[2016] UKFTT 693 (TC)

TC05424

Appeal number: TC/2016/03350

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

FT Publicity Ltd. **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 26 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 14 June 2006 and HMRC's Statement of Case dated 30 June 2016.

DECISION

Introduction

1. This is an appeal against a Default Surcharge for the period 02/16 for the late payment of VAT. The surcharge was levied 10% of the tax due amounting to £3,424.08.

2. The period 02/16 had a due date of 7 April 2016 for electronic VAT Returns and Payments. The VAT Return was received on the due date. The Appellant paid the VAT by way of a Faster Payment Service (FPS). The VAT payment reached HMRC's bank account after the due date on 15 April 2016.

3. The Appellant acknowledges that the payment for the period 02/16 was rendered late and as a result a Default Surcharge was issued.

Legislation and Case Law

4. VATA 1994 S.59 (4); 59(5); 70; 71(1).

5. VAT Regulations 1995, Reg. 25A and Reg. 40

HMRC v Trinity Mirror PLC 2015 [UKUT] 421 ("Trinity Mirror").

Relevant Facts

6. The Appellant registered for VAT in 2010 and the nature of its business is public relations, marketing and advertising. The Appellant had been mandated to submit their VAT Returns and payment electronically under VAT Regulations 1995 Reg. 25A.

7. The Appellant has been in the Default Surcharge Regime from the period 05/15 onwards.

8. The legislation lays out provisions whereby a Default Surcharge may be levied where HMRC have not received a VAT Return for a prescribed period by the due date, or have received the Return but have not received by the due date the amount of VAT shown on the Return as payable.

9. The first default does not give rise to a penalty but the trader is brought within the Default Surcharge Regime. The 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%. When a Trader does not default within a full year they fall outside the penalty regime.

10. A Trader will escape a penalty if a reasonable excuse can be established.

Appellant's submission

11. The Appellant states in its Notice of Appeal the following:

> "In spite of HMRC's decision I maintain that it is unfair and unreasonable to impose a Penalty on a small business when full VAT payment is only seven days late.
>
> This "one size fits all" VAT rule discriminates against small businesses, which are least able to afford such additional expense. It is not the same for "big" business and VAT.
>
> For example I have read that BHS in administration owes £19.4 million VAT, which presumably will not be collected in full, or at all. No doubt some of this amount includes the amount that the owners helped themselves to "out of the till". Will these big businesses "spivs" (media description not mine) be brought to account?
>
> There should be some flexibility in the system. If the VAT payment for each quarter was extended from one month to two months for businesses with turnovers of less than (say) £250k, we would have nothing to complain about."

HMRC's Submissions

12. HMRC say that the Appellant has acknowledged that the payment was late and the surcharge was correctly issued.

13. They say that the Appellant would be familiar with the VAT payments system and the deadline dates. This is clearly outlined in HMRC Public Notice 700, The VAT Guide. The Appellant would also, when submitting its VAT Return and Payment, receive an acknowledgement which advises both the payment due date and for the Appellant to check with its bank as to the cut-off time for making payments by way of the Faster Payment System.

14. HMRC provide web pages with a "VAT Payment Deadline Calculator" which advises on the last date for payment by Faster Payment Service for the relevant period. There was therefore an abundance of helpful information for Taxpayers which would have been readily available for the Appellant to check on payment and deadline dates.

15. In relation to the argument that a Default Surcharge is disproportionate, the Respondents draw reference to the case of *Trinity Mirror* where the Court held that

the Regime was rational and proportionate. They further point out that the Upper Tribunal in *Trinity Mirror* explains that the Default Surcharge Regime is compliant with EU Law and the European Convention on Human Rights. The Appellant is largely complaining about the Regime itself without providing a reasonable excuse for the late payment.

16. As such the Appellant has no reasonable excuse and the penalty should be upheld.

Conclusion

17. It is easy to see how a Taxpayer could think that the Default Surcharge Regime was unfair. However two recent Upper Tribunal decisions have considered the proportionality of VAT Default Surcharges in the light of European law. In both cases, the Tribunal decided that the Default Surcharge Regime was fair and proportionate.

18. The Court explained that the Regime was proportionate under the relevant EU Directives and Human Rights law.

19. Particular member states have the power to impose the penalties which they think appropriate in implementing the Regime and that power should be exercised in a proportionate manner. Essentially, the penalties that are applied should not go beyond those strictly necessary for the objectives pursued by the relevant EU Directives. In assessing proportionality the courts stated that the penalty should not be so disproportionate to the gravity of the infringement for to do so would be an obstacle to achieving the underlying aims of the relevant directive.

20. There are two relevant cases of the Upper Tribunal are *HMRC v Total Technology (Engineering Ltd) 2012 [UKUT] 418* ("*Total Technology*") and the *Trinity Mirror* case. The Tribunal in both of these cases looked at the question as to whether the Regime itself was disproportionate or whether it could be disproportionate if applied to individual Taxpayers. The Tribunals concluded there was nothing in the Regime as a whole which led to the conclusion that the architecture is fatally flawed but it is possible for it to be disproportionate in individual cases.

21. In those cases, the Tribunal in considering the objectives of the Regime, which is to penalise a failure to pay VAT on time, found that if a Payment was made late the fact that it was only one day late was not sufficient to render an otherwise proportionate penalty disproportionate. In the *Total Technology* case the Court noted that the fact that there was not a link between the amount of the penalty and the Taxpayer's profitability was not a relevant matter in considering proportionality. In the *Trinity Mirror* case, the Court accepted that the absence of the financial limit on the level of the Surcharge might be considered disproportionate but only in "wholly exceptional cases".

22. The Tribunal does not consider this case to be one of those exceptional cases therefore the penalty is proportionate.

23. The Taxpayer has provided no reasonable excuse for the late payment. The simple argument that the penalty is disproportionate does not succeed in this case and for this reason the penalty is upheld and the appeal is dismissed.

24. 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: 18 OCTOBER 2016