where there is a single day's delay due to a human
error nor are there any other features that make the penalty plainly unfair. The amount
of the penalty might be described as harsh but we conclude that in this case it is not
"plainly unfair"; indeed we wonder if it is unfair at all. Accordingly we dismiss the
20 appeal.

15 21. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
which accompanies and forms part of this decision notice.

25 **Judith Powell**

TRIBUNAL JUDGE
RELEASE DATE: 16 February 2012