



TC05263

Appeal number: TC/2016/01563

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*VAT – late submission of VAT return and payment of VAT due on return -
whether reasonable excuse for late submission of return and payment due
on return - No.*

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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INNZONE LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE
PETER R SHEPPARD FCIS FCIB CTA AIIT**

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**The Tribunal determined the appeal on 1 July 2016 without a hearing under the
provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax
25 Chamber) Rules 2009 (default paper cases) having first read the undated Notice
of Appeal received 14 March 2016 with attachments, and HMRC's Statement of
Case dated 14 April 2016 with attachments. The Tribunal wrote to the Appellant
on 22 April 2016 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

Introduction

1. This considers an appeal against a default surcharge of £3,220.65 levied by HMRC for the late submission and payment by the due date of 7 January 2016 of the appellant's VAT return for the period ended 30 November 2015.

Statutory Framework

2. 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 seven days for those paying electronically, and a further three days for those paying by means of a direct debit arrangement.

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

4. 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.

5. A succinct description of the scheme is given by Judge Bishopp in paragraphs 20 and 21 of his decision in *Energys 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."*

6. 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.

7. Section 70 VAT Act 1994 covers what is not to be considered a reasonable excuse.

8. **Case law**

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

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

The appellant's submissions

9. In the unsigned and undated Notice of Appeal received by the Tribunal on 14 March 2016 the appellant states

“Please refer to our letters dated 2.11.15 & 9.3.16 which explains our reasons for appeal. We have not yet received a reply from HMRC. Please also note that HMRC letter enclosed dated 11 Feb 2016 was not received by us until the 26 Feb 2016. We were requested to reply/appeal by 25 Feb which was obviously impossible. Copy of our reply dated 9/3/16 is enclosed.”

10. The letter of 2 November 2015 from Michael Glyn, Finance Director to HMRC of the appellant stated:

“We refer to your letter of 7 July and would inform you that we may not be able to submit the return and payment for 30/11/15 in time due to the signatory to the cheque being on an extended vacation and not returning until a couple of days before 30/11/15. We shall obviously try to meet the deadline to our best endeavours.

We hope you will bear with us on this occasion.”

11. In an undated letter received by HMRC on 3 February 2016 Michael Glyn wrote:

“We refer to your notice of assessment of surcharge issued on 15 January 2016 in the sum of £3,220.65 being 5% of £64,413.19.

We have always, as a company, complied with payment terms for VAT each quarter that the company is responsible and consider that the issue of the surcharge is extremely harsh in this instance particularly as it was only a few days late.

We also had various problems over the Xmas period in compiling all the information necessary to submit the VAT return and only managed to reconcile the figures in early January hence the late submission.

Normally we have 12 days grace before the direct debit is charged to our bank account and in this instance was effectively only 6 days over the date when the DD would have been debited i.e. 12/01/16.

We therefore request that you give due consideration to granting dispensation in this case and await your favourable reply.”

12. The letter dated 9 March 2016 also from Michael Glyn of the appellant to HMRC stated:

“We refer to your letter of 11 February and in particular to your previous letter of 7 July 2015 where you advised that we should contact you before the due date if we were unable to submit the return and payment on time. We would inform you that we wrote to you on the 2nd November stating that we may not be able to submit the return and payment in time (Copy enclosed) due to the signatory to the cheque being on extended vacation.

The director returned from holiday 3 days prior to 30/11/2015 and actually signed the cheque pre 30/11/15 and posted it 1st class post. Obviously the post took longer and was a few days late thereby creating the surcharge.

We were totally satisfied that our company had a reasonable expectation that you would receive the return and payment by the due date.

We therefore appeal against your decision not to cancel the default surcharge based on the facts in this letter.”

HMRC’s submissions

13. HMRC state that the VAT return for the period to 30 November 2015 was due by 7 January 2016. In fact the return was received electronically on 13 January 2016 so was six days late. In respect of payment HMRC say that as a direct debit arrangement was in place an additional three days is allowed so payment was due by 10 January 2016. In fact payment was collected three working days after receipt of the late return and that was by direct debit on 18 January 2016 so was late.

14. A schedule in the papers provided to the Tribunal shows that in two previous quarters the appellant submitted a late return/payment and has been in the default surcharge regime since period 11/2014. The first default was in respect of the period ended 30 November 2014 and the return due by 7 January 2015 was received two days late on 9 January 2015. This brought the appellant into the default surcharge regime. HMRC issued the appellant with a surcharge liability Notice V160 which warned that future failures may result in a default surcharge being levied. The second default was in respect of the VAT return for the following period which was due by 7 April 2015 but was received 10 days late on 17 April 2015. HMRC issued a surcharge document V162 and levied a surcharge of £686.97 being 2% of the tax due of £34,348.58, which the appellant paid after initially appealing it.

15. The net amount of VAT due on the return for the period to 30 November 2015 is stated on the return as £64,413.19. Therefore on 15 January 2016 HMRC assessed the surcharge as 5% of this sum being £3,220.65. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4).

16. HMRC point out that from the beginning of 2013 until 31 March 2015 the reverse of surcharge liability notices has included the following standard paragraphs:-

Submit your return on time

Make a note of when your return is due.

Pay your VAT on time

Don't rely on HMRC to remind you – go to www.hmrc.gov.uk/paying_hmrc/vat.htm.

Problems paying your VAT?

If the person who normally does your VAT return will be absent, make alternative arrangements. If you can't pay the full amount on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether.”

17. From 1 April 2015 the reverse of surcharge liability notices has included the following standard paragraphs:-

How you can avoid surcharges

Submit your return and pay your VAT on time

For information about how to complete and submit your return go to www.gov.uk and search for 'VAT return'

Think ahead

If the person who normally does your VAT return will be absent, make alternative arrangements. If you can't pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge.....”.

18. HMRC state that the reverse of the surcharge notices details how surcharges are calculated and the percentage used in determining surcharges in accordance with the VAT Act 1995 s 59(5).

19. HMRC consider that the return and payment were made late and no reasonable excuse for the late payment has been established and request that the appeal be dismissed and the surcharge upheld.

The Tribunal's observations

20. 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 *Energys Holdings Ltd* the Tribunal discharged a potential

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

21. 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 20 above. The Tribunal does not consider that a penalty of £3,220.65 which is 5% of the tax due which is the culmination of previous 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.

22. The VAT Payment of £3,220.65 was received late by direct debit on 18 January 2016. The Act provides that a person is to be regarded as being in default if he fails to pay by the due date the amount of VAT shown on the return as payable by him. The appellant defaulted in respect of this period. The question for the Tribunal is whether the appellant had a reasonable excuse for these failures as contemplated by Section 59(7) VAT Act 1994.

23. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the appellant's control.

24. The appellant's submissions are unclear. In the appellant's letter dated 2 November 2015 reference is made to the need for a cheque to be signed by a director. In the letter received by HMRC on 3 February 2016 the same writer refers to payment being made by direct debit. Then on 9 March 2016 the same writer refers once again to the need for a director to sign a cheque. Payment is ultimately collected by HMRC by means of a direct debit. The references to a director signing a cheque and posting it before 30 November 2015 are therefore difficult to understand.

25. The Tribunal also accepts that HMRC publish guidance literature advising taxpayers to ensure that payments get to HMRC's account on time. In the Tribunal's view the directors of the appellant should have been aware of these matters. As they had previously received surcharge liability notices for previous failures warning of potential surcharges for future failures the directors should have been particularly alert to the need to ensure that subsequent returns and payments were submitted on time.

26. The appellant could have avoided a surcharge if he had made contact with HMRC prior to the due date to discuss late payment. HMRC say they did not receive the letter of 2 November 2015 but even if they had it indicated that matters would be resolved well in advance of the DD due date of 12 January 2016. The appellant in fact confirms that the director returned from extended vacation "a couple of days before 30/11/15".

27. Thus the Tribunal considers that the director's late return from vacation does not explain why the return was sent in late causing HMRC to activate the direct debit later than the due date for payment.

28. That being the case the only other explanation offered by the appellant is the “various problems over the Xmas period in compiling all the information necessary to submit the vat return and only managed to reconcile the figures in early January hence the late submission.”

29. Reconciliation of the figures necessary to submit the VAT return is an exercise that occurs each time a VAT return is due and therefore cannot be considered to be unexpected, unforeseeable or something that is out of the appellant’s control. Thus the appellant has not established any reasonable excuse for his failure to submit his VAT return and VAT payment for the period ended 30 November 2015 on time.

30. In the light of the Upper Tribunal decision in *Total Technology (Engineering) Ltd* as explained in paragraph 20 above this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated. HMRC applied the legislation correctly and has calculated the surcharge accurately as £3,220.65 being 5% of the outstanding tax of £64,413.19 at the due date in respect of the appellant’s tax return for the period ended 30 November 2015.

31. In the Tribunal’s opinion the appellant has not put forward any circumstances that occurred that were unexpected, unforeseeable or out of his control. The appellant knew the dates his VAT return and payment were due and should have made provision accordingly. The appellant has established no reasonable excuse for either the late submission of his VAT return or for the late VAT payment for the period ending 30 November 2015. Therefore the appeal is dismissed and the surcharge upheld.

32. 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 JUDGE**

RELEASE DATE: 21 JULY 2016