TC03241

Appeal number: TC/2012/00940 & TC/2012/02305

VAT – default liability surcharge – were surcharges notices received – yes – were amounts of surcharge disproportionate – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRONTIER ENVIRONMENTAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
ANTHONY HUGHES

Sitting in public at Bedford Square on 3 December 2013

William Hedley-Miller, Company Secretary and In-House Solicitor, for the Appellant

Erika Carroll, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This matter concerns the Appellant company's consolidated appeals against default surcharges for the VAT periods ending February 2010, May 2010, August 2010, November 2010, February 2011 and August 2011. The total liability under the surcharge notices is £28,754. HMRC upheld the surcharge notices following a review.

The Appellant's Case

2. Mr Hedley-Miller helpfully clarified for the Tribunal the basis of the company's appeal. Firstly, he did not challenge the company's liability to be surcharged, apart from in respect of the last two quarters where he said that the surcharge notices had not been received; secondly, he advanced no case of reasonable excuse for the default; thirdly, he submitted that the amount of the surcharge was disproportionate in equating to some 22.5% of the 2011 trading year's profit in respect of a company which, until 2010, had a good payment record (two previous defaults in a period of sixteen years). He asked the Tribunal to take into account that payment of the VAT due was made swiftly once the default was noticed. He submitted that the main issue for the Tribunal was the application to the circumstances of this case of the decision of the Upper Tribunal (Tax and Chancery Chamber) in *The Commissioners for Her Majesty's Revenue and Customs v Total Technology (Engineering) Limited* [2012]UKUT 418 (TCC). He argued that the application of a robust default surcharge regime approved by Parliament had, in the particular circumstances of this case, led to a result which was disproportionate and unfair. He complained that HMRC's skeleton argument quoted too selectively from the Upper Tribunal's decision and did not guide the Tribunal fairly as to the principles to be applied.

HMRC's Case

3. Ms Carroll on behalf of HMRC submitted that all surcharges had been correctly applied in accordance with section 59 of the Value Added Tax Act 1994 (as amended). She informed the Tribunal that HMRC did not agree with the decision in *Total Technology* but had not appealed it. She accepted that the decision was binding on this Tribunal. She characterised the Appellant's case as being that the surcharges should be geared to the company's turnover, but submitted that this was not a feature of the default surcharge regime approved by Parliament. She submitted that the application of the surcharge regime was not disproportionate or unfair in this case and asked the Tribunal to dismiss the appeal.

4. In respect of Mr Hedley-Miller's submission that the last two surcharge notices had not been received, she informed the Tribunal that surcharge liability notices are issued centrally by computer but that no copy is retained by HMRC. She further submitted that all correspondence had been sent by post to the same business address held by HMRC and that no post had been returned undelivered.

The Evidence

5. There was no dispute between the parties about the essential facts concerning the payment due dates or the periods during which the company was in default. We summarise these as follows.

(1) For the period 02/10, the due date was 31March 2010. Payment was received by HMRC on 26 July 2010, following the issue of a surcharge liability notice extension on 16 April 2010. The surcharge rate was 5% of the tax unpaid at the due date.

(2) For the period 05/10, the due date was 30 June 2010. Payment was received by HMRC on 18 November 2010 following the issue of a surcharge liability notice extension on 16 July 2010. The surcharge rate was 10% of the tax unpaid at the due date.

(3) For the period 08/10 the due date was 7 October 2010. Payment was received by HMRC on 28 January 2011 following the issue of a surcharge liability notice extension on 15 October 2010. The surcharge rate was 15% of the tax unpaid at the due date.

(4) For the period 11/10 the due date was 7 January 2011. Payment was received by HMRC on 9 February 2011, following the issue of a surcharge liability notice extension on 14 January 2011. The surcharge rate was 15% of the tax unpaid at the due date.

(5) For the period 02/11 the due date was 7 April 2011. Payment was received by HMRC on 14 April 201. The surcharge liability notice extension was issued on 15 April, with a surcharge rate of 15% of the tax unpaid on the due date.

(6) For the period 08/11 the due date was 7 October 2011. Payment was received by HMRC on 24 October 2011, following the issue of a surcharge liability notice extension on 14 October. The surcharge rate was 15% of the tax unpaid at the due date.

6. Frontier Environmental Limited is a company which acts as a tour operator and supplier of tour packages, mainly for students travelling overseas. The Tribunal was shown its profit and loss accounts for the financial years ended in 2010 and 2011 (into which the default surcharges fall), showing turnover of £818,000 and £985,000 respectively. The accounts show a trading loss of over £110,000 in 2010 and a profit of £79,000 in 2011.

7. Whilst not advancing a legal argument of reasonable excuse, Mr Hedley-Miller explained the background to the default to the Tribunal. He submitted that the period from August 2009 to August 2011 was an "*aberratory period of VAT default*" by a "*normally God Fearing company*". He explained that HMRC had sent the surcharge notices to the company director's home address, and that she had passed them on to a member of staff, expecting him to deal with them. That member of staff had usually been reliable but had unfortunately "taken his eye off the ball" for that period. We were told that he is still employed by the company but has moved to a marketing role.

8. The company's sole director, Eibleis Fanning, filed witness statements in the appeals which contained little factual information but advanced a number of grounds of appeal which were not in the event relied upon by Mr Hedley-Miller. Her factual evidence was not challenged by HMRC. She explains in her witness statements that a previously reliable member of staff ceased to deal with the company's VAT affairs competently during the default period.

9. In her witness statement of 22 December 2011 Ms Fanning states that "…*FE has no record of having received any surcharge liability notices, notices of assessment of surcharge, or other communications whatsoever from HMRC in respect of any of the quarters ended 31 August 2009, 30 November 2009, or 28 February 2010*". There is no mention of any notices not having been received in her witness statement dated 9 July 2013. Ms Fanning states that the defaults in periods 02/11 and 08/11 were caused by insufficient funds being available in the current account to which the direct debit instruction had been applied but that arrangements for payment were swiftly put in place when this was discovered.

Conclusion

10. We have considered the parties' submissions carefully. We are satisfied that the Respondent has discharged its burden of proof with regard to the Appellant's liability to be surcharged under the legislative scheme.

11. With respect to the submission that two notices were not received, we note that, although Mr Hedley-Miller addressed the Tribunal on the basis that the last two surcharge liability notices had not been received by the Appellant company, there is actually no evidence before the Tribunal to support this submission. The evidence contained in Ms Fanning's witness statement (see paragraph 9 above) relates to a different period and in any event she does not say that no notices were received, only that the company has no record of receiving them, which is a different point. There is no evidence before us about the usual procedure for the logging of the company's post. We are also aware from Mr Hedley-Miller's submissions that the usual arrangement was for the company's post from HMRC to be received at Ms Fanning's address and handed by her to staff, so there appear to be a number of possible explanations for the company not having made a record of receiving a particular notice. We note that section 98 of the Value Added Tax Act 1994 requires a penalty notice to be served by sending it in the post and we take into account Ms Carroll's submission on behalf of HMRC that the notices were sent to the company's usual business address, having been computer-generated. We have had regard to section 7 of the Interpretation Act 1978 which provides that in these circumstances service is deemed to have been effected by the posting of the letter to a recipient's usual address unless the contrary is proved. In the circumstances we find that the Appellant has not proved the contrary in respect of the last two notices and we deem service to have been duly effected.

12. We have considered the decision in *Total Technology* (in its entirety) and applied it to the circumstances of this case. We note the Upper Tribunal considered at [83] a number of features of the VAT default surcharge regime which might be said to

result in unfairness. One of those features was (e) that the amount of the penalty is not related to profitability. That feature was mentioned further at [90] where the Upper Tribunal said that it did not consider that there is anything in this point at the level of the regime viewed as a whole or at the level of the individual taxpayer.

13. The Upper Tribunal concluded at [99] that

> 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.

14. In considering the particular facts of the case before it at [101] the Upper Tribunal specifically considered the complaint that the amount of the penalty represented an unreasonable proportion of the company's profits in addition to other complaints similar to those made in this case, such as a previously good compliance record, an innocent explanation for the default, and a short period of default. It concluded at [102] that

> None of those complaints results in the default surcharge being non-compliant with the principle of proportionality…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.

15. The appeal against the default penalty surcharges in this case is made on the basis that the total penalty is disproportionate because it equates to too high a percentage of the company's profits. We take the view that this argument was raised and specifically addressed in the *Total Technology* decision but was found not to provide a basis for arguing that the penalty was not proportionate. Mr Hedley-Miller has not sought to distinguish that finding and he has raised no other basis upon which we could properly conclude that the penalty in this case offends the principle of proportionality. We have accordingly decided to dismiss this appeal.

16. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 20 January 2014