



TC05427

Appeal number: TC/2016/02222

VALUE ADDED TAX – late payment of VAT due on Return – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Peter William Mason-Apps t/a Mason Apps, Smallmans & Co. Appellant

- and -

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

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 15 August 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 15 April 2016 and HMRC's Statement of Case dated 4 May 2016.

DECISION

Introduction

- 5 1. This is an appeal against a Default Surcharge for the period 12/15 for the late payment of VAT. The surcharge was levied at the rate of 10% of the tax due; the surcharge amount is £662.11.
2. The Appellant acknowledges that the payment for period 12/15 was rendered late and the Default Surcharge was correctly issued.
- 10 3. The Appellant has been in the Default Surcharge Regime since 09/14. In that period the VAT Return was received before the due date the VAT was paid by way of three instalments all of which were received after the due date.
4. The first default does not give rise to a penalty but the Trader is brought within the Default Surcharge Regime. A second Default within a twelve month period leads to a penalty of 2% of the tax due. Further defaults within the following year result in a 5% penalty, which with further defaults can increase to 15%. The Trader will escape a penalty if a reasonable excuse can be successfully established.
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Legislation

- 20 5. VATA 1994 Sections 59(4); S.59 (5); S.70; S.71 (1); S.98.
6. The VAT Regulations 1995 Reg. 25(A); Reg.40

Cases

7. HMRC v Trinity Mirror plc [2015] UKUT 421 (TCC) (“*Trinity Mirror*”).
8. HMRC v Total Technology (Engineering) Ltd. [2012] UKUT 418 (“*Total Technology*”)
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Appellant’s submission

9. The Appellant in its Notice of Appeal dated 15 April 2016 stated the following:
- 30 “1) I simple [sic] cannot reconcile a justification for hounding small business men such as myself on the High Street, for clearly doing their very best to bring arrears up-to-date and pay them and there is absolutely no logic in imposing surcharges on people who are clearly in difficulties, which makes bringing those arrears up-to-date even more difficult and is more likely in consequence or any logical person to see that that is going
- 35 to drive that business into liquidation. In the case of my business like so

5 many others that would mean the Revenue loses that is owed [sic] instead
of recovering that which I am trying to repay on a sensible basis. I admit I
am behind in payments and have been for some time but evidence over the
last several years clearly shows that I am doing my very best. This is a
10 one-man firm employing three people since 1984 and MAAS & Co's is a
successor firm of which I was a partner in Maidenhead since they were
bombed out of London City in 1942. Not a fly by night business. I cannot
see the common sense of imposing Surcharges save in exceptional
circumstances thereby making it even more difficult for a firm clearly
15 struggling out of a recession to survive. However, perhaps common sense
and logic cannot be found in HMRC regulations.”

“2) This firm has a good base and is recovering. These Surcharges are
counterproductive and I am doing my best to square the books and have
been doing so for some time.”

15 “3) I am mystified as to why the original Government intentions in the
emergency budget of 2009 have not been put into place and if they were
of course the Surcharges on such a high scale would not be imposed in the
first place. Clearly Government at this time in 2009 saw this was causing
20 problems to small firms and sought to correct it. I also question whether it
was the intention originally for Government to allow HMRC to store up
penalties so that original 2% penalties were store up [sic] to become 5%
then 10% so that the Revenue could hammer the besieged small business
with a 10% penalty when the returns were high enough to justify
25 maximum return to HMRC. This is not at all equitable and not at all
helpful nor beneficial over all to the Revenue to recover monies in the
long term, there is no logic to it and I appeal accordingly that I be given
the chance to work out the ongoing liability I have admitted I owe and I
am doing the best to repay without the extra penalty and burden of
30 Surcharges which are not helpful in anyway at all and indeed to any
logical person are clearly counter-productive.”

“4) I work hard and take all the risks to generate the VAT on bills I
35 deliver. 20% VAT is now so high that for the small private individuals
and business for whom I act it inflates the bills I deliver and unlike big
corporate lawyers my clients cannot reclaim the input VAT. The result is
that I cannot increase my bills to a fair level.

I am having to pay a book keeper in part to account for the tax I generate
collect and account for BUT I get no consideration for it only penalisation
by surcharge. It is simply not equitable and it is unfair to give us “little
40 people” no help at all whilst the big corporations get away with murder!”

HMRC's Submissions

10. HMRC say there is no reasonable excuse and the Appellant paid their VAT by way of the Faster Payment Service (FPS) to reach HMRC's bank account after the due date on 23 February 2016. As a result of the late payment a Surcharge Liability Notice Extension was issued at 10%.

11. The Appellant submitted their VAT Return and Payment electronically. When the VAT Return was submitted for the period 12/15 on 13 January 2016 the Appellant would have received an acknowledgment which advised both the Payment due date and for the Appellant to check with their bank as to the cut-off time for making payment by way of the FPS. The Appellant, being in the Surcharge Regime, would have known the consequences of a late payment.

12. The Respondent's records show that the Appellant telephoned HMRC on 17 February 2016 and requested a Time to Pay arrangement for the period 12/15. HMRC refused this request as the Appellant still had a Time to Pay arrangement in place. The Appellant acknowledges that the Time to Pay request was refused in their letter of 26 February 2016. The Appellant said they had cash flow difficulties. HMRC say that this is not a reasonable excuse.

13. In relation to the argument that the Default Surcharge is disproportionate, HMRC say the Upper Tribunal in their decision of *Trinity Mirror* stated that the Default Surcharge Regime, viewed as a whole, is a rational scheme. Using the amount unpaid as the amount on which the surcharge is based, is an appropriate way to calculate the tax. The Surcharge Regime seeks to impose a reasonable penalty for failing to pay VAT on time and the decision in *Total Technology* acknowledged the tax regime as being proportionate.

14. The Default Surcharge of £662.11 for the period of 12/15 is less than 1.9% of the total value of sales of the business net of VAT and as such is not disproportionate.

15. The Respondents say that there is no reasonable excuse for late payment of the VAT for the period 12/15 and therefore the penalty should be upheld.

Conclusion

16. The Appellant makes an impassioned plea on behalf of small businesses. The Tribunal has heard this plea before. The Tribunal has very limited power to intervene in these cases. It cannot mitigate the Penalty and is unable to give any weight to the number of days of default. This means that the Regime does not distinguish between Traders who are a day, a week or a month late. It is understandable that a system which does not make this distinction can create potential hardships on taxpayers. Further, the Surcharge Regime is related to the tax unpaid and not to any other measure such as the profitability of the taxpayer, and therefore the penalty can appear unfair to small businesses.

17. In this case, the fact that the Taxpayer has paid their VAT late means that they would be liable to a Default Surcharge. There is no reasonable excuse which has been established by the Taxpayer since financial difficulties is not a reasonable excuse. The Appellant in a letter of 22 March 2016 refers to “difficulties starting 2008/2009” which means that there were cash flow difficulties for some time within the business. The Taxpayer has a statutory obligation to make a Return and to pay over “such amount of VAT as is payable by him in respect of the period to which the Return relates not later than the last day on which he is required to make the Return” pursuant to VAT Regulations 1995, Regulation 40. It should be remembered that the VAT is never the property of the company, the money belongs to the Crown at all times and must be paid over as the law requires. An insufficiency of funds does not provide a reasonable excuse for the late payment of the VAT pursuant to VATA 1994 Section 71(1)(a).

18. The Default Surcharge Regime has been held to be fair and proportionate since it provides a graduated Penalty Regime increasing in severity as more defaults are recorded, provides a reasonable excuse provision that allows a Return to be submitted late in unforeseen circumstances without penalty as well as Time to Pay arrangements which take late payments out of the Penalty Regime. In this case, the Appellant did not have a Time to Pay arrangement in place. In the circumstances, the Tribunal can find that there is no reasonable excuse and upholds the penalties. The argument presented by the Appellant is perfectly understandable but the Tribunal has limited powers of intervention in these cases. The appeal is dismissed and the penalty upheld.

19. 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 K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 19 OCTOBER 2016