



TC03933

Appeal number: TC/2013/00298

*Value added tax – default surcharge – late payments – penalties 48% & 55%
of pre-tax profits for quarter - proportionality of penalty – Total Technology
– cumulative effect of defaults – circumstances of case – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ART HOTELS (UK) LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR DEREK SPELLER FCA**

Sitting in public at 45 Bedford Square, London on 12 August 2014

Mr I S Ghattaura, Group Accountant, for the appellant

Mr M Ratcliff of HM Revenue and Customs for the respondents

DECISION

1. This appeal concerns default surcharges for the periods 03/12 and 09/12 for £8,306.75 and £9,541.82 respectively. We find the following facts established.

5 *Facts and submissions*

2. The surcharge history of the appellant shows that defaults occurred in periods 03/10, 12/10, 09/11 and 12/11, as well as the two under appeal. The explanation given for the defaults under appeal is that they were due essentially to the oversight of the financial controller in each case.

10 3. In 03/12, the return was furnished on 19 April; the due date for the appellant was 7 May, and payment was made by three instalments, on 3 May, 4 May and 8 May. All would have been well except for the last payment being one day late, the explanation being twofold: first that one of the two hotels from which the company's payments came in had in place an inhibition on payments of more than £45,000 being
15 made each day; secondly, that the Financial Controller had overlooked the fact that 7 May 2012 – the last day for payment – was a bank holiday and that no payment using the method then adopted by the company could be made until the next day.

4. In 09/12, the return was furnished on 15 October 2012 and the tax was paid as before in three instalments on 5 November, 7 November and 8 November, the last one
20 being again one day late. The delay was, Mr Ghattaura said, due to the oversight of the Financial Controller who had found that on 7 November there was no-one about who could authorise the payment.

5. Mr Ghattaura told us that there was no cashflow problem underlying the defaults, and indeed twice offered to show us bank statements to demonstrate that. Mr
25 Ghattaura could not explain the reason for the inhibition on daily payments exceeding £45,000 being made by one of the hotels in the group, and there was no evidence that it was imposed from outside the business, or that it prevented the inhibited payments being made a day or so earlier in order to meet the tax deadline. Mr Ghattaura told us that the company's gross profit for the year ending August 2012 was some £1.5M, the
30 net profit before tax being £68,941.

6. Two other points had been raised in the Notice of Appeal: (i) that the facts in relation to quarter 06/12 were similar, but the surcharge in that case had been cancelled, and (ii) that the penalties were in the circumstances harsh and excessive.

7. The Revenue's response to the first point is that the facts in 06/12 were different,
35 in that that quarter concerned direct debit arrangements, a feature absent from the periods under appeal. In any event, inconsistent treatment – even if there had been any – was not a matter within the jurisdiction of the tribunal, which could only consider the periods under appeal.

Conclusions

8. As to the first of these objections, it is correct to say that the tribunal cannot take account of administrative inconsistencies, supposing there to have been any. If the appellants consider that they have been treated inconsistently as between one quarter and another, their remedy lies in a complaint to the Revenue Complaints Adjudicator and not to this tribunal.

9. In regard to the second point, it is well 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; parliament has given us no power to reduce or mitigate default surcharges. The decision of the Upper Tribunal in *Total Technology (Engineering) Limited v. RCC* [2012] UKUT 418 (TCC) does however acknowledge that the tribunal at this level may strike down penalties if they are clearly out of all proportion to a default.

10. The decision in *Total Technology* was an exhaustive review of the law on this subject and a case 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 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 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.

11. At [99] the parameters of the First-tier Tribunal's discretion in the matter are set out:

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

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

5 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:

- 10 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;
- 15 d. the amount of the penalty represents an unreasonable proportion of the Company's profits.

20 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
25 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 *Energysys*.

30 13. In *Total Technology*, the penalty being appealed was £4,260.26; annual profits were “around £50,000”, which suggests quarterly profits of £12,500 making the surcharge in that case 34% of the quarterly profit. For 03/12, the surcharge equates to 48% of the appellant's quarterly profit; for 09/12, the surcharge equates to 55% of the quarterly profit.

35 14. This, together with the fact that the payments were but one day late each, suggests that there could be a case for regarding the surcharges as falling within the discretion allowed to the tribunal in *Total Technology*. We must nonetheless look at the situation in the round. Against the possibility of disproportionality must weigh the fact that these defaults continued over a period of more than two years, and that the problems that occurred were wholly within the control of the appellant company –
40 and indeed consisted of the internal errors of its own officers. We have to be guided by the Upper Tribunal's warning that It is right that the [First-tier] 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.

45 15. Having regard to these circumstances, we have concluded that the appeal does not disclose an “unimaginable” disproportionality between the penalties and the defaults

and that we are not entitled to set aside the clear intention of parliament, so that the appeal must therefore fail.

16. This document contains the 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 no 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.

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**MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE**

RELEASE DATE: 19 August 2014

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