



TC02946

Appeal number: TC/2012/07737

*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**

CRAIGTON COACH INN

Appellant

- and -

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

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

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 6 August 2012 with enclosures, and HMRC's undated Statement of Case received by the tribunal on 14 June 2013, with enclosures. The Tribunal wrote to the Appellant on 14 June 2013 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. No reply was received.

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DECISION

1. Introduction

This considers an appeal against a default surcharge of £277.80 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 29 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 26 May 2012 to HMRC the appellant states

“As I previously wrote, I am not seeking to avoid the responsibility of paying taxes but trading has been extremely difficult and priority has been given to paying suppliers and the PAYE/NIC obligations to HMRC. All of my disability living allowance goes into the business to ensure it meets its obligations in as timely a manner as possible.

As your records show we have notified you of our trading difficulties and the consequence that we have been unable to meet our VAT obligations in the required timescales. The trading position is becoming less unfavourable but, as you will be aware, transformations tend not to be quick affairs.

The appellant asks for the penalty to be cancelled.

In a letter dated 20 June 2012 the appellant makes similar points.

HMRC treated the 26 May letter as a request for a review and wrote to the appellant on 4 July 2012. The letter advised that HMRC could not consider the insufficiency of funds was a reasonable excuse. The letter gave the appellant 30 days to appeal to the Tribunal

The appellant submitted a notice of appeal dated 6 August 2012 to the Tribunal, it was received on 7 August 2012. Although this was 4 days late no objection has been raised by HMRC so the Tribunal has allowed the appeal to proceed.

5. 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 on 3 August 2012.

A schedule in the papers provided to the Tribunal shows that the appellant has a history of late payments starting with the period ended 31 December 2010. The significance of this is that it demonstrates that continued late payments have had the cumulative effect of increasing the surcharge liability rate to 10%. The penalty for the quarter ended 31 March 2012 HMRC calculate as £277.80 being 10% of the tax unpaid at the due date of £2778.02 as shown on the appellant's VAT return for the period .

6. HMRC states that it holds no evidence to suggest that the appellant had requested a time to pay arrangement before the date the tax was due to be paid. A short letter dated 7 May 2012 was sent by the appellant but not received until 10 May 2012.

This said "I write to advise that we will be unable to pay the required VAT for quarter 1 of 2012 by the due date and request deferment of a few days without penalty. We envisage that we will be able to make the payment by 23rd May."

7. HMRC submit that the appellant has received surcharge notices for previous defaults and should be aware from the advice on them of the financial consequences of any further default.

8. HMRC submit that Section 71 (1) (a) of the VAT Act 1994 specifically excludes insufficiency of funds from being a reasonable excuse for the late payment of VAT.

9. HMRC provided evidence to show that previous Time To Pay (TTP) arrangements had been agreed by the appellant with their Debt Management unit. They say these are a concession designed to help traders overcome short term cash flow problems in meeting their VAT obligations and should be a one off concession. This continued use of TTP concessions would seem to indicate that the business has suffered from regular cash flow problems and that the lack of funds is not an exceptional circumstance, but rather a normal hazard of business which could have been anticipated before the VAT became due.

10. HMRC request the appeal be dismissed.

11. 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.

12. 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 11 above. The Tribunal does not consider that a penalty of 10% of the tax due (£277.80) 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.

13. 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.

14. Section 71 (1) (a) of the VAT Act 1994 specifically excludes insufficiency of funds from being a reasonable excuse for the late payment of VAT.

15. 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 £277.80 being 10% of the tax of £2,778.02 shown as due on the appellant's tax return for the period ended 31 March 2012. The appellant has established no reasonable excuse for the late submission of the VAT return for the quarter ended 28 February 2012. Therefore the appeal is dismissed.

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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 26 September 2013