[2015] UKFTT 0462 (TC)

TC04630

Appeal number: TC/2015/04043

VAT – default surcharge – alleged failure to receive notice of surcharge liability extension – reasonable excuse for late payment – whether surcharge disproportionate

FIRST-TIER TRIBUNAL
TAX CHAMBER

V GROUP INTERNATIONAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MR NICHOLAS DEE

Sitting in public at Oxford on 8 September 2015

The Appellant did not appear and was not represented

Mrs R. Pavely of HM Revenue and Customs for the Respondents

DECISION

1. This is an appeal made by the Appellant against a VAT default surcharge of £12,800.26 for failing to pay on or before the due date all of the VAT due in respect of the period 12/14.

2. The Appellant was not represented at the hearing. Shortly before the hearing was due to commence, we were handed an email from Mr Bryan Ackers FCA, the Appellant's group finance director, to the Tribunal timed at 08:11 that morning to the effect that he would be unable to attend the hearing as the engine warning light had come on in his car the previous evening when he was travelling home. The email said that Mr Ackers had not had time to make alternative travel arrangements and requested that the hearing be postponed to another day so that he could attend. After giving Mr Ackers' request due consideration, and noting that, pursuant to paragraph 2(2)(e) of the rules governing the Tribunal, avoiding delay, so far as compatible with proper consideration of the issues, is an important constituent of the objective to deal fairly and justly, we concluded that it would be fair and just to proceed with the hearing because:

(a) the papers provided to us prior to the hearing showed that the Appellant had been given ample opportunity to put forward its case; and

(b) we considered that the reason given by Mr Ackers for requesting a postponement was insufficient to justify the costs which would be incurred by our agreeing to a postponement. Since the warning light had come on in his car on the previous evening, we considered that Mr Ackers would have had ample time to make alternative arrangements for attending the hearing, whether by using public transport or borrowing another vehicle.

Although the Appellant was not represented at the hearing, we were satisfied that it had been notified of the hearing and considered that it was in the interests of justice to proceed with the hearing.

The relevant law

3. The default surcharge which is the subject of this appeal relates to the period 12/14 and was imposed at the rate of 10% on the VAT outstanding after the due date. A person is liable to a default surcharge only where the requirements of Section 59 Value Added Tax Act 1994 ("VATA") are satisfied. In summary, a default surcharge may be assessed only if a taxpayer defaults in a "surcharge period". A "surcharge period" comes into existence only if the taxpayer defaults and HMRC serves a notice creating a surcharge period. The period runs for twelve months from the period of the default but may be extended if the taxpayer defaults in respect of a period ending within the surcharge period and HMRC serve an extension notice extending the period to the end of 12 months after the period of that later default.

4. The amount of the surcharge is prescribed by sub-section 59(5) VATA. Broadly, it is a percentage of the outstanding VAT for the period of default. That percentage is 2%, 5%, 10% or 15%, according to whether the default is the first, second, third, fourth or subsequent default in the surcharge period (as the same may be extended).

5. Sub-section 59(7) VATA provides that a person who would otherwise be liable to a surcharge in respect of a default will not be so liable if that person has a reasonable excuse for the default.

6. The surcharges set out in the VATA are subject to the limitations imposed by EU and human rights legislation. As a matter of EU law, each Member State is constrained in the VAT penalties which it may impose by the requirement that those penalties must go no further than is necessary to obtain the objectives of the relevant EU directive and, as a matter of human rights law, although a state is entitled to a wide margin of appreciation in its powers of legislation, that legislation must not be "devoid of reasonable foundation".

Background

7. In the present case, the Appellant was in default in respect of each of the periods 03/13, 06/13 and 12/13. Subsequent to the period 12/13, and before the period 12/14 which is the subject of this appeal, the Appellant did not default. However, as regards the period 12/14, the Appellant defaulted in the payment of its VAT because it paid only part of the VAT which was due in respect of that period (£30,000) prior to the due date of 7 February 2015. Of the balance, £125,903.90 was paid on 9 February 2015 and the remaining £2,098.73 was left outstanding.

8. The Appellant accepts that it was in default for the period 12/14. However, it appeals against the default surcharge imposed in respect of that period on the following three grounds:-

(a) first, it contends that, following its default in respect of the period 12/13, it did not receive the notice extending the surcharge period to the end of 12 months after the period of that default and therefore that, even if the period 12/14 is a period of default, that default took place outside the surcharge period as previously extended;

(b) secondly, it contends that it has a reasonable excuse for the default on the basis that "a delayed bank payment meant the transfer missed the cut off on the Friday and hence payment was made on the next working day"; and

(c) thirdly, it contends that the penalty imposed upon it in this case is disproportionate.

The first ground

9. In relation to the first ground of appeal, Mrs Pavely on behalf of the Respondents explained that VAT surcharge liability notice extensions are included within the surcharge liability notice which gives rise to the relevant extension and that such

notices are issued under an automated system approximately ten days after the relevant due date and automatically posted out. We were shown a specimen of such a notice at Page 56 of the Respondents' Bundle. Any post returned to the Respondents is recorded by being scanned into an automatic system.

10. Mrs Pavely also pointed us to Section 98 VATA, which provides that any notice to be given to any person for the purposes of the VATA "may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative" and to Section 7 Interpretation Act 1978, which provides that, where an Act authorises or requires any document to be served by post, then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, service is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

11. Finally, Mrs Pavely explained that the Appellant had been at the same address for a considerable period of time, that it had received correspondence from the Respondents at that address both before and after the relevant surcharge liability notice extension was despatched and that the relevant surcharge liability notice had not been recorded as being returned to the Respondents.

12. All of this information would in any event have inclined us to conclude that, on the balance of probabilities, the Appellant had received the relevant surcharge liability notice extension following the default in respect of 12/13. But the most compelling evidence that the Appellant must have received the relevant surcharge liability notice extension in this case is that, as noted in paragraph 9 above, a surcharge liability notice extension is included within the surcharge liability notice which informs the taxpayer that it is liable to pay a default surcharge and that, in respect of the period 12/13, the Appellant paid the default surcharge of £1,326.48 on 14 March 2014. In our view, this could only have been because the Appellant had received the surcharge liability notice of 25 February 2014 requiring payment of that amount. It follows that the Appellant must have received notice of the extension of the surcharge period to 12/14.

13. We therefore conclude that, contrary to the Appellant's contention, the Appellant did receive the surcharge liability notice extension following its default in respect of the period 12/13 and therefore that the default which occurred in respect of the period 12/14 took place within the surcharge period as extended by that surcharge liability notice extension.

The second ground

14. In relation to the second ground of appeal, there was produced to us at page 37 of the Respondents' Bundle a print out showing that the Appellant made a payment of £30,000 by way of Faster Payment on 6 February 2015 and a payment of £125,903.90 by way of CHAPS payment on 9 February 2015. The latter payment was late as it should have been paid on the previous working day – 6 February 2015.

15. The Appellant contends that the delay in the CHAPS payment was attributable to a delay on the part of its bank and that it therefore has a reasonable excuse for the relevant default.

16. In that context, we note that sub-section 71(1)(b) VATA states that "where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse". Based on that wording, we have some doubt as to whether, as a matter of law, a delay on the part of the bank (assuming that it received the payment instruction in good time) would be capable of constituting a reasonable excuse. However, Mrs Pavely assured us that, in practice, the Respondents usually accept that a taxpayer who gives instructions for payment to its bank in good time has a reasonable excuse for any ensuing default caused by a delay on the part of its bank.

17. We have therefore approached this question on the basis that the Appellant would have a reasonable excuse if we were to conclude that it had given the relevant payment instruction to its bank in good time for the payment to be effected on 6 February 2015. However, the Appellant has not produced any evidence to that effect even though it has been given ample opportunity to do so.

18. On the contrary, the Appellent's explanation for the late payment has been inexplicably vague. In their letter of 20 April 2015, the Respondents requested a copy of the payment instruction (showing the date and time of the request) and other evidence to support the proposition that the delay in payment was attributable to a delay on the part of the Appellant's bank. In response, Mr Ackers' letter of 12 May 2015 stated that "For some reason, which the Bank are unable to confirm, there was a delay in the payment initiated on 6 February 2015 which resulted in it not being released that day". What is striking about his response is that he did not include any evidence shedding light on why the delay had occurred or the payment debit advice relating to the relevant payment which the Respondents had specifically requested in their letter of 20 April 2015. In contrast, he attached to his letter the payment debit advices in relation to the payments which had been made in respect of the three periods preceding the period of default. Each of those debit advices reflects a debit date which is the same date as the date at the top of the advice and also sets out a time, each of which is earlier than 3pm on the date in question. The obvious inference which we draw from the provision of the payment debit advices in respect of those three periods, and the failure to provide a payment debit advice in respect of the period 12/14 or any other evidence suggesting that the Appellant gave its instructions for payment in sufficient time is that no such evidence exists in relation to the period 12/14.

19. We therefore conclude that the Appellant did not have a reasonable excuse for the late payment that was made on 9 February 2015.

The third ground

20. In relation to the third ground of appeal, we have a duty under EU and human rights law to consider whether the default surcharge which has been imposed upon the

Appellant is proportionate. In this endeavour, we are bound by the previous decisions of the Upper Tribunal in *The Commissioners for Her Majesty's Revenue and Customs and Total Technology (Engineering) Limited* ([2012] UKUT 418 (TCC)) ("**TT**") and *The Commissioners for Her Majesty's Revenue and Customs and Trinity Mirror PLC* ([2015] UKUT 0421 (TCC)) ("**TM**"). The principles which we derive from those cases may be summarised as follows:

(a) it is a well-established principle of EU law that penalties must not go beyond what is strictly necessary for the objective pursued and must not be disproportionate to the gravity of the infringement – see paragraph 72 of TT;

(b) as a matter of human rights law, a state is entitled to a wide margin of appreciation in its powers of legislation but that legislation must not be "devoid of reasonable foundation" – see paragraphs 50 to 63 of TT;

(c) a penalty system such as the default surcharge regime should be applied in such a way as to give the Member States the widest discretion in deciding the balance between the public interest and the interests of individual taxpayers – see paragraph 49 of TT;

(d) the objective of the default surcharge regime is to penalise a failure to do something by a due date rather than to penalise a continuing failure to put right a default – see paragraphs 79 to 82 of TT;

(e) there are various aspects of the default surcharge regime which can result in unfairness in certain specific circumstances but the architecture of the regime as a whole is not totally flawed – see paragraphs 83 to 100 in TT;

(f) whilst the absence of any financial limit on the level of the surcharge is a feature that can result in a disproportionate penalty in a specific case, such cases are likely to be wholly exceptional – see paragraph 66 of TM;

(g) the gravity of an offence should not be exclusively dictated by the number of times that the taxpayer has been in default because the surcharge is based on a percentage of the amount unpaid and therefore, in assessing the gravity of a default, the amount of unpaid VAT is an essential element of the scheme – see paragraph 48 of TM;

(h) the question of whether the taxpayer has a reasonable excuse for the default has no bearing on the question of proportionality because it is axiomatic that there will have been no reasonable excuse for any default to which the surcharge applies – see paragraph 55 of TM;

(i) it is not appropriate for the courts or tribunals to seek to set any maximum penalty or range of maximum penalties. Instead, the court or tribunal should consider the relevant tests in the context of the individual case before it – see paragraph 62 of TM; and

(j) in assessing whether the penalty in any 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 – see paragraph 99 of TT.

21. Based on the principles described above, we consider that there are no exceptional circumstances in the Appellant's case that render this particular surcharge disproportionate. It was a fourth default in a period of less than two years and, although the payment was only one working day late, we do not think that this is sufficient to render an otherwise proportionate penalty disproportionate, given that the objective of the regime is to impose a penalty for failing to pay VAT on time rather than to penalise a continuing failure to pay the VAT.

22. Similarly, for the reasons set out in TT and TM, we consider that the surcharge in this case has arisen by the application of a scheme that cannot be characterised as being "devoid of reasonable foundation".

23. It follows that we consider the default surcharge in this case to be proportionate and consistent with EU and human rights law.

24. For the reasons we have given above, we dismiss the Appellant's appeal.

25. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 14 SEPTEMBER 2015