



TC05567

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Appeal number: TC/2016/04949

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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TURNER ELECTRICAL & ALARM LIMITED

Appellant

- and -

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

Respondents

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

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The Tribunal determined the appeal on 12 December 2016 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 13 September 2016, with attachments, and HMRC's Statement of Case received by the Tribunal on 31 October 2016, with attachments. The Tribunal wrote to the Appellant on 31 October 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

1. Introduction

This considers an appeal against a default surcharge of £588.55 levied by HMRC for the late payment by the due date of 7 May 2016 of the amount shown as payable on the appellant's VAT return for the period ended 31 March 2016.

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.

Regulation 40 contains provisions for the making of payment to HMRC by the due date of the VAT shown as payable on a return.

Regulation 98 covers the service of Notices.

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.

The Interpretation Act 1978 Section 7 refers to services by post.

3. Case law

Garnmoss Ltd t/a Parham Builders [2012] UKFTT 315 (TC)

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.

On 31 May 2016 the appellant wrote to HMRC. The letter included

“I am writingwith reference to your recently imposed VAT surcharge of 588.55. I believe my usual accountant was away from her job for a while which left this VAT return calculation very late (please see enclosed e-mails).”

In the Notice of Appeal dated 13 September 2016 the appellant states

“As a director I am fully aware of the deadlines imposed by HMRC for filing and paying VAT returns, and I have never missed a payment for this since trading commenced. The VAT due in March 2016 was exceptionally high and I have never had to make a payment this large before, therefore when I came to pay the VAT the bank refused to let me make such a high payment in one instalment, I had to split it into 2 payments. This meant the second payment was late by one day.

I was also under the impression that these sort of charges only occurred when a payment or filing is late when within a surcharge period, which as far as I’m aware, I am not in.”

5. HMRC’s submissions

HMRC state that the VAT return and payment for the period to 31 March 2016 was due by 7 May 2016 assuming payment was made electronically. In fact the return was received electronically on 5 May 2016 so was in time. It showed the net VAT payable was £11,885.50. In respect of payment HMRC say this was received in two parts £6,000 on 7 May 2016 and £5,885.50 on 8 May 2016. The first part was received in time but the second part one day late.

6. A schedule in the papers provided to the Tribunal shows that in three previous quarters the appellant submitted a late return/payment and has been in the default surcharge regime since period 03/2014. These ultimately have had the effect of increasing the surcharge liability rate to 10%. HMRC had issued three surcharge notices to the appellant although no financial penalty was levied on those three occasions.

7. By the end of the due date £5,885.50 remained outstanding so on 13 May 2016 HMRC assessed the surcharge as 10% of this sum being £588.55. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

8. HMRC point out that from the beginning of 2013 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 you can't pay the full amount on time, pay as much as you can.

9. HMRC state that the reverse of the surcharge notices details how surcharges are calculated and the percentage used in determining surcharges. HMRC submit that the appellant should have been aware of the possible financial consequences of further late returns or payments.

10. HMRC State that insufficiency of funds is excluded from providing reasonable excuse for a default under Section 71 (1(a) of the VAT Act 1994.

11. HMRC point out that in period 12/14 the appellant was liable to pay VAT of £11,793.22 and paid that in two parts £10,000 on 5 February 2015 and £1,793.22 on 6 February 2015 so both payments were made prior to the due date. HMRC therefore consider that the appellant was aware of their banks daily limits and had acted accordingly in the past to ensure they met their obligations.

12. HMRC consider that the appellant should have been aware that it was in a surcharge period. They had sent surcharge liability notices and extensions to the appellant's principal place of business in respect of periods 03/14, 09/14 and 09/15 and none had been returned by the postal service. HMRC observe that the fact that these default notices did not contain a financial element may be relevant. They suggest that the appellant may not have realised they were default surcharge notices because of this, whereas they immediately recognised the notice for period 03/16 as it included a financial element.

13. HMRC took the letter of 31 May 2016 as a request for a review. On 25 July 2016 HMRC wrote to the appellant giving the result of that review which was that the

default surcharge was not cancelled. HMRC said that they would expect a VAT registered trader to be aware of any daily payment limits imposed by its bank.

14. Whilst noting the appellant's comments about the usual accountant being away HMRC state "by law a VAT registered trader is responsible for the timely submission of the VAT and delegating the task to a third party does not absolve the responsibility. Where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any delay or inaccuracy on the part of the person relied upon is a reasonable excuse."

15. HMRC note that the appellant's VAT return was submitted on Thursday 5 May 2016. As at that date the appellant knew the VAT amount due it would have been possible to make the two part payment by 7 May.

16. HMRC consider that payment was made late and no reasonable excuse for the late payment has been established and request that the appeal be dismissed.

17. 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.

18. 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 15 above. The Tribunal does not consider that a penalty of £588.55 which is 10% of the tax due which is the culmination of three 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.

19. Parties agree that a VAT payment of £5,885.50 was received one day late on 8 May 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. In this case the date shown on the return was 7 May 2016. The appellant therefore defaulted in respect of this period. The question for the Tribunal is whether the appellant had a reasonable excuse for this failure as contemplated by Section 59 (7) VAT Act 1994.

20. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the appellant's control. The appellant had had to make payment in two parts on a previous occasion and should therefore have foreseen the possibility of this happening again. Leaving payment until the last possible day is brinkmanship

which leaves little opportunity to make adjustments where they become necessary. The Tribunal accepts HMRC's observation that the appellant knew the amount due by 5 May 2016 so it was entirely possible to make the payment in two parts by 7 May 2016.

21. Section 71 of the VAT act 1994 states that reliance on another is not considered a reasonable excuse for late payment. The responsibility to ensure that the return and payment are submitted by the due date remains with the appellant.

22. In the Tribunal's opinion the appellant has not put forward any circumstances that occurred that were unforeseeable or out of his control. The appellant knew the dates his VAT return was due and should have made provision accordingly.

23. 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. It is surprising that the director was unaware that the appellant was in a surcharge liability period as the appellant had been sent at least three surcharge liability notices for previous failures warning of potential surcharges for future failures.

24. Thus the Tribunal considers that the appellant has not established any reasonable excuse for his failure to submit his full VAT payment for the period ended 31 October 2014 on time.

25. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 14 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 £588.55 being 10% of the outstanding tax of £5,885.50 at the due date in respect of the appellant's tax return for the period ended 31 March 2016. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

27. 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: 20 DECEMBER 2016