



TC06231

Appeal number: TC/2017/05469

VAT – default surcharge – unavailability of online banking facilities – oversight of bookkeeper – whether or not a reasonable excuse – no – whether or not disproportionate – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GALAXY DECORATORS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD CHAPMAN

**Sitting in public at Eastgate House, Newport Road, Cardiff, CF24 0YP on 2
October 2017**

There was no attendance by or on behalf of the Appellant

**Ms Comfort Iyiewuare, Presenting Officer, on behalf of the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. This appeal is against HMRC's decision to impose a default surcharge for the late payment of VAT in respect of the 09/16 period ("the Surcharge"). The Surcharge is in the sum of £2,396.68. In essence, Galaxy Decorators Limited ("Galaxy") seeks to argue that it has a reasonable excuse for the default and that the amount imposed is disproportionate.

10 2. There was no attendance for or on behalf of Galaxy at the hearing. Ms Iyiewuare, appearing for HMRC, made an application pursuant to Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to proceed with the hearing in Galaxy's absence. I granted this application for the following reasons:

15 (1) A notice of hearing dated 29 July 2017 was sent by the Tribunal to Galaxy. I note that Galaxy's address does not appear on the letter dated 5 July 2017 which constituted its notice of appeal, as it was sent by accountants purporting to act on Galaxy's behalf. On 14 July 2017, the Tribunal acknowledged the notice of appeal but informed Galaxy that it would not communicate with Galaxy's representative without a signed form of authority. 20 No such authority has been forthcoming. Both the notice of acknowledgement of appeal and the notice of hearing were sent to Galaxy at the address which appears on correspondence between HMRC and Galaxy. Ms Iyiewuare informs me that this was and remains the address which HMRC have on their records. There is no suggestion that the notice of acknowledgment or notice of hearing 25 have been returned undelivered. On the balance of probabilities and in the light of section 7 of the Interpretation Act 1978, I was therefore satisfied that Galaxy had been notified of the hearing.

30 (2) I considered that it was in the interests of justice to proceed with the hearing. This was because the amount involved was modest, Galaxy has had the opportunity to attend and Galaxy has (with the assistance of representation by its accountants) set out its case in correspondence which has been placed before me by HMRC.

3. The appeal is made late. However, HMRC have consented to the appeal being brought out of time and so I give permission to Galaxy to do so.

35 Background

4. As its full name suggests, Galaxy carries on business in the provision of painting and decorating services. Its managing director is Mr Darren Gilbert. Galaxy engages a bookkeeper to assist in dealing with VAT, although there is no evidence as to whether the bookkeeper is an employee of Galaxy or engaged as an agent or 40 independent contractor.

5. Galaxy's relevant history in the filing of VAT returns and payment of VAT liabilities is as follows (with all due dates being extended by seven days as the returns and payments were made electronically):

<i>Period</i>	<i>Date return received</i>	<i>Due date for electronic payment</i>	<i>Amount paid by due date</i>	<i>Amount paid after due date</i>	<i>Date full payment received</i>	<i>Rate of default surcharge</i>
06/14	6/8/14	7/8/14	£0.00	£12,084.10	8/8/14	0%
03/15	5/5/15	7/5/15	£0.00	£21,598.73	14/5/15	2%
12/15	29/1/16	7/2/16	£60,000.00	£8,308.97	22/2/16	5%
06/16	12/8/16	7/8/16	£0.00	£2,948.11	13/10/16	10%
09/16	4/11/16	7/11/16	£0.00	£15,977.89	18/11/16	15%

5 6. Galaxy has not appealed any default surcharges other than the Surcharge. Galaxy has not disputed the fact that the payment was 11 days late, that the Surcharge is due or its calculation.

The Statutory Framework

10 7. The default surcharge regime is set out at section 59 of the Value Added Tax Act 1994 ("VATA 1994").

“59. The default surcharge

(1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period –

- 15 (a) the Commissioners have not received that return, or
 (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

20 then that person shall be regarded for the purposes of this section as being in default in respect of that period.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

25 (2) Subject to subsection (9) and (10) below, subsection (4) below applies in any case where –

- (a) a taxable person is in default in respect of a prescribed accounting period; and
 30 (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the

last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

5 (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

10 (4) Subject to subsections (7) and (10) below, if a taxable person on whom a surcharge liability notice has been served –

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

15 (b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

20 (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that –

25 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

30 (d) in relation to each such period after the third, the specified percentage is 15 per cent.

35 (6) For the purposes of subsection (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

40 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge –

45 (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was

reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

5 he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

10 (8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

15 (b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

20 (9) In any case where –

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

25 (b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

30 (10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.”

8. Section 71 of VATA 1994 provides as follows:

35 “71. Construction of sections 59 to 70

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct –

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

40 (b) 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.”

Galaxy's Case:

9. Galaxy's primary case appears to be that it has a reasonable excuse for the default because Mr Gilbert was away on holiday at the relevant time. The precise basis for this has been put differently at various times and so I set out the relevant parts of Galaxy's and its representative's contact with HMRC as follows.

10. By a letter to HMRC dated 23 November 2016, Galaxy's accountants stated as follows:

10 "Our client was working away at the time the payment became due and did not have access to the internet to be able to make the payment due to the coverage in the area and also there wasn't a bank branch anywhere near to call in and make the payment. Our client made the relevant payments as soon as he was able to [and] also made contact with you to make you aware of the situation."

11. A further letter appears to have been sent by Galaxy's accountants to HMRC on 23 November 2016 to the same broad effect but in different terms:

20 "Our client was working away from the business premises covering the period 24 October to 18 November 2016 and during this time had very limited access to the internet which meant he was restricted from undertaking some business matters in a timely manner.

20 This meant he was unable to access his online banking to make the payment to you before the deadline of 7 November 2016. Our client did however make this payment at his first opportunity after the deadline and tried to telephone you to discuss this matter."

12. By a letter to HMRC dated 21 April 2017, Galaxy's accountants stated as follows:

25 "Perhaps in hindsight our original letter dated 23 November 2016 didn't make clear that our client was away on holiday and due to a delay caused by the travel company, in turn our client was unable to file the VAT return on time and make the necessary payment."

30 13. By a letter to HMRC dated 8 June 2017, Galaxy's accountants stated as follows:

"In hindsight perhaps my letter of 23 November 2016 did not detail the full facts as to why the payment in respect of the quarter ended 30 September 2016 was not paid on time.

35 As you are aware the VAT return was filed on 4 November 2016, Mr Gilbert was away on holiday at the time and gave instructions to his book keeper to pay the VAT liability but sadly the book keeper failed to do so.

40 I enclose as evidence the bank statement for the period in question and you will note the references to the Las Vegas trip, you will also note that the company had more than sufficient funds to pay the VAT liability on the due date.

Mr Gilbert then returned from holiday and was working away at the time and had limited access to the internet, but at this stage he was oblivious to the fact that this liability had not been paid.

5 It wasn't until the 21 November 2016 that the book keeper admitted the error and Mr Gilbert made the payment immediately."

14. Galaxy's accountant's letters of 23 November 2016 both refer to the financial impact of the surcharge upon Galaxy's business. As such, I treat this as a submission that the surcharge is disproportionate.

HMRC's Case

10 15. HMRC dispute that Galaxy has a reasonable excuse. Ms Iyiewuare argues that none of the reasons put forward show Galaxy to have been acting reasonably.

16. Ms Iyiewuare also argues that, relying upon *Revenue and Customs Commissioners v Trinity Mirror plc* [2015] UKUT 0421 (TCC), the default surcharge regime is a proportionate one.

15 Discussion

Findings of fact

17. No witness evidence has been presented by either party. I have seen a bundle of documents prepared by HMRC, which includes the correspondence with Galaxy's representatives referred to above. Galaxy has not sent any documentary evidence of its own to the Tribunal. I therefore make findings of fact upon the documents before me.

18. In doing so, I bear in mind that the burden of proof is upon HMRC to establish that the Surcharge is due and properly calculated, whereas the burden of proof is upon Galaxy to establish a reasonable excuse. In both respects, the standard of proof is that of the balance of probabilities.

19. The payment for the 09/06 period was late as (given that it was paid electronically) it was due by 7 August 2016 but was in fact paid on 18 November 2016. Galaxy does not dispute this.

20. Galaxy has not disputed any of the previous defaults or the matters set out in the table at paragraph 5 above. As such, I find that the appropriate percentage rate for the Surcharge is 15%. Further, I find that the Surcharge is properly calculated as it represents 15% of the VAT due for the period.

21. Galaxy asserts that Mr Gilbert was abroad from 24 October 2016 to 18 November 2016 that Mr Gilbert was not able to access his internet banking and that he gave instructions to a bookkeeper to pay the VAT but the bookkeeper failed to do so. HMRC does not dispute these assertions and so I make findings of fact to that effect.

Reasonable excuse

22. In considering whether or not Galaxy has a reasonable excuse, I bear in mind the following guidance of HHJ Medd QC in *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234:

5 “It has been said before in cases arising from default surcharges that
the test of whether or not there is a reasonable excuse is an objective
one. In my judgment it is an objective test in this sense. One must ask
oneself: was what the taxpayer did a reasonable thing for a responsible
trader conscious of and intending to comply with his obligations
10 regarding tax, but having the experience and other relevant attributes of
the taxpayer and placed in the situation that the taxpayer found himself
at the relevant time, a reasonable thing to do?”

23. I do not accept that Galaxy had a reasonable excuse for the late payment. This is
15 for the following reasons, both individually and cumulatively.

24. First, Galaxy has not provided any evidence (and does not even assert) that the
difficulty which Mr Gilbert had in respect of access to the internet and online banking
was not reasonably foreseeable. A failure to make arrangements to make payments
when difficulties were reasonably foreseeable was not a reasonable thing to do for a
20 “reasonable taxpayer” (which term I use in this decision as shorthand for “a
responsible trader conscious of and intending to comply with his obligations
regarding tax, but having the experience and other relevant attributes of the taxpayer
and placed in the situation the taxpayer found himself at the relevant time”).

25. Secondly, Galaxy has not provided any evidence (and does not even assert) that
25 the payment could not have been made by means other than the internet. For example,
there is no evidence as to whether or not telephone banking was available. In any
event, the fact that it is Galaxy’s case that a bookkeeper ought to have made the
payment reveals that payment could have been made without Mr Gilbert accessing the
internet. I find that failing to use means other than the internet to arrange payment on
30 time was not a reasonable thing to do for a reasonable taxpayer.

26. Thirdly, Galaxy has not provided any evidence (and does not even assert) that
the bookkeeper was a third party rather than an employee of Galaxy. If the
bookkeeper was an employee, then the bookkeeper’s default was Galaxy’s default.
Mere oversight by a taxpayer is not a reasonable excuse. If the bookkeeper was not an
35 employee, then Galaxy faces the difficulty that section 71(1)(b) of VATA 1994
precludes from being a reasonable excuse reliance upon any other person to perform
any task, the fact of that reliance, any dilatoriness and any inaccuracy on the part of
the person relied upon. This does not mean that delegation to a third party can never
constitute a reasonable excuse. However, this would require the acts or omissions of
40 the third party to be such as to constitute a reasonable excuse. Again, there is no
evidence of that in the present case. In the circumstances, I find that Galaxy has not
established that the default of his bookkeeper, whether employed or not, constitutes a
reasonable excuse.

27. Fourthly, the fact that Galaxy had (on its case) sufficient funds in its account to pay the sums due does not explain what caused the default and so is not capable of being a reasonable excuse. Similarly, the fact that Galaxy contacted HMRC after the deadline had passed does not provide any assistance as the default had already occurred.

Proportionality

28. I find that Galaxy cannot establish that the surcharge is disproportionate. This is for the following reasons.

29. In *Revenue and Customs Commissioners v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), [2013] STC 681 (Warren J (P) and Judge Bishopp) (“*Total Technology*”) it was held that the default surcharge regime as a whole is proportionate (see in particular [99] and [100]).

30. In *HMRC v Trinity Mirror* [2015] UKUT 0421 (TCC) (Rose J (P) and Judge Berner) (“*Trinity Mirror*”) the Upper Tribunal held that the proportionality of the scheme as a whole would not preclude the possibility of the absence of a maximum limit rendering a surcharge disproportionate. However, a surcharge would only be disproportionate in a wholly exceptional case. The Upper Tribunal stated as follows at [63] to [67]:

“[63] The correct approach is to determine whether the penalty goes beyond what is strictly necessary for the objectives pursued by the default surcharge regime, as discussed in detail in *Total Technology* and whether the penalty is so disproportionate to the gravity of the infringement that it becomes an obstacle to the achievement of the underlying aim of the directive which, in this context, we have identified as that of fiscal neutrality. To those tests we would add that derived from *Roth* in the context of a challenge under the Convention to certain penalties, namely “is the scheme not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?”

[64] In *Total Technology* the Upper Tribunal identified, at [84], features of the regime which supported an argument that the scheme was fair. The tribunal said:

“However, from HMRC's point of view, the regime has a lot to commend it. It is mechanistic and therefore comparatively easy to administer. There is no need for hard-pressed officers of HMRC to spend scarce time and resources in dealing with a vague and amorphous power to mitigate a penalty. The following factors can be prayed in aid in response to the unfairness alleged by the Company:

- (a) The simplicity of the system makes it easily understood, as well as being relatively easy to operate.
- (b) The surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if defaults

again within a year. Taxpayers thus know their positions and should be able conduct their affairs so as to avoid any default.

5 (c) The penalty is not a fixed sum but is geared to the amount of outstanding VAT. Although a somewhat blunt instrument, it does bring about a broad correlation between the size of the business and the amount of the penalty. It does not suffer from the objections which could be made to the fixed penalty in *Urbán*.

10 (d) The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within 12 months of each other. This is a rational and reasonable response to successive defaults by a taxpayer.

15 (e) The ‘reasonable excuse’ exception strikes a fair balance. The gravity of the infringement is reflected in the absence of ‘reasonable excuse’ and the amount of the penalty reflects the extent of the default, that is to say the amount of tax not paid by the due date.’

[65] We agree with the tribunal in *Total Technology* that the default surcharge regime, viewed as a whole, is a rational scheme. The penalties are financial penalties, calculated by reference to the amount of tax unpaid at the due date. Although penalties may vary with the liability of the taxable person for the relevant VAT period, and increase commensurately with an increase in such liability (and, consequently, such default), the penalties are not entirely open-ended. The maximum liability for a fifth or subsequent period of default is 15% of the amount unpaid. In common with the Upper Tribunal in *Total Technology*, we consider that the use of the amount unpaid as the objective factor by which the amount of the surcharge varies is not a flaw in the system; to the contrary, the achievement of the aim of fiscal neutrality depends on the timely payment of the amount due, and that criterion is therefore an appropriate, if not the most appropriate, factor.

[66] However, we accept that, applying the tests we have described, the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgment, given the structure of the default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances. Although the absence of a maximum penalty means that the possibility of a proper challenge on the basis of proportionality cannot be ruled out, we cannot ourselves readily identify common characteristics of a case where such a challenge to a default surcharge would be likely to succeed.

[67] We should, in particular, not be taken to have endorsed the suggestion put forward by Mr Mantle that the exceptional circumstances that might give rise to a disproportionate penalty could include cases, such as *Energys*, where there had been what was described as a “spike” in profits, such that for a particular VAT period the liability to account for and pay VAT was of a different order of magnitude that was normal for the trader concerned. Attempting to identify particular categories of case in this way is not, in our view,

helpful. Whilst it might be tempting to seek to isolate, and thus confine, cases by reference to particular criteria, such cases, by reason of their exceptional nature, are likely to defy such characterisation.”

5 31. There is nothing to suggest that the present case is wholly exceptional and Galaxy does not even assert that it is. Further, the amounts involved are modest and there is no evidence of the impact of the surcharge upon Galaxy.

Disposition

32. It follows that I dismiss the appeal.

10 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 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)”
15 which accompanies and forms part of this decision notice.

**RICHARD CHAPMAN
TRIBUNAL JUDGE**

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RELEASE DATE: 22 November 2017