



TC05135

Appeal number: TC/2016/01010

VAT – Default Surcharge; reasonable excuse; proportionality; appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GASTROPUB HOSPITALITY LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE J GORDON REID QC FCIarb
MRS EILEEN A SUMPTER, WS**

Sitting in public at George House, 126 George Street, Edinburgh on 4 April 2016

Alastair Owen, CA, Owen & Co CA, Edinburgh, for the Appellant

Mark Boyle, Officer of HMRC, for the Respondents

DECISION

Introduction

1. This is a Default Surcharge appeal under the VAT regime. The amount at stake, according to the appellant is £1200.

2. A hearing took place at George House, Edinburgh on 4 April 2016. The appellant was represented by Alistair Owen, CA of Owen & Co, CA, Edinburgh. William Robertson, one of its directors, was also in attendance. The respondents (HMRC) were represented by Mark Boyle, an HMRC officer. A bundle of documents was produced.

3. The Notice of Appeal was lodged late but no objection to this was taken. We allowed the appeal to proceed, it being in the interests of justice to do so.

Statutory Background

4. The default surcharge regime is well known. It is fully described in *Trinity Mirror plc v HMRC*¹ and in a number of other cases. Liability to pay a surcharge may be avoided where the failure timeously to despatch the return or make payment of the VAT declared to be due is attributable to a *reasonable excuse*.² We discuss the question of reasonable excuse below.

5. We have no statutory power to reduce the penalty, unlike other fiscal regimes.

Factual Background

6. The appellant carries on business as a village pub/restaurant. It was registered for VAT on 10 October 2013. In the first two years of business, it made a small loss but has kept going, in spite of staff difficulties of absence through sickness and maternity leave and the generally high turnover of staff in this sector of business. Since then it has edged into profitability and now has a turnover of between about £300,000 to £400,000 per year. It provides some 25-30 jobs for individuals living in the locality.

7. The appellant has two directors, William Robertson and his father. Mr Robertson, senior, does not take an active role in the business. William Robertson is essentially in sole charge and has sole responsibility for the management of the business.

8. The appellant has been in the Default Surcharge regime since the VAT quarter ending on 31 August 2014, when the first default was recorded. The appellant also defaulted in respect of the periods ending 28 February, and 31 May 2015.

¹ [2015] UKUT 421 (TCC)

² VATA s59(7)(b)

9. The first default incurred no penalty. The second default (relating to the period 2/15) incurred no penalty as, at (2%), HMRC considered the amount too small to levy a surcharge as the amount was too low.

5 10. The third default (relating to the period 5/15) incurred a penalty of £544.85 (5%).

11. The appellant further defaulted for the period ended 31 August 2015 (08/15). This default is the subject of the appeal. A Surcharge Liability Notice was served in respect of each default.

10 12. The appellant's preferred method of payment was by the Faster Payment System (FPS) through the online banking system. On that basis, electronic submission of its VAT return and payment were due on 7 October 2015. The return was received by HMRC on 1 October 2015, but the declared payment was received in four instalments between 20 August 2015 and 9 November 2015.

15 13. The instalments relating to the return for the period 08/15 were paid on 20/8/15 (£285.32), 8/10/15 (£12,000), 5/11/15 (£1,500) and 9/11/15 (£2,739.54). The appellant accepts liability for a default surcharge in respect of the third and fourth instalments but not the second (£12,000).

20 14. The bulk of the sum due was paid one day late on 8 October 2015 (£12,000). Mr Robertson had apparently had a difficult week. He was not *on site* throughout the week. His head chef was unwell and was absent. His assistant manageress had taken maternity leave. He and his partner had recently had a baby (born 28/7/15). Although funds were available to meet the appellant's liabilities, and Mr Robertson was sent reminders about this, he simply overlooked the deadline; something, anyone can do.

25 15. The fourth default (relating to the period 8/15) incurred a penalty of £1,623.95, calculated on 10% of the amount declared in the return to be due. A Surcharge Liability Notice was issued on or about 16 October 2015.

30 16. The appellant did not timeously request a Time to Pay (TTP) agreement and none was arranged. The appellant did, however, make some payments by instalments but in the absence of a TTP agreement this has led to the default in issue.

17. The decision to issue the fourth surcharge liability notice was upheld on review by letter to the appellant dated 7 January 2016, essentially on the basis that the administrative oversight relied upon did not constitute a reasonable excuse.

Grounds of Appeal and Appellant's case

35 18. In summary, the appellant says that it has a reasonable excuse. The default was due to significant pressures of work leading to oversight and late payment. Certain key members of staff were said to have taken sick leave and maternity leave

19. It is also said that the increase in penalty from 5% to 10% was unduly severe. It was for a delay in payment of only one day. We take this to raise the question of proportionality.

20. It was also noted that this type of business is notoriously gruelling and stressful, that the business is struggling to trade on the edge of profitability and if the business fails, 25-30 local jobs will be lost.

Discussion and Decision

Reasonable excuse

21. What has been put forward on behalf of the appellant does not amount to a *reasonable excuse* as interpreted in accordance with the general thrust of jurisprudence on this topic. We refer to *The Clean Car Company Ltd*,³ *Garnmoss Ltd v HMRC*⁴, and *European Development Co (Westhill Hotel) Ltd v HMRC*.⁵

22. We accept that the business and, in particular, Mr Robertson were under some pressure. Running this type of business is no doubt demanding and can be stressful from time to time, if not most of the time. What led to the payment of £12,000 being paid one day late was no doubt unfortunate but was, at the end of the day, a careless and regrettable mistake, a genuine error that was plainly not deliberate. However, that does not amount to a *reasonable excuse*. VATA does not provide shelter for *bona fide* mistakes or muddles, only reasonable excuses. There was no relevant underlying cause which gave rise to the delay in payment which justifies the late payment. There was no specific event, whether foreseeable or unexpected, that could justify its lateness. The applicable test is essentially the standard of the (fictional) reasonably prudent trader circumstanced as the actual trader found himself to be. Here, with the funds available, the reasonably prudent trader would have ensured that payment was made by the due date and not on the following day.

23. Although general financial pressure was mentioned, we note that in this type of business, VAT due on supplies is normally collected at the point of sale, rather than rendering an invoice and having to wait until the debtor pays. Thus, the trader ingathers at the point of sale, the VAT for which he is subsequently accountable.

24. Moreover, there is a considerable body of literature produced by HMRC available to traders who have difficulty in meeting their VAT obligations. A TTP can be requested. The HMRC Business Payment Support Service can be contacted. Surcharge Liability Notices explain the basics of the regime and how default surcharges are calculated. Accordingly, the financial pressures described to us do not amount to a *reasonable excuse* justifying the discharge of the disputed part of the surcharge.

³ 13/2/91

⁴ [2012] UKFTT 313 (TC) paragraphs 11 and 12

⁵ [2013] UKFTT 671 (TC) at paragraphs 6, 28- 30, and 33

25. The appellant also argues that the penalty was severe. We therefore consider briefly the question of proportionality.

Proportionality

5 26. HMRC say that the surcharge was not disproportionate and that this Tribunal is bound by *Trinity Mirror*.

27. We agree that we are bound by the ratio of the decision in *Trinity Mirror*. The Upper Tribunal (UT) allowed HMRC's appeal and re-made the decision, holding that a default surcharge of some £70,000 based on 2% of the VAT due, in respect of a return and relative payment being only one day late, was **not disproportionate**. In particular, the UT held that a penalty of 2% could not be regarded as so disproportionate to the gravity of the infringement as to constitute an obstacle to the underlying aim of the directive (presumably the Principal VAT Directive - no express provision of the relevant EU directives is discussed in detail). In addition, the UT concluded that the surcharge liability regime was Convention compliant. While the penalty might be considered harsh, it could not, it was said, be regarded as unfair or devoid of all reasonable foundation.⁶ No specific Article of the Convention is discussed.

28. Had we been free of binding authority, and had we been favoured with a comprehensive review of the authorities on *proportionality*, we might well have come to the conclusion that a penalty of even about £1200 or £1600 for a minor administrative failing of very short duration was so plainly and obviously unfair as to be manifestly inappropriate.⁷ The gravity of the infringement was minimal. We are unaware of any regulatory regime that imposes such large penalties for such minor administrative indiscretions. We respectfully suggest that the proportionality (in EU law) of the default surcharge regime requires urgent consideration by and guidance from the Courts on an appropriate occasion.

29. Proportionality, as a general principle of EU law, seems to us to be concerned primarily with the suitability of the measure in question to achieve the objective being pursued; and whether the measure is necessary to achieve the objective ie could it be achieved by less onerous means; this may also involve balancing the burden being imposed with the benefits obtained. Here, the burden is extreme.

30. It has, however, to be recognised that the legislature must be allowed a wide margin of appreciation, particularly in relation to the measures to secure the payment of taxes, where provisions are not fully harmonised.

35 31. In the light of *Trinity Mirror*, its reasoning and the relatively brief discussion before us, we cannot hold that the imposition of a penalty of some £1200 for a minor

⁶ See paragraphs 71 and 72

⁷ See *R (Lumsdon) v Legal Services Board* [2015] 3 WLR 121 *Euro Trade and Finance Ltd* UKFTT 25/4/16 (Judge Mosedale)

administrative error enduring some three days, in circumstances in which there was no loss of or risk to the revenue was disproportionate and liable to be set aside.

Disposal

32. The appeal is dismissed.

5 33. 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
10 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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**J GORDON REID QC FCIarb
TRIBUNAL JUDGE**

RELEASE DATE: 25 MAY 2016