



TC04194

Appeal number: TC/2014/01839

***VAT – DEFAULT SURCHARGE – LATE PAYMENTS – WHETHER
REASONABLE EXCUSE – NO – SECTIONS 59 AND 71 VATA 1994 –
WHETHER PENALTY PROPORTIONATE – YES – APPEAL DISMISSED***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MSL INTERIORS LTD

Appellant

- and -

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

TRIBUNAL: JUDGE JENNIFER TRIGGER

Sitting in public at Alexandra House, Manchester on Friday 24 October 2014

Ms Mitchell, Officer of HMRC, for the Respondents.

The Appellant did not attend and was not represented. The Appellant had given notice to HM Courts and Tribunals Service that no one would attend before the Tribunal to present the Appellant’s case. I carefully considered the evidence and decided that there was sufficient information in the papers for me to proceed with the appeal. Furthermore I decided that it was expedient to do so having regard to the length of time that this matter had been outstanding and to the fact that the Appellant had received notice of the hearing and the accompanying papers and had reached a decision not to attend or to be represented. In all the circumstances I decided to proceed in the absence of the Appellant.

DECISION

1. This appeal relates to three default surcharges incurred as a result of the late payment of VAT viz £1,961.37 for the period 12/12 and £2,209.18 for the period 03/13 and £2,928.65 for the period 06/13.

2. Helpfully Ms Mitchell set out the stance of HMRC at the outset. She referred to the Schedule of Defaults and Payment schedule at page 16 – 20 of the Bundle. There had been a first default in the period 12/09 and hence the Appellant company came within the default regime. There had been seven further defaults prior to the default periods, the subject of this appeal. During that time the returns were not filed on time and the payments of VAT were late. Accordingly liability to surcharges was incurred so that by the period 03/11 the surcharge rate was 15% and remains so throughout. For the period 12/12, 03/13 and 06/13 the returns were in time but the payments of VAT were not.

3. In 12/12, the first period which is the subject of appeal, payment of the balance of VAT due, £13,075.86 was not made until 22nd February 2013, and a 15% surcharge resulted, which amounted to £1,961.37.

4. In 03/13, the second period included in the appeal, payment of the balance of VAT due, £14,727.88, was not made until 20 May 2013, when an instalment of £4,727.88 was paid, and 11 July 2013 when the remaining amount outstanding of £10,000 was paid. Again a 15% surcharge was incurred, which amounted to £2,209.18.

5. In 06/13, the third period included in the appeal, payment of the balance of VAT due, £19,524.35, was not made until 12 August 2013, and a 15% surcharge resulted which amounted to £2,928.65.

6. Ms Mitchell explained that once the Appellant company had entered the default surcharge regime the potential financial consequences attached to the risk of further default would have been known to the Appellant from this point onwards because of the information printed on the Surcharge Liability Notice that was issued. Up to and including the 12/12 period the Surcharge Liability Notice carried a standard paragraph;

“Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under H M Revenue and Customs in the Phone Book as soon as possible, or the National Audit Service on 0845 0109000”.

7. Likewise the notes on the reverse of Surcharge Liability Notices issued for the periods 01/13 onwards had similar standard paragraphs. Each Surcharge Liability Notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 Section 59 (5).

8. The Appellant had been advised during a telephone conversation on 29 October 2012 that a Time to Pay Agreement for the period 09/12 had been agreed. That agreement was on the basis that the next quarter 12/12 would be paid in full on time. Any Time to Pay Agreement is a short term solution only relating to specific periods and not an automatic agreement which applies to subsequent periods.

9. Ms Mitchell maintained that the surcharges were not harsh as the Appellant would have been aware of the rate of the surcharge that had been reached and that surcharges were liable no matter how long the delay in payment after the due date.

10. The correspondence did not disclose a “reasonable excuse” in the context of Section 71 of the VAT Act 1994 Ms Mitchell submitted. At page 34 of the bundle the Appellant was in credit at the due date of 7 August 2013 and Ms Mitchell submitted that the credit of £852.95 could, together with the Appellant’s overdraft limit to the sum of £20,000, have been used to pay the VAT for the period 06/13.

11. Miss Mitchell referred me to the decisions of the Upper Tribunal in *Hok* [2012] in UKUT 3630(TCC) and *Total Technology Engineering Limited* [2012] UKUT 418 (TCC). She submitted that the penalties were not disproportionate and that for reasonable excuse to found something exceptional which could not reasonably have been anticipated was required. Accordingly I was invited to dismiss the appeal.

12. On behalf of the Appellant company Mr Michael Laking, Managing Director, recorded in the Notice of Appeal dated 12 March 2014 and accompanying letter of 28 January 2014 at page 8 of the bundle that the Appellant had been subject to acute market contraction and had posted losses for the three financial years. Steps had been taken to restructure the business which included the closure of the Appellant’s London showroom and overheads had been reduced by working at home and from serviced office accommodation in Manchester and London. On behalf of the Appellant Mr Laking accepted that there had been a late submission of payment for periods 12/12, 03/13 and 06/13 but asked that the total amount of surcharges levied for those three periods be reconsidered because the sum of £7,099.20 would have severe consequences for the continued viability of the business and was disproportionate in relation to the short delays in making payments in full.

13. The Appellant relied on *Trinity Mirror Plc* [2014] UKFTT 355 (TCC) where a VAT default surcharge had been found to be disproportionate.

14. For these reasons, Mr Laking asked me to allow the appeal.

15. I considered that Ms Mitchell’s stance was well founded. HMRC’s calculations and particularly the details in the Schedule of Defaults were not challenged. The circumstances which pertained did not disclose any exceptional factor which might give rise to a reasonable excuse in the context of the relevant legislation. Section 71(1)(a), specifically excludes an insufficiency of funds as being a reasonable excuse for late payment. I accepted that the Appellant faced serious trading difficulties and cash flow problems. However the VAT due is collected immediately on sale and should be allocated in respect of the Appellant’s liabilities to HMRC. The decisions

in *Hok* and *Total Technology Engineering Limited* offered no assistance to the Appellant in my view.

16. I was of the opinion that the Appellant would have been aware that payments of VAT should have been made by the due date and the consequences of failure to do so were clearly stated on the various Surcharge Liability Notices. It was immaterial how long the delay in payment had been to the imposition of a surcharge. In fact the Appellant had not disputed the 15% surcharge imposed nor that any of the earlier surcharges, prior to 12/12, were incorrect. Whilst the Appellant had previously negotiated a Time to Pay agreement for the period 9/12 this concession had been granted on the basis only that the 12/12 period was paid on time. There was factual evidence that the Appellant company was in credit at the due date for payment of the 6/13 period, namely 7 August 2013. No explanation was supplied by the Appellant company as to why payment had not been made on that occasion when there were funds available for the Appellant to meet its responsibilities to pay the VAT due to HMRC.

17. I noted the decision in *Trinity Mirror Plc* but distinguished the case on the facts from *Total Technology Engineering Limited*. In the *Trinity* case a default surcharge had arisen by reason of one day's delay in filing the VAT return and paying the VAT due. The surcharge was initially assessed in the amount of £95,900 but reduced to £70,909.44 following a voluntary disclosure by Trinity Mirror of the overpayment of VAT in the relevant VAT period.

The two events of default were the first events of default since the effective date of the VAT registration held by *Trinity Mirror*, which was 10/03/1986. In the case before me the Appellant had been in the surcharge regime from 12/09 and there had been seven surcharge liability notices issued for periods from that date to the period 12/12, the first of the surcharge liability periods in contention before me.

18. In *Trinity Mirror Plc* the Court adopted the stance that there was a hierarchy of seriousness in breaches within the surcharge period. It found that an otherwise compliant trader had been penalised for one day's default and that was plainly unfair. The Court found that on the particular facts the imposition of the surcharge was disproportionate. On the facts before me the Appellant's case was wholly different. The gravity was high and the penalty was high, whereas in the *Trinity* case the very opposite pertained where the gravity was low but the penalty was high.

19. For these reasons we considered that the appeal must fail and I confirmed the penalties.

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 "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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**JENNIFER TRIGGER
TRIBUNAL JUDGE**

RELEASE DATE: 18 December 2014

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