TC03391

Appeal number: TC/2012/04217

VAT – Default surcharge – Reasonable excuse – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOBILE CELLULAR SOLUTIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR DAVID E WILLIAMS CTA

Sitting in public in Norwich on 18 February 2014

Mr P McGowan of the Appellant

Mr B Robinson, Presenting Officer, for the Respondents

DECISION

1. This is an appeal against the imposition of a default surcharge under s 59 of the Value Added Tax Act 1994 on late payment of VAT for VAT period 10/10. The amount of that default surcharge is £3,370.64, being 5 percent of the VAT that was paid late for that period.

2. The Tribunal gave an oral determination at the end of the hearing, dismissing the appeal. Mr McGowan for the Appellant requested that the Tribunal provide full reasons for the decision.

3. The following matters were not in dispute. The amount of the VAT payable for that period was £87,412.82. The due date for payment where payment was made online was 7 December 2010. The VAT was paid by the Appellant by a series of online BACS payments, received by HMRC on 8, 9, 10, 13 and 14 December 2010.

4. According to the Appellant, these payments were made by the Appellant on 6, 7, 8, 9 and 10 December 2010 respectively, which would mean that the payments took some 2 working days to be received by HMRC.

5. The Appellant states, and HMRC has not disputed, that the reason for making a series of payments over several days was that the Appellant's bank imposed a limit of £20,000 for electronic payments on a given day. The Appellant states, and again HMRC has not disputed, that the Appellant had the funds available to make payment by the due date.

6. For the Appellant, Mr McGowan stated that the Appellant could have made the whole payments in a single amount on a single day if it had made payment by CHAPS. He said that the reason why this was not done was that he had a telephone call with HMRC on 3 or 4 December 2010 which led him to believe that the course of action that he adopted was acceptable to HMRC and would not lead to the imposition of any default surcharge.

7. In his oral evidence, Mr McGowan said that this telephone conversation on 3 or 4 December 2010 was essentially "unilateral", in the sense that he explained to the HMRC official what he would be doing, and the HMRC official provided no substantive response. Mr McGowan produced no contemporary note of this call.

8. The Appellant's grounds of appeal state that "When we contacted the HMRC at no point did they state that there would be any surcharge involved. If they had, we would have elected to use a different method of payment ie CHAPS". Essentially, the Appellant's argument is that the HMRC official with whom he spoke on that day, by saying nothing when Mr McGowan explained what he proposed to do, led Mr McGowan to believe that what he proposed to do would be acceptable to HMRC and would not lead to any penalty or surcharge.

9. The HMRC case centred on the contention that HMRC had no record of the Appellant having made a telephone call to HMRC on 3 or 4 December 2010. HMRC

produced an "info log entry" (page 50 of the bundle), which Mr Robinson informed the Tribunal was used mainly by the HMRC debt management department. This contained no details of a call on 3 or 4 December 2010 as claimed. HMRC also identified a call to the HMRC contact centre on 10 December 2010. A transcript of that call is at pages 58-59 of the bundle. In that phone call, Mr McGowan indicated that the Appellant was making a series of payments over several successive days, although there is no discussion of deadlines for payment or the issue of default surcharges for late payment. Mr Robinson said that there was no record of a call to the HMRC contact centre on 3 or 4 December 2010. Nor did the record of the 10 December call make any reference to such an earlier call. Mr Robinson accepted that there are other HMRC telephone numbers to which calls might be made without any record of the call being kept by HMRC.

10. On its consideration of the material before it as a whole, the Tribunal found as follows.

11. The Tribunal finds that the payment of VAT for the period in question was made after the deadline. In fact, all of the five payments were received by HMRC after the applicable deadline of 7 December 2010. Notwithstanding that, HMRC has decided to treat the first of the payments, received by HMRC on 8 December 2010, as having been received within the time limit, and the default surcharge has been calculated on that basis.

12. The Tribunal accordingly finds that all of the VAT for the period under appeal, other than the amount of the first payment, was paid late. The amount of the default surcharge is fixed by legislation. A schedule of defaults at pages 48-49 of the bundle sets out the previous defaults, indicating why the surcharge for this period was 5 percent of the amount of VAT paid late. The Appellant has not disputed the details in this table. The Tribunal is satisfied that the amount of the surcharge imposed is in accordance with the legislation, and it follows that the Appellant is liable to the surcharge imposed, subject to the question whether the Appellant has a reasonable excuse for the late payment.

13. There is no definition in the legislation of what constitutes a "reasonable excuse". In the context of the present case, the Tribunal understands the expression to refer to a situation where a diligent taxpayer (that is, a taxpayer who is not seeking to avoid or be dilatory in his tax obligations), has done everything that could reasonably be expected in the circumstances. It "is a matter to be considered in the light of all the circumstances of the particular case". See for instance (see *LaMancha Limited v HMRC* [2010] UKFTT 638 (TC) at [13], quoting *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

14. The Tribunal considers that a diligent taxpayer would do all that can reasonably expected to be aware of the obligation to make the payment, the amount of the payment, the deadline for payment, and the amount of time that different methods of payment take to reach HMRC, and would do all that can be reasonably expected to ensure that the correct payment reaches HMRC within the deadline.

15. The Appellant's own case is that it was aware of the amount of the payment required to be made and the deadline. The Appellant does not appear to dispute that it was aware that an online BACS payment would take time to reach HMRC, and in any event, a diligent taxpayer would have been aware of this. Publicity material issued by HMRC (page 74 of the bundle) states clearly that "CHAPS is the only method of same day payment" and that "Other methods take at least three working days to reach HMRC's bank account". It also states that HMRC did not (at that time) participate in the "Faster payments" system.

16. The Tribunal considers that the Appellant, if acting diligently, would have been aware of the daily transfer limits applicable to its banking facility, and would have either commenced the series of daily payments sufficiently early in order to ensure that the full amount reached HMRC by the deadline, or would instead have made a CHAPS payment.

17. The Tribunal is not persuaded that the Appellant could reasonably have considered that the course that it adopted was acceptable, based on a telephone conversation with HMRC on 3 or 4 December 2010. Even if Mr McGowan had such a conversation, on his own evidence he was not told in that conversation by HMRC that what he proposed to do was acceptable and that no default surcharge would apply. Mr McGowan's case is simply that the HMRC official did not tell him that a default surcharge would apply. The Tribunal does not consider that a diligent taxpayer would regard this as an assurance by HMRC that his proposed course of action would attract no default surcharge.

18. The Tribunal is therefore not persuaded that the Appellant has a reasonable excuse for the late payment.

19. The Appellant's grounds of appeal also contend that the size of the surcharge is disproportionate.

20. In *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), the Upper Tribunal said at [99] that:

> In our judgment, there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are, however, some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But 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. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's Convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to Convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged).

21. We have therefore considered whether the penalty in this case is disproportionate on the facts of this particular case, bearing in mind the observations made by the Upper Tribunal.

22. In *Total Technology*, the Upper Tribunal found that the penalty was not disproportionate in that case. It said:

> 101 Nor, on the facts of the present case, do we consider that the penalty imposed on the Company is disproportionate in the sense that its imposition is a breach of EU law and in particular of the principle of proportionality. The Company's essential complaint is that the amount of the penalty is unfair. It is unfair because of the following factors:
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> a. the payment was only one day late;
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> b. the previous defaults had been due to errors which were innocent even if the Company could not establish a reasonable excuse for them;
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> c. the Company had an excellent compliance record prior to the first of the defaults leading to the penalty;
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> d. the amount of the penalty represents an unreasonable proportion of the Company's profits.
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> 102 Each of those factors falls within one of the heads of complaint which we have addressed. None of those complaints results in the default surcharge being non-compliant with the principle of proportionality; nor, in our view, do they have that result even if taken collectively. At the level of the Company, the amount of the penalty has been arrived at by applying a rational scheme of calculation which involves no breach of the principle of proportionality. That amount cannot, even if looked at in isolation, be said to be disproportionate in the sense of giving rise to a breach of the principle of proportionality. And even if the penalty is more than would be imposed if it were a matter for the decision of a tribunal, the amount of the penalty does not approach the sort of level which Judge Bishopp described as unimaginable in Enersys .
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> 103 So far as concerns A1 , we find it impossible to say that the default surcharge regime falls outside the margin of appreciation afforded to States under the Convention. The result for the Company may be seen by some as harsh, but we do not consider that it can be regarded as plainly unfair. Clearly the regime itself is not devoid of rational foundation. Accordingly, we do not consider that the Company's Convention rights have been infringed by the imposition of the penalty.
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> 104 The Tribunal relied on the following factors in determining that the penalty was disproportionate:
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> a. The number of days of the default;
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> b. The absolute amount of the penalty.
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> c. The “inexact correlation of turnover and penalty”.
>
> d. The absence of any power to mitigate.

> 105 We have in the course of this decision addressed each of those matters. Our conclusion is that none of them leads to the conclusion that the default surcharge regime infringes the principle of proportionality or to the conclusion that the actual penalty imposed on the Company does so either.

23. The Tribunal has considered all of the material before it, but is not persuaded that this case is relevantly distinguishable from *Total Technology*.

24. The Appellant's grounds of appeal also state that HMRC have refused to take into consideration the size of the Appellant's business and that its customers have a poor payment record which continues to cause it financial challenges.

25. However, section 71(1)(a) of the Act expressly provides that "an insufficiency of funds to pay any VAT due is not a reasonable excuse". If the Appellant seeks to rely on something more than an insufficiency of funds, such as unforeseen circumstances or events beyond the Appellant's control (compare *Steptoe v Revenue & Customs* [1989] UKVAT V4283), the burden of proof is on the Appellant to establish the existence of such unforeseen circumstances and events, and also to establish that these circumstances and events were the cause of the late payment. On its consideration of the material as a whole, the Tribunal is not persuaded that the Appellant has established this.

26. The appeal is therefore dismissed.

27. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 25 February 2014