TC 04593

Appeal number: TC/2015/03764

VAT– Default Surcharge; reasonable excuse; proportionality; VATA 1994 s59; appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT W BROWNLIE MOTORS ENGINEERS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC, FCIArb
PETER SHEPPARD, FCIS, FCIB, CTA

Sitting in public at George House, Edinburgh, on Tuesday 11 August 2015

No appearance for the Appellant

Mrs Elizabeth McIntyre, Officer of HMRC, for the Respondents

DECISION

Introduction

1. This is a default surcharge appeal under the VAT regime. The amount surcharged is £10,713.78. The surcharge was for the late payment of the appellant's VAT return for the period ended 31 December 2014. The payment was one day late. The appellant was not represented at the hearing. Shortly before the hearing began, the Tribunal clerk telephoned three numbers provided by representatives of the appellant but there was no response.

Procedure

2. We were satisfied that the appellant had been notified of the time and place of the hearing or at least that reasonable steps had been taken to notify it of the hearing. We considered that it was in the interests of justice to proceed with the hearing. We refer to Rule 33 of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) Rules 2009, as amended. The issue was short, the essential facts were not in dispute. No indication that the appellant would not be represented was given in advance either to HMRC or to the Tribunal. Additional expense would likely be avoided if we proceeded with the appeal. We consider this to be a fair and just way of dealing with the situation which has arisen and is consistent with the overriding objective of the Tribunal Rules.

3. The appellant delivered the Notice of Appeal to the Tribunal late by a few days. In its reasons for the appeal being made late, the appellant stated *inter alia We are a small business and the appeal would allow us the chance to put our case forward, the implications for us as a business are so great.* We allowed the appellant's unopposed, written application, incorporated in a revised Notice of Appeal, to extend the time for the appeal to be made.

4. At an earlier stage in the proceedings, the appeal was categorised as a Basic case.

Statutory Background

5. The default surcharge regime is summarised in *Total Technology (Engineering) Ltd v HMRC* [2013] STC 681, (which related to the *payments on account* regime) paragraphs 7-9 and more recently in *HMRC v Trinity Mirror plc* [2015] UKUT 0421 (TCC), 3/8/2015, paragraphs 9-16 (which also related to the *payments on account* regime). Mrs McIntyre accepted that the summary in *Total Technology* was accurate and applicable here. The decision in *Trinity Mirror* was not available on the day of the hearing. *Total Technology,* in turn, referred to an earlier decision *Enersys Holdings UK Ltd v HMRC* 2010 FTT 20 (TC) where the default surcharge regime was also described (paragraphs 14-16, 18-25). *Enersys,* which was decided in favour of the appellant on the ground of proportionality, was appealed to the Upper Tribunal. The appeal was subsequently withdrawn.

6. In essence, the default surcharge regime, as set out in s59 and 59A VATA 1994, establishes a system of civil penalties for defaulting traders who delay in the submission of a return or payment. There is no penalty for the first default but it brings the trader within the regime. He receives a surcharge liability notice which warns him that further default will lead to a penalty. A second default within a year of the first (the surcharge period) leads to a penalty of 2% of the net tax due. Further defaults lead to a penalty at an increased rate up to 15% of the net tax due. If a trader does not default for a whole year, he is removed from the regime. If he thereafter defaults, the whole process starts again.

7. There is no prescribed maximum penalty. The Tribunal has no power to mitigate the penalties imposed. However, if the return and the VAT was timeously despatched, or there is a reasonable excuse for the return or VAT not having been so despatched, the trader is treated as not being liable to the surcharge (s59(7)). An insufficiency of funds to pay any VAT due is not a reasonable excuse, although some underlying cause of the insufficiency may be; generally, too, reliance on a third party is not a reasonable excuse (s71(1)). Finally, it should be noted that the amount of the penalty levied is not affected by the extent of the default. Thus, a payment in default by one day attracts the same penalty as a payment 100 days late.

8. There has been much discussion on whether the default surcharge regime or its application to a particular case is disproportionate according to the principles of EU law. The current view of the Upper Tribunal in *Trinity Mirror* (the ratio of which we regard as binding) appears to be that the default surcharge regime, viewed as a whole, is a rational scheme (paragraph 65). However, it seems that the absence of a maximum penalty means that a proper challenge on the grounds of proportionality cannot be ruled out, although it is unlikely to succeed (paragraph 66). The Upper Tribunal has been unable to identify any common characteristics of a case where such a challenge would likely succeed (paragraph 66). This leaves the door, if not open, at least ajar, for further challenge by the inventive and the ingenious. *Trinity Mirror* may not therefore be the last word on the subject.

Facts

9. The appellant carries on business as a motor vehicle recovery and repair operator, based in Edinburgh. It has been registered for VAT since 2002. For the last few years its turnover has been in the order of £2m.

10. The appellant has been in the default surcharge regime since 2011. Since at least March 2012 the appellant has made payments electronically using the online banking FPS (Faster Payment Service/Scheme) system. It has a history of late payment by a few days or a week or so. From time to time, payment was deferred in agreement with HMRC under the TTP (Time to Pay) arrangements, which may be given to a trader as a short term solution to cash flow or other financial difficulties, to enable measures to be put in place to ensure timeous payment. However, its payment for the quarter ended 30 June 2014 was late. It was correctly surcharged at the rate of 15%; it had more than four previous defaults within the surcharge period.

11. The appellant's VAT return for the period 1/10/14 to 31/12/14 stated that the net VAT due was £71,425.24. The submission of the return and payment would have been due by 31 January 2015, but because payment was being made electronically the due date for submission was extended by seven days to Saturday 7 February 2015. The return was submitted on 6 February 2015.

12. On 7 February 2015, a representative of the appellant carried out an online banking transaction by which the appellant's bank was instructed to transfer electronically, using the FPS system, the sum of £71,425.24 to HMRC's account.

13. HMRC's records (namely a printout of an electronic ledger) show that the sum of £71,425.24 was not received by HMRC until the following day, Sunday 8 February 2015. The payment was one day late. It was credited to the appellant's account on Monday 9 February 2015. These records show that the payment received on 8 February was via the FPS.

14. There were no TTP arrangements in place and a surcharge equal to 15% of the appellant's outstanding VAT for the quarter to 31 January 2015 (£71,425.24), namely £10,713.78 was levied on the appellant.

15. The appellant responded to the surcharge by letter dated 26 February 2015. It stated *inter alia* that the appellant *was not in a position to pay any earlier….* and that it was *a small business and such a large penalty would put the business in an uncertain future financially.* In response, HMRC carried out a review. By letter dated 8 April 2015 to the appellant, HMRC intimated that they did not accept that the appellant had a reasonable excuse for the default. The letter observed that it appeared that *on this occasion that adequate time was not given for the payment to reach us by the due date.*

16. In subsequent telephone conversations with HMRC in July 2015, a representative of the appellant, who had previously been asked by HMRC to make enquiries of its bank with a view to providing an explanation for the late payment, informed HMRC that the bank's policy was that payments entered online after 23.55hrs on a Friday would not be received by the recipient until the following Monday. The appellant had not hitherto enquired of its bank as to its policy and procedures for weekend online banking, and was not hitherto aware of that policy.

17. This apparent statement of bank policy or procedure contradicts the facts as the payment was received by HMRC on Sunday 8 February and not Monday 9 February 2015. This contradiction is unexplained and unresolved. However, it does not affect the fact that the payment was late or, in this appeal, the reasonableness of any excuse for payment being late.

Grounds of Appeal

18. In summary, the grounds (i) admit that the payment was late, (ii) state that cash flow problems led the appellant to leave payment to the last date for payment, (iii) assert that if 7 February had not fallen on a Saturday, payment would have been

timeous, and (iv) state, in effect, that the surcharge is excessive and morally wrong and harsh for a small company acting honestly.

19. The application of 15% to the net tax due and the arithmetical correctness of the calculation of the default surcharge have not been challenged at any stage.

Discussion

20. We have taken the facts from the well-presented bundle of papers produced by HMRC, through which we were carefully guided by Mrs McIntyre. We heard no oral evidence. As the appellant was not represented there was no contradictor.

21. We are satisfied on the balance of probabilities that the surcharge was correctly levied. The papers, which include *inter alia* true copies of electronic VAT returns from 2012, Schedules of defaults and payments, correspondence, file notes of two telephone conversations in July 2015, default surcharge schedules and calculations, amply vouched the facts as we have found them to be.

22. Mrs McIntyre also took us through the relevant parts of the legislation and submitted, under reference to *Total Technology,* that the surcharge was justified, there was no reasonable excuse and the surcharge was not disproportionate.

23. We agree. The facts disclose no reasonable excuse. The appellant has chosen the high risk option of attempting to meet its statutory obligations at the last possible moment. It has availed itself of the TTP arrangements in the past but did not do so on this occasion. Last minute payment by the FPS has not worked on this occasion. There was nothing else to indicate anything beyond the normal hazards of business that might be described as a reasonable excuse as that phrase has been interpreted over the years in relation to the default surcharge regime (see for example *Arthurton v HMRC* [2013] UKFTT 185 (TC) paragraphs 46-51; and *Fifields Mechanical and Electrical Services Ltd v HMRC* [2015] UKFTT 0835 (TC) 3/8/15, paragraphs 57-58).

24. The appellant's bank has not been identified, but it seems reasonably clear that the appellant and its representatives, as at 7 February 2015, were unaware of and took no steps to find out about any policy or procedures its bank might have in place for electronic banking transactions over the weekend, and in particular, whether an electronic instruction on a Saturday would be carried into effect in the course of that day. Given the amounts potentially at stake, it would, in our view, have been prudent to have sought reassurance or clarification from the bank or even HMRC in advance of the deadline. This failure renders it unnecessary to resolve the contradiction mentioned in paragraph 17 above, and distinguishes the circumstances here from the more detailed discussion in *Fifields* (above) at paragraphs 79-87, where a reasonable excuse was established.

25. As for the question of proportionality, we proceed on the basis that this argument has at least been raised in the Notice of Appeal. No specific aspect of proportionality has, however, been raised. Having regard to the decision of the Upper Tribunal in *Trinity Mirror,* and especially paragraphs 66-72, there is no material

before us which would entitle us to conclude that the surcharge imposed on the appellant should be classified as disproportionate.

26. In particular, we resist the temptation to carry out a comparative exercise based on the appellant's turnover or other financial circumstances. Nor do we consider it appropriate to analyse and compare the figures in *Trinity Mirror* or the other default surcharge cases we have mentioned. Such an arithmetical approach received much criticism in *Trinity Mirror* (paragraphs 47, 51 and 52). We have identified no exceptional circumstances that could render this surcharge disproportionate (within either EU or Convention jurisprudence) (see paragraphs 68, 69 and 72). We note the recent discussion of proportionality in the context of partner payment notices and Convention rights in *Rowe v HMRC* [2015] EWHC 2293 (Admin) paragraphs 138-148), where it is observed that tax measures are seen as entitled to particular deference (paragraph 141).

27. While there are or may be widespread misgivings about (i) the absence of any correlation between the period of delay and the magnitude of the penalty, between the gravity of the *offence* and the amount of the penalty and, (ii) the fact that delays in the accounting for and payment of other taxes allow for such correspondence, for mitigation, and sometimes impose a maximum penalty, all as discussed in *Enersys,* these factors seem to us now to be superseded by the tests set forth in *Trinity Mirror* at paragraph 63 but subject to the wholly exceptional case with, as yet, unidentified characteristics (paragraph 66).

28. *Trinity Mirror* does not state *Enersys* was wrongly decided (see paragraph 47). Instead, *Trinity Mirror* emphasises the principle of fiscal neutrality; and what underlies that principle which according to the Upper Tribunal includes the accounting for tax on a timely basis (paragraphs 59, 60, and 65). There is nothing to assist the appellant in the approach of the Upper Tribunal which we are bound to follow or in its facts or those of *Enersys,* or *Total Technology*. Had we been free of binding authority we might have taken the view that in the circumstances of this appellant, a much smaller business than Trinity Mirror, a penalty of about £10,000 was an extraordinary and unfair measure which in comparable circumstances in other forms of litigation, and indeed in other tax regimes, for non-compliance with a statutory time limit would be regarded as unconscionable far less unfair.

29. The appeal is nevertheless dismissed.

30. 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.

Postscript

31. Although it is not relevant to the merits of the appeal and we do not take it into account, we note that the appellant did not even manage to lodge its appeal to this tribunal in time, failed to be represented at the hearing and failed to inform either HMRC or the Tribunal that it would not be represented. We regard that last failure, in particular, as discourteous. The appellant was informed of the date and time of the hearing by letter dated 26 June 2015 and by email.

32. On the day after the hearing (12 August 2015), we were informed that Mrs Julie Brownlie, a director of the Appellant, had telephoned Mrs McIntyre stating that she had just returned from holiday or words to that effect. Mrs McIntyre contacted the Tribunal who in turn contacted Mrs Brownlie. Mrs Brownlie was informed, either by Mrs McIntyre or Ms Cockburn of the Tribunal secretariat that the hearing had proceeded and a decision would be issued in due course informing the appellant of its rights. In addition to paragraph 30 above, we draw the appellant's attention to the terms of Rule 38 of the Tribunal's Rules.

J GORDON REID QC, FCIArb
TRIBUNAL JUDGE

RELEASE DATE: 20 AUGUST 2015