



TC02933

Appeal number: TC/2012/07693

*TYPE OF TAX – VAT – late submission of payment of VAT due on returns
–whether surcharge should be reduced - No. Whether reasonable excuse
for late submission of return - No.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SPEEDLINK TRANSPORT SOUTHWEST LIMITED Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD
 FCIS FCIB CTA AIT**

The Tribunal determined the appeal on 6 September 2013 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 7 August 2012 with enclosures, and HMRC's undated Statement of Case received by the tribunal on 24 June 2013, with enclosures. The Tribunal wrote to the Appellant on 24 June 2013 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. An e-mail reply dated 17 July 2013 was received and has also been read by the Tribunal.

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DECISION

1. Introduction

This considers an appeal against a default surcharge of £781.85 levied by HMRC for the late filing by the appellant of its Value Added Tax return for the period ended 31 March 2012. By a direction of the Tribunal dated 20 August 2012 the appeal was stood over until 60 days after the issue of its decision by the Upper Tribunal (Tax & Chancery Chamber) in the matter of Total Technology (Engineering) Ltd. That decision was released on 29 November 2012.

2. Statutory Framework

The VAT Regulations 1995 Regulation 25 (1) contains provisions for the making of returns and requiring them to be made not later than the last day of the month following the end of the period to which it relates. It also permits HMRC to vary that period, which they do in certain circumstances eg by allowing a further 7 days for those paying electronically.

Regulation 25A (3) requires the provision of returns using an electronic system.

Section 59 of the VAT Act 1994 sets out the provisions whereby a Default Surcharge may be levied where HMRC have not received a VAT return for a prescribed accounting 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.

A succinct description of the scheme is given by Judge Bishopp in paragraphs 20 and 21 of his decision in *Enersys Holdings UK Ltd.* [2010] UKFTT 20 (TC) TC 0335 which are set out below.

20”The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence.

21. There is no fixed maximum penalty; the amount levied is simply the prescribed percentage of the net tax due. The Commissioners do not collect some small penalties; this concession has no statutory basis but is the product of a (published) exercise of the Commissioners’ discretion, conferred on them by the permissive nature of s 76(1) of the 1994 Act, providing that they “may” impose a penalty, and their general care and management powers. Even though the penalty is not collected, the default counts for the purpose of the regime (unless, exceptionally, the Commissioners exercise the power conferred on them by s 59(10) of the Act to direct otherwise). Similarly, where the monetary penalty is nil, because no tax is due or the trader is entitled to a

repayment (.....)the default nevertheless counts for the purposes of the regime, subject again to a s 59(10) direction to the contrary.”

Section 59 (7) VAT ACT 1994 covers the concept of a person having reasonable excuse for failing to submit a VAT return or payment therefor on time.

Section 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

3. Case law

HMRC v Total Technology (Engineering) Ltd. [2011] UKFTT 473 (TC)

Energys Holdings UK Ltd. [2010] UKFTT 20 (TC) TC 0335

4. The appellant’s submissions.

In a letter dated 1 June 2012 to HMRC the appellant states

“As you will see from the documentation I have copied and enclosed, the deadline of returning the completed return and payment was the 7th May 2012.

You will also find a copy of the online receipt I printed at the time, and a copy of the payment from my bank I also made at the time, both are dated 7th May 2012.

However I can only assume that because the 7th May 2012 was in fact a bank holiday that the necessary receipts at your end would not have been seen until 8th May when your team returned from the bank holiday break.

Therefore I feel it is somewhat harsh to penalise me for meeting the necessary deadlines that were simply affected by a bank holiday”

The appellant then requested a review.

5. Mrs M. Drake of HMRC Appeal and Reviews replied on 16 July 2012 saying they do not consider the appellant had a reasonable excuse. The letter includes the following paragraph

“Faster payment was received late on 8 May 2012, the date by which this should have reached us being 7 May 2012. Under the faster payment system, payment can reach our account on a weekend or bank holiday, providing sufficient cleared funds are available and payment instructions are received in time by the payer’s bank”

The letter gave the appellant 30 days to appeal to the Tribunal

6. The appellant submitted a notice of appeal dated 7 August 2012. The Grounds of appeal are similar to the letter of 1 June 2012 but include the following:

“It now transpires that the funds were affected by the bank holiday though I believed and as you will see from the letter from Mrs. Drake (HMRC) she also believed that faster payment transfers should not be affected by a bank holiday as long as the funds

were available and payment instructions are received at the senders bank. Which in both cases they were.”

On 17 July 2013 the appellant responded to HMRC’s statement of case by e-mail. Mr Anthony B. Kirby Director of the appellant makes similar points to those made in the letter of 1 June 12 and the Notice of Appeal dated 7 August 2012 and also states

Furthermore , I note that within the statement of case, Mrs Drake includes past history documentation amongst other paperwork. Once again, I see no relevance to introducing this as this has no bearing on the actual case in hand, it more so dilutes the case and draws a picture that could simply create point of view on those reading it, a somewhat poor tactic to take ones view in a favourable direction of HMRC.

He also mentions other points which are discussed in paragraph 14 below

7. HMRC’s submissions

HMRC state that the VAT return and payment for the period to 31 March 2012 was due by 7 May 2012 assuming payment was made electronically. In fact the return was received on 28 April 2012, but payment was received one day late on 8 May 2012.

8. A schedule in the papers provided to the Tribunal shows that the appellant has made previous late payments starting with the period ended 31 March 2011. These have had the cumulative effect of increasing the surcharge liability rate to 5%. The penalty for the quarter ended 31 March 2012 HMRC calculated as £781.85 being 5% of the tax unpaid at the due date of £15,637.13 as shown on the appellant’s VAT return for the period.

9. HMRC states that the payment instruction print out from the Bank of Scotland dated 7 May 2012 clearly shows a “to be paid” date as 8 May 2012. The appellant should therefore have been aware that payment would not reach HMRC’s account by the due date.

10. HMRC submit that their Notice 700 The VAT Guide section 31.3.1 states that traders should check the following with their bank when making payments electronically. “Is there a cut off time for processing payments on the same day? How long your payment will take to clear into HMRC’s bank account?”

11. HMRC request the appeal be dismissed.

12.The Tribunal’s observations

The level of the surcharges and whether or not they are disproportionate is discussed at length in the Upper Tribunal’s decision in the case of Total Technology Engineering Ltd. The decision also discusses the fact that there is no power of mitigation available to the Tribunal. The only power in this respect is that if the tribunal considers the amount of the penalty is wholly disproportionate to the gravity of the offence, if it is not merely harsh, but plainly unfair, then the penalty can be discharged. For example in Enersys Holdings Ltd the tribunal discharged a potential

penalty of £130,000 for the submission and payment of a return submitted one day late.

13. The level of the penalties has been laid down by parliament and unless the default surcharge has not been issued in accordance with legislation or has been calculated inaccurately the Tribunal has no power to discharge or adjust it other than for the reasons as outlined in paragraph 12 above. The Tribunal does not consider that a penalty of 5% of the tax due which is the culmination of a series of failures to submit VAT returns and/or payments of VAT due on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

In respect of Mr. Kirby's objection to the inclusion of the past history documentation. The Tribunal considers that the documentation does have relevance. The percentage used to calculate the surcharge is linked to past failures as described in paragraph 2. above. It is therefore incumbent on HMRC to prove to the Tribunal that in calculating the penalty they have used the correct percentage. The schedule of defaults is submitted by HMRC for that purpose.

14. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by Section 59 (7) VAT Act 1994.

An HMRC online services print out shows successful submission of the appellant's VAT return at 15.11 on 7 May 2012. The payment instruction to Bank of Scotland is dated 7 May 2012 but the narrative clearly states "To be paid 08 May 12".

The appellant states in his letter of 17 July 2013

".....there was no reason why the transfer should not have landed in HMRC's account on the same date." (7th May 2012)

"It is also completely feasible that the monies did in fact arrive with the receiving bank on time, but as it was a bank holiday, the bank did not process the incoming transfers until the day they returned to work (the day after the bank holiday)."

The Tribunal cannot agree with either of these statements. The response from Bank of Scotland to the appellant's payment request clearly states " To be paid 08 May 12". Therefore there was a reason why the transfer could not have landed in HMRC's account on 7 May 2012. For the same reason it is not feasible that the monies did in fact arrive with the receiving bank on time.

".....having proved that the funds left my account on the correct date, they should have arrived in HMRC's account the same date."

The only evidence before the Tribunal was the payment confirmation from Bank of Scotland which clearly shows "Payment pending" and "To be paid 08 May 12". No bank statement was provided by the appellant. So the Tribunal has no evidence that the funds left the appellant's bank account on the correct date. The evidence that the

Tribunal does have proves that the funds should arrive in HMRC's account on 8 May 2012. Therefore the Tribunal cannot accept this contention

Whilst the Tribunal accepts that the payment instructions were given to Bank of Scotland on 7 May 2012 the print out clearly states "To be paid 08 May 12" Thus the appellants should have expected payment would be made on 8 May 2012 which it was.

15. The Tribunal has considered why in response to an instruction made on or shortly after 3.11 pm on 7 May 2012 the Bank of Scotland's confirmation states "to be paid 08 May 12". It appears to the Tribunal that this is an automated response and the instruction was made by the appellants at a time which most probably was later than the cut off time for same day settlements.

16. In the Tribunal's view leaving submission and payment of a VAT return until 3.11 pm on the last possible day for submission, which day in this particular case was a bank holiday, is brinksmanship and courts disaster. The bank issues warnings that it may take until close of business the following day for a payment to reach the recipient's account. The appellants has left instruction for payment until late in the day and has not allowed any margin to cover for delay. The payment confirmation indicated that payment would be made on 8 May 2012 so the appellants should not be surprised that the payment arrived on that day, ie one day late.

17. In the Tribunal's view in these circumstances there is no reasonable excuse for the late payment.

18. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 11. above this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated. HMRC has applied the legislation correctly and has calculated the surcharge accurately as £781.85 being 5% of the tax of £15,637.13 shown as due on the appellants' tax return for the period ended 31 March 2012. The appellants has established no reasonable excuse for the late submission of the VAT return for the quarter ended 31 March 2012. Therefore the appeal is dismissed.

19. 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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 2 October 2013