



TC05359

Appeal number: TC/2016/02477

***VALUE ADDED TAX – Default Surcharge – VAT Return late –whether
reasonable excuse – no – appeal dismissed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Ivy Stationery Ltd.

Appellant

- and -

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

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 25 July 2016 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 3 May 2016 and HMRC's Statement of Case dated 7 June 2016.

DECISION

Introduction

- 5 1. This is an appeal against a Default Surcharge for the period 11/15 for the late submission of a VAT Return and payments. The Penalty is £620.69 which is calculated at 10% of the tax due for the period.
2. The Tribunal has to determine whether there was a reasonable excuse for the late submission of the Return.

10 Legislation and case law

VATA 1994, Section S.59 (4); 59(5); Section 70; Section 71(1); Section 98

VAT Regulations 1995, Reg.25A and 40

HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418

15 Relevant facts

3. The Appellant's business was registered for VAT in 2009 and trades as stationery retailers. The Appellant has been mandated to submit their VAT Returns and Payments electronically under VAT Regulation 1995 Reg. 25(A).
4. The Appellant has been in the Default Surcharge Regime from the period 11/13
20 onwards.
5. The Appellant provided the VAT Return but payment was by Direct Debit and collected automatically from the Appellant's bank account on the third bank working day after the extra seven days following the standard due date.
6. The Appellant acknowledges that the VAT Return for the period 11/15 was
25 rendered late on 8 January 2016 and as a result a Default Surcharge was issued.

Appellant's case

7. In their Notice of Appeal received on 3 May 2016 the following points were made;
- 30 "On your website it states that within a 12 month period there is no surcharge for being late once, no surcharge for being late twice, 2% for being late 3rd time, 5% for 4th time and 10% for 5th time. We have not been late 5 times in our entire 4 year history.

5 This fine is disproportionately large for our crime of filing our VAT return less than 24 hours late. It was filed on the 8th of January instead of the 7th, it was obviously a mistake and there was no intention to delay payment. The actual VAT payment gets paid by direct debit at a time that you advise. It was just the return that was a day late.

10 I run a very small business, with few staff and I am under pressure most of the time keeping the business going but during holidays it is worse. This return was due the week we were back from Christmas shutdown. Even though Christmas happens every year, when you run a small business it is very difficult to plan for as you have no extra staff or resource to call upon.

15 I aimed to do the return on the 7th but due to other pressures like paying suppliers, getting stock in, replenishing customers after the Christmas break and generally getting the business back up and running I ran out of time.

There seems to be no understanding or allowance made for small business's [sic] and the fact that we have a good history of filing and paying on time – this should be taken into account.

20 I understand that since we started we have had 3 default notices for late filing which were 11/13, 11/14 and 01/15 – I have checked my file and I have no copy of information on these, and I certainly have never paid a surcharge or fine.

I think your rules are unfair and unclear;

25 Unfair because I was just 1 day late filing my return but got fined 10% - this is disproportionate, but also if I had delayed it longer I would not have been fined any more. So because I ran out of time and missed the date by 1 day, we were fined the same as amount [sic] as a company who are always late and late by more than 1 day.

30 Unclear because on your website it states that within a 12 month period if you are late once you get no surcharge, twice no surcharge, third 2%, 4th 5%, 5th 10%.”

Respondent's submissions

35 8. The Appellant's VAT Return was received after the due date on 8 January 2016. The due date was 7 January 2016 for electronic returns. The Appellant's VAT payment was also late having reached HMRC's bank account on 13 January 2016 rather than 12 January 2016. As the VAT Return and payment were both received after the due date the Surcharge Liability Notice Extension was issued at 10%.

9. The Respondents say that the Appellant’s statement that the Return was late and that it was “obviously a mistake” is not acceptable as a reasonable excuse for Surcharge purposes.

5 10. The Respondents said that the pressure of “paying suppliers”, “getting stock” and the “Christmas break” are all foreseeable events. The Respondents maintain that the Appellant has failed to submit their VAT Return and payment on time for the same period for three consecutive years and there is no reasonable excuse. The delay was not as a result of something which was beyond their control.

10 11. In reply to the Appellant’s argument that the Default Surcharge is disproportionate the HMRC draw reference to the use of the *Commissioners for Her Majesty’s Revenue and Customs v Trinity Mirror PLC* [2015] UKUT 2421 which states that Surcharge Regime is fair and proportionate.

12. They say that the Appellant has no grounds on which to base a reasonable excuse and therefore the Penalty should be upheld and the appeal dismissed.

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Conclusion

13. While the Tribunal has sympathy with the Appellant’s difficulties at a busy trading time, it is no excuse to say that the business is small with few staff and under enormous pressure during trading periods and holidays especially at Christmas. It is correct to say that the overall Default Surcharge Regime is not fundamentally flawed and the Penalties are fixed by statute. This position is upheld in the case of *Trinity Mirror*.

14. However the Tribunal notes the decision in *Equoland* (Case C-272-13) where the European Court of Justice stated that in order for a Penalty to be consistent with the principle of proportionality, the nature and the degree of seriousness of the infringement which that Penalty seeks to sanction must, be taken into account. The use of Fixed Penalties, as in the case of the Default Surcharge Regime, raises questions of fairness. For example, an accidental delay of one day is treated in the same way as a deliberate delay of one month. It is understandable that some Taxpayers may think the system unfair.

15. As a mechanism for encouraging Taxpayers to file their Returns and make payment on time, it has been effective since before the Default Surcharge Regime was introduced, there was little incentive to pay VAT on time.

16. It is open to Tax Tribunals to consider individual Default Surcharges without having first concluded that the Default Surcharge Regime as a whole is disproportionate. However when assessing whether a Penalty in any particular case is disproportionate, the Tribunal must not substitute its own views of what is fair for the Penalty which Parliament has imposed. The role of the Tribunal is therefore restricted and must defer to the will of Parliament.

17. The Tribunal can look to see if a Penalty is “not merely harsh but plainly unfair” and in this case the Tribunal has concluded that the Penalty has been correctly levied on the Taxpayer by the statutory provisions and is not disproportionate.

5 18. The Appellant was aware through the Surcharge Liability Notices of the liability for future defaults. The Tribunal would have expected the Taxpayer to conduct their affairs so as to avoid future defaults.

10 19. The Penalty is not a fixed sum but is geared to the amount of outstanding VAT. The Penalty applicable to the calculation of the Penalty increases with successive defaults if they occur within twelve months of each other. HMRC have also provided a web page with a VAT payment deadline calculator which advises the date of payment by Direct Debit. The Appellant entered the Default Surcharge Regime in the period 11/13 and was well aware of Regime and the Penalties. The Appellant has failed to submit Returns and payments on time for the same period for three consecutive years. This is not acceptable.

15 20. There is nothing in this case to suggest that the Appellant has a reasonable excuse. From their submissions it is apparent that the Appellant feels aggrieved by the quantum of the Penalty, however, the Tribunal has no power to mitigate the Penalty.

20 21. The appeal is therefore dismissed with the advice to the Appellant that, in future, the timely payment of VAT and submission of Returns should be a priority for his business in order to prevent further Defaults.

22. The appeal is dismissed and the Penalties upheld.

25 23. 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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**DR K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 8 SEPTEMBER 2016

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