



TC03004

Appeal number: TC/2012/08449

*Value added tax – default surcharge – payment one day late – penalty 71%
of pre-tax profits for quarter - proportionality of penalty – Total Technology
– cumulative effect of defaults - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AUTOMA LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MRS JANET WILKINS**

Sitting in public at 45 Bedford Square, London on 19 July 2013

Mr Tom Trainer for the appellant

Mr Ralph Cooper of HM Revenue and Customs for the respondents

DECISION

Introduction

1 This appeal concerns a default surcharge of £10,465.41 for the period ending 31
5 March 2012, being 15% of the tax outstanding on the due date of 7 May 2012. The facts are not in dispute, it is accepted that the regime has been correctly operated and the only question for the tribunal is whether the penalty is in the circumstances so disproportionate to the default that it must fail. We find the following facts established.

10 *Facts*

2 The surcharge history of the appellant shows that defaults occurred in periods 08/09 (0% penalty), 11/09 (2% penalty of £975.86), 02/10 (5% penalty of £1,178.74), 06/10 (10% penalty of £311.99), 09/10 (15% penalty of £10,533.53), 12/10 (£15% penalties initially totalling £18,583.42, but reduced to £7,852.21 as part was paid in time),
15 06/11 (15% penalties totalling £6,868.04, but again reduced for part payment in time). The default under appeal was occasioned by payments totalling £69,769.42 being made on 8 May 2012 instead of on 7 May 2012, i.e. the date adjusted for the seven extra days allowed for electronic payments.

1. 3 The explanation given for this default is that 7 May 2012 was a bank holiday
20 and that, had it not intervened closing banking activity, the payments would have arrived just in time; as it was, the last effective day for electronic payment in the circumstances was 4 May, the preceding Friday. In this case, the surcharge for 03/12 represented 71% of the pre-tax profits for the quarter in question and 16% of the profit made by the business in the previous year. Although no evidence was produced
25 to substantiate these figures, they were accepted by the commissioners and we proceed on the basis of them.

Submissions

4 It was urged on behalf of the appellants that, being in the bar and restaurant trade in London's West End, bank holidays did not affect them and they had therefore not
30 realised that there would be a problem and had been affected by a combination of circumstances which it was not reasonable to expect them to foresee.

5 The authorities, in particular *Total Technology (Engineering) Limited v. RCC* [2012] UKUT 418 (TCC), gave jurisdiction to the tribunal to strike down penalties which were clearly out of all proportion to the default. The previous defaults should
35 not, in application of the principles laid down, be relied on to justify disproportionality. Additionally, Mr Trainer pointed out that had the taxpayer requested time to pay, the penalties would under section 108 of the Finance Act 2009 have been suspended and the payment being received on 8 May there would then have been no penalty at all; in these circumstances, it was especially unfair and
40 disproportionate that a penalty amounting to a swingeing 71% of pre-tax profit should be imposed.

6 For the commissioners it is said that the possibility of penalty suspension is irrelevant to the issue under appeal because no time to pay application had been made;

it was inadmissible to speculate about what would have happened if one had been made. The fault of the appellant was simply not to foresee the entirely foreseeable fact of the intervening bank holiday and, against the background of the appellant's persistent defaults, the penalty though severe was not disproportionate. This was
5 default number 8 in the series and the surcharge system, being progressive, gave plenty of opportunity to taxpayers to come to terms with the need to get their systems in place to pay tax on time.

Conclusions

7 The tribunal has no power to reduce or mitigate default surcharges. It is well
10 established that if a surcharge complies with the statutory requirements in the circumstances of the case, it must be upheld and any indulgence or mitigation is a matter for the commissioners alone or, in certain eventualities, for judicial review.

9 Immediately binding upon us is the decision of the Upper Tribunal in *Total Technology* referred to, which was an exhaustive review of the law on this subject and
15 in which the appeal failed. In the context of the approach to be taken to the principle of proportionality in connection with the default surcharge regime, the Upper Tribunal observed at [97] -

At the individual level, however, the question is whether the actual penalty is
20 disproportionate in all of the circumstances and not whether there is a power to mitigate. The relevance of a power to mitigate is that an unreasonable penalty can be reduced and the question of proportionality of the penalty then falls to be answered by reference to the penalty as mitigated. Accordingly, we do not consider that the absence of a power to mitigate a
25 penalty renders the regime non-compliant with the principle of proportionality. It is the level of the penalty, if anything, which will bring about that result.

10 At [99] the parameters of the tribunal's discretion in the matter are set out –

In our judgment, there is nothing in the VAT default surcharge which leads
30 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
35 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
40 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).

45 11 In regard to the circumstances of the case then under appeal, the Upper Tribunal noted at [101] and [102] –

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:

- a. the payment was only one day late;
- b. the previous defaults had been due to errors which were innocent, even if the Company could not establish a reasonable excuse for them;
- c. the Company had an excellent compliance record prior to the first of the defaults leading to the penalty;
- d. the amount of the penalty represents an unreasonable proportion of the Company's profits.

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 *Energys*.

12 In *Total Technology*, the penalty being appealed was 5% of the tax paid one day late; annual profits were "around £50,000", which suggests quarterly profits of £12,500 making the surcharge in that case (£4,260.26) 34% of the quarterly profit or 8.52% of the annual profit, contrasting with the 71% and 16% claimed in the present case.

13 In *Energys Holdings UK Limited v. RCC* [2010] UKFTT 20 (TC), the appeal was against a penalty of 5% of tax paid one day late and the surcharge was £131,881, which represented "almost 16%" of the taxpayer's profits for the year, closely comparable to the proportion which the penalty is said to bear to annual profits in the current case. In that appeal, which was allowed, Judge Bishopp concluded on the amount and proportion of the penalty –

Before examining those considerations [about the absence of a power to mitigate and the flat rate nature of the penalty] in more detail it seems to me that a pertinent question to ask is whether, if the penalty were not determined mechanically but by a court or tribunal with the power to set any monetary penalty it chose without statutory constraint, that court or tribunal, exercising ordinary judicial discretion, would impose a penalty of as much as £130,000 for an error of this kind. In my view the answer is obvious: it is unimaginable that such a high penalty would be imposed.

14 The possibilities of there being a reasonable excuse for the delay, or of arguing that the payment was dispatched 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 relevant time limit, were not raised in the appeal. In some sense, however, the

argument that the nature of appellant's business made it unaware of impending bank holidays because they did not affect the operation of its businesses is such a defence, and as such we must reject it. Bank holidays are a matter of public knowledge and it cannot be suggested that a normal citizen, still less a reasonable and prudent
5 businessman, would be taken by surprise by them. The dates of bank holidays are moreover a matter of law, of which the appellant is deemed to have knowledge.

15 In regard to the only other defence open to the taxpayer, the lack of proportionality in the surcharge, it is clear that we are not constrained to look at this latest instance of default in isolation and that we are entitled to take into account the appellant's poor
10 compliance history. That some penalty for a late payment being made yet again was merited is indisputable and we would reach the conclusion that the surcharge in this case fails for lack of proportionality with great reluctance. The evidence, such as it is, shows a repeated willingness to sail close to the wind and take chances with the
15 appellant's tax obligations, notwithstanding that it is in a substantial way of business and has, or could have, adequate resources available to it to ensure timely and accurate compliance.

16 Taken in isolation, the penalty under appeal is arguably disproportionate in amount for the default which occurred, but in the context of the past defaults it gives effect to
20 parliament's clear intention that repeated and persistent default is to be severely reprimanded; in the light of the Upper Tribunal's guidance in *Total Technology*, we conclude that it is not for this tribunal to decide otherwise.

17 In the circumstances, the appeal must therefore fail.

Appeal rights

18 This document contains the full findings of fact and reasons for the decision. Any
25 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 no later than 56 days after this decision is sent to that party. The parties are referred to
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MALACHY CORNWELL-KELLY

TRIBUNAL

RELEASE DATE: 25 October 2013

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