



TC04145

Appeal number: TC/2014/02708

***VALUE ADDED TAX – default surcharge – whether disproportionate – HMRC v
Total Technology (Engineering) Ltd considered – held, no – appeal dismissed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CONTENTYS LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
 MR ALAN REDDEN FCA**

Sitting in public at Manchester on 17 November 2014

Mark Hallam for the Appellant

Barry Sellers, Higher Officer, HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against default surcharges imposed on Contentys Limited
5 (“Contentys”) for the VAT periods 09/12, 03/13 and 09/13, totalling £13,432.27.

2. Contentys had made its first relevant default in respect of the VAT period
12/10, where the relevant VAT of £31,098.12 had been paid by cheque 14 days after
the due date. That default did not attract a surcharge because it was the ‘first default’.
The next relevant default was in respect of the VAT period 09/11. In that case the
10 VAT due of £49,739.65 had been paid in two tranches - £45,000 was paid by CHAPS
before the due date, and the balance of £4,739.65 had been paid by cheque 11 days
after the due date. That default attracted a surcharge calculated at 2% which had been
effectively waived by the Respondents (“HMRC”).

3. The next relevant default – and the first default giving rise to a surcharge – was
15 in respect of the VAT period 09/12. In this case the VAT due of £52,956.14 was paid
via the faster payment system and arrived with HMRC 1 day late. It attracted a
surcharge at 5% - i.e. £2,571.74.

4. The next relevant default – the second giving rise to a surcharge – was in
respect of the VAT period 03/13. In this case the VAT due of £46,987.61 was again
20 paid via the faster payment system and arrived with HMRC 2 days late. It attracted a
surcharge at 10% - i.e. £4,698.76.

5. The final relevant default – the third giving rise to a surcharge – was in respect
of the VAT period 09/13. In this case the VAT due of £41,078.49 was paid via the
faster payment system and arrived with HMRC 4 days late. It attracted a surcharge at
25 15% - i.e. £6,161.77.

6. There had been other *prima facie* defaults which had been removed by HMRC
in correspondence and which are therefore not relevant.

7. Mr Hallam, for Contentys, did not submit that there was a reasonable excuse for
these late payments. Contentys had used staff to make the payments who had not
30 been reasonably competent and in particular the bookkeeper had misunderstood the
length of time which it would take using ordinary banking procedures for the VAT
payments to reach HMRC. In none of the periods had there been any insufficiency of
funds as far as Contentys was concerned.

8. Mr Hallam complains that the surcharges are disproportionate. He told us that
35 Contentys’s annual turnover is currently slightly less than £1m and that Contentys’s
net profit before tax for the year ended March 2013 had been £24,144. He pointed out
that the surcharges based on total delays in payment of 7 days accounted for over half
of that net profit. He also pointed out that for the VAT period 09/12 a surcharge of
£2,571.74 had been imposed for late payment of VAT of £52,956, whereas for the
40 VAT period 09/13 a surcharge of £6,161.77 had been imposed for late payment of
VAT of the significantly smaller sum of £41,078.

9. Mr Sellars, for HMRC, pointed out that the rates of default surcharge were set by section 59 VAT Act 1994 and that there was no provision for mitigation – unlike in the cases of the construction industry scheme and PAYE penalties. He submitted that the default surcharge regime complied with the EU law principle of proportionality and in particular was not flawed for the absence of a maximum surcharge.

10. We were referred to *Energys Holdings UK Limited v HMRC* (TC00335), *Trinity Mirror plc v HMRC* (TC03490) and *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). *Energys* and *Trinity Mirror* are decisions of this (First-tier) Tribunal. *Energys*, which was decided in 2010 and in which the surcharge complained of was discharged, was not, in the event, appealed by HMRC (HMRC withdrew their appeal to the Upper Tribunal). In *Trinity Mirror* the appeal was also allowed, but we were told that an appeal to the Upper Tribunal was pending. *Total Technology* is, of course, a decision of the Upper Tribunal.

11. In *Total Technology*, the Upper Tribunal gave full consideration to the decision in *Energys*. Both *Energys* and *Total Technology* were considered in *Trinity Mirror*. The surcharge sought to be imposed in *Energys* (at the 5% rate) was £131,881. The surcharge in *Trinity Mirror* was £70,909. The surcharge in *Total Technology* was £4,260.26

12. The decision of the Upper Tribunal in *Total Technology* was that there was nothing in the VAT default surcharge leading to the conclusion that its architecture was fatally flawed, but there were some aspects of it that may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate (*ibid.* [88]).

13. The Upper Tribunal made it clear that the question to be asked in an individual case is whether the amount of the penalty for the failure to file and pay by the due date is proportionate – adding that if it is of an appropriate amount, then there is no need for a power to mitigate (*ibid.* [88]). The Upper Tribunal expressly rejected the suggestion that the fact that the surcharge is not related to profitability renders it disproportionate (*ibid.* [90]). We therefore cannot attach importance to the fact that the surcharge in this case is over 50% of the net profit of Contentys for the year ended March 2013.

14. The Upper Tribunal also emphasised that in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed (*ibid.* [99]).

15. In this case the relevant facts are that Contentys has been surcharged a total of £13,432 for late payments as follows: (1) in respect of the VAT period 12/10, £31,098 was paid 14 days late; (2) in respect of the VAT period 09/11, £4,739 was paid 11 days late; (3) in respect of the VAT period 09/12, £52,956 was paid 1 day late; (4) in respect of the VAT period 03/13, £46,987 was paid 2 days late; and (5) in respect of the VAT period 09/13, £41,078 was paid 4 days late.

16. These figures show that the late payments total 798,743 “£-days” which equate to 2,188 “£-years” – or an equivalent of withholding £2,188 for one year – and the surcharge in respect of that is £13,432, which works out at an equivalent to interest at 613% per annum.

5 17. We realise, however, that we should not simply equate the surcharge to a rate of interest, as the system is of a deterrent nature and, in any case, no surcharge was imposed for the first two relevant defaults and no reasonable excuse for the late payments has been shown.

10 18. We have regard to the fact that there were 5 relevant defaults and that the consequence of our allowing the appeal would be that the penalty is discharged completely (as it was in *Energysys*). We also have regard to the fact that, since HMRC are bound by statute to apply the default surcharge regime rules mechanically without considering mitigation, discharge of a penalty except in extreme cases would be likely to undermine seriously the practical application of the regime.

15 19. We conclude on consideration of all the circumstances that this is not an extreme case and that the penalty in this case is not disproportionate. We therefore dismiss the appeal, pointing out with some sympathy, as the Upper Tribunal did in *Total Technology* (*ibid.* [107]), that Contentys has made an unfortunate error for which Parliament has chosen to impose a penalty.

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

30

**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 24 November 2014

35