



**TC05188**

**Appeal number: TC/2015/5217**

*VAT –default surcharge- whether disproportionate, unjust or unfair – whether FTT could consider if HMRC should have exercised discretion not to assess.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAMSON CONSULTING LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE CHARLES HELLIER  
CHRISTOPHER JENKINS**

**In Chambers, the parties having agreed that the tribunal should determine the appeal on the written materials.**

## DECISION

1. Damson Consulting appeals against a VAT default surcharge of £2,318.53 assessed by HMRC in respect of a late payment of the VAT for the quarter ending 30 April 2015 (the "04/15 period").

2. Damson does not dispute that the payment was received by HMRC after the due date (7 April 2015). It says, and we accept, that the payments left its account on Monday 8 June 2015 although the request had been made to the bank before that day. Damson does not say when the request to make the transfer was made, but it says that the 6<sup>th</sup> and 7<sup>th</sup> of June being a Saturday and Sunday thus suffered from "the limitations of UK bank transfers", and we conclude that the instruction was given electronically on either Saturday or Sunday and was not implemented until Monday.

3. Section 59 VAT Act 1994 provides that if a person is late in paying VAT due (or in sending in its VAT return), HMRC may send it a surcharge liability notice which gives rise to the start of an "surcharge period" ending 12 months after the end of the VAT period of the late payment. If in relation to a VAT period ending within that surcharge period the taxpayer defaults again, then the taxpayer becomes liable to a surcharge of 2% of the late paid VAT and the surcharge period may be extended by the service of a surcharge liability extension notice to end 12 months after the end of the period of that default. If within the extended period the taxpayer defaults again then that period may be similarly extended, and a surcharge of 5%, 10% or 15% of the late paid VAT becomes exigible according to whether the default is the second, third, or fourth or subsequent default in the (extended) surcharge period.

4. In their statement of case HMRC say that a surcharge liability notices and surcharge liability extension notices had been served on the taxpayer in relation to the periods 04/12, 07/12, 07/13, 01/14 and 7/14. Damson did not dispute this, and we find they were served. As a result if Damson defaulted in the 04/15 period it became liable to a surcharge of 15% of the late paid VAT. The VAT paid late was £15,456.92 and the disputed surcharge is 15% of that amount.

5. Section 59(7) provides that if the taxpayer had a reasonable excuse for a default then, broadly speaking, the default is treated as having not occurred and no surcharge is due.

### **The Appellant's Grounds of Appeal**

6. In its notice of appeal, and in an e-mail of 8 May 2016 to the tribunal, Damson raised the following grounds:

- (1) that when the surcharge was assessed by HMRC the VAT was already in their account: the surcharge must have been raised after the receipt of payment;
- (2) that HMRC have a discretion as to whether or not to assess a surcharge and that that discretion should have been exercised in Damson's favour; and

(3) that the surcharge was not proportionate, fair or just.

### **Discussion.**

Reasonable excuse.

7. There was nothing in Damson's submissions which indicated any grounds for holding that it had a reasonable excuse for its default and we find that it did not.

The timing of the surcharge notice

8. Damson notes that when the surcharge assessment was raised, HMRC must have had the money in its account. We accept that this is likely to have been the case, but the statute provides for a penalty for paying late and does not make liability to a surcharge dependent upon the payment being received after the surcharge is assessed. We can see no way in which the provisions of section 59 can be read to mean that a surcharge cannot be assessed after payment has been received.

HMRC's discretion

9. A liability to a surcharge may be enforced only once HMRC have assessed it, and we accept that section 76, which provides that if a person is liable to section 59 surcharge "the Commissioners *may* ... assess the amount due ... and notified", gives HMRC discretion as to whether or not to assess.

10. However, this tribunal is a creature of statute and section 83 VAT Act sets out the VAT appeals which may be heard by it. Section 83 (1) provides that "an appeal shall lie to the tribunal with respect to any of the following matters ... (n) any liability to a penalty or surcharge by virtue of ... section 59".

11. By this provision the tribunal is given power to hear an appeal about the "liability" to a surcharge but is not given power to consider an appeal against the making of the decision to assess that liability. It does not permit us to adjudicate on whether or not the discretion was properly exercised. There is no other provision in section 83 which permits as to consider the exercise of the discretion which HMRC have under section 76.

12. As a result we have no power to consider whether or not HMRC should or should not have assessed liability: our jurisdiction is limited to considering whether in fact there was a liability to the surcharge.

Proportionality, fairness and justice.

13. The VAT system is a creature EU law and its provisions are subject to the general rules of EU law which deny a State the ability to charge a citizen a penalty if the charge is not proportionate, that is to say it goes beyond what is necessary to achieve a justified aim or is so disproportionate to the gravity of the infringement that it becomes an obstacle to the aim of the Directive. .

14. The aim of section of the section 59 provisions is to ensure compliance and prompt payment of VAT. That is an aim which in the light of the VAT Directive is justified. The question is whether the surcharge is necessary to achieve that aim i.e. whether it is proportionate.

5 15. In *HMRC v Trinity Mirror* [2015] UKUT 421 (TC) the Upper Tribunal accepted that a particular surcharge could be disproportionate although it thought that the circumstances when that would be the case would be exceptional.

10 16. It seems to us that the test to be applied is whether or not the surcharge is not just harsh but plainly unfair or is so disproportionate to the gravity of the offence as to undermine the aims of the Directive.

15 17. The surcharge in this case is harsh: it bears heavily on a small enterprise with irregular inputs and is in respect of only one day's delay in making payment. But it does not seem to us to be *so* harsh as to be plainly unfair, given the object of the provision under which it was made. Nor does it seem so harsh as to constitute an obstacle to the aims of the Directive. Thus we do not consider it was disproportionate.

18. Damson also argue that the surcharge was unjust. Our duty is to do justice in accordance with the law. Even if the appellant was right that in some way the penalty could be described as unjust (without that at the same time being disproportionate) if it has been levied in accordance with the law we cannot set it aside.

## 20 **Result**

19. We dismiss the appeal.

25 20. 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.

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**CHARLES HELLIER  
TRIBUNAL JUDGE**

**RELEASE DATE: 20 JUNE 2016**

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