



TC02848

Appeal number: TC/2013/01211

Value Added Tax – Whether VAT returns for three periods were outstanding - yes. Whether VAT returns supplied on paper are in accordance with VAT Regulations - No; whether reasonable excuse – no; appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A & R ROBERTSON & BLACK , WS

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R SHEPPARD FCIS,
FCIB, CTA, ATII
SCOTT A RAE LLB,WS**

Sitting in public at George House, Edinburgh on 23 August 2013

The Appellant was unrepresented.

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

Introduction

1. The appellant is a firm of solicitors. The senior partner is John Paterson Gray
5 who is a Writer to the Signet and a Notary Public.

2. On 21 November 2012 the appellant wrote a very short letter to the Tribunal
which reads as follows:- “We appeal the decision letter dated 20 November, 2012 a
copy of which is attached”. The letter which was attached was from HMRC and the
content which is the subject of this appeal is discussed later. However the letter also
10 contained the following statement “If you dispute this decision you have 30 days from
the date of this letter in which to lodge an appeal to First-tier Tribunal (Tax)...”.

3. On 18 December 2012 the Tribunal wrote to the appellant returning the original
documents and requesting a Notice of Appeal form and advising that the original time
limit still applied.

4. On 7 February 2013 the appellant wrote to the Tribunal enclosing a signed and
dated Notice of Appeal form. This form was incomplete in some important respects
which are discussed later. However it was received outside the time limits so the
Tribunal had to consider whether to allow the appeal to continue late.

5. On 26 March 2013 the Tribunal wrote to the appellant acknowledging receipt of
20 the Notice of Appeal. The letter also included the following paragraphs:

“Your application for permission to make a late appeal will be considered at the
start of the hearing. If permission is granted, the Tribunal will proceed to hear
your appeal.

You will be notified as soon as the hearing is arranged

25 If you do not attend the hearing, The Tribunal may decide the matter in your
absence”.

6. On 24 April 2013 the Tribunal sent a Notice of Hearing to the appellant
advising that a hearing had been arranged for 3pm on 23 August 2013. This included
the statement. “If you do not attend, the Tribunal may decide the matter in your
30 absence”.

7. On the morning of Thursday 22 August 2013 one of the Tribunal clerks
telephoned the appellant and spoke to Mr John P Gray the senior partner. This was a
courtesy call to check if everything was in order for the following day and who might
be attending the Tribunal. The clerk was told by Mr Gray that he would be unable to
attend and he requested a postponement. The clerk contacted HMRC to advise them
35 of this application and they objected to this very late request. The clerk then referred
the matter to the presiding member assigned to the case. The request was refused for
the following reasons.

- 5 i) Mr Gray makes no argument that he was unaware of the date of the hearing. Assuming there were no postal delays he has known of the hearing since the end of April 2013 and had made no application for a postponement until the day before the hearing and then he only did so as a result of the telephone call from the Tribunal. On 27 June 2013 Mr Gray, for the appellant, wrote to HMRC saying “We had understood this matter was under appeal. We attach a copy of our letter of appeal dated 21 November 2012 and copy Notice of hearing dated 24 April 2013.” Thus showing that he was at that time aware of the date of the hearing.
- 10 ii) The presiding member and the member had both prepared for the hearing.
- iii) Mrs E McIntyre of HMRC had prepared for the hearing and objected to the request.
- 15 iv) The Tribunal had booked the room which if the application was allowed would have been unavailable for use by other Tribunals because of the short notice.
- v) Between October and December 2013 the Tribunal is already committed to a number of cases which are set down for hearing over weeks rather than days. If the hearing did not go ahead it would probably not be until January 2014 that the appellant’s case could be heard.
- 20 vi) If a party fails to attend a hearing Tribunal Rule 33 allows an appeal to proceed if the Tribunal-
 - (a) is satisfied that the party has been notified of the hearing and reasonable steps have been taken to notify the party of the hearing.
 - (b) considers it is in the interests of justice to proceed with a hearing.

25 In respect of (a) this had clearly been done. In respect of (b) no formal application for a postponement was received. However the presiding member considered an e-mail from Mr Gray to the Tribunal Clerk dated 22 August 2013. The e-mail reads as follows:

30 "Dear Sarah
 Thank you for speaking with me.
 I feel very strongly about this matter but as you know there is a bank holiday on Monday next week.
 35 Attendance at the Tribunal on Friday for a self-employed person is really very, very difficult and I don't think I will be able to attend.
 I would like to attend and suggest any future hearing is on a Tuesday, Wednesday or Thursday of any week in the afternoon.
 Thank you for your assistance.
 40 John P. Gray"

- 45 vii) The presiding member did not consider anything John P Gray wrote amounted to a good reason for postponing the hearing at such short notice. It was not just a bank holiday weekend for Mr Gray it was also a bank holiday weekend for the Tribunal and Mrs McIntyre all of whom would have been just as inconvenienced by the date as Mr Gray. Mr Gray had had since April to notify the Tribunal that the date was unsuitable for him. If the Tribunal

had not telephoned one wonders when he would have bothered to contact the Tribunal.

5 viii) Mr Gray says that he feels very strongly about this matter. Papers in the
bundle of documents provided before the hearing reveal that Mr Gray objects
to submitting VAT returns on-line. Because Mr Gray objects to submitting
VAT returns on line he sends paper ones by amending old return forms.
HMRC reject them. Thus the longer this matter continues the worse the
10 position will get and the higher the penalties the appellant may potentially
have to pay. Thus it was considered to be in the appellant's interest that the
appeal be heard as soon as possible.

8. In the above circumstances the presiding member decided that it was in the
15 interests of justice to not postpone the hearing.

9. On the morning of Friday 23 August 2013, the day the hearing was scheduled
to take place, the Tribunal was advised by email that Mr Gray was considering
appealing against the decision not to postpone the hearing. By 3pm on the Friday
afternoon the time allocated for the hearing to start no appeal had been received and
20 Mr Gray had not attended the tribunal so the Tribunal proceeded to hear the appeal in
his absence.

Statutory Framework

10. The VAT Regulations 1995

25 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.

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

Regulation 25A(6) lists exceptions to making returns by an electronic system.

Regulation 25A(15) states that for prescribed accounting periods ending on or
after 31 March 2011, a person who fails to comply with paragraph (3) above is
liable to a penalty.

35 Regulation 25A (16) covers the concept of a person having reasonable excuse
for failing to comply with Regulation 25A(3).

Regulation 25A(17) sets out the level of the penalty which depends on the level
of turnover. The penalty for those such as the appellant who have a turnover
between £100,001 and £5,600,000 is £200.

The Appeal

11. There being no objection from HMRC the Tribunal allowed the application for permission to make a late appeal.

5 12. The Tribunal had some difficulty understanding exactly what was being appealed. The original letter of appeal dated 21 November 2012 appeals against the decision letter of HMRC dated 20 November 2012.

That appeal letter states as follows:

“Dear Sirs

Registration for online returns

10 Your letter of 5 November refers.

VAT returns are still outstanding for VAT periods 09/11, 06/12 and 09/12. The online filing penalties for March 2011, June 2011 and December 2011 are upheld, the penalty for the March 2012 period having been upheld in my letter of 3 October 2012.

15 If you dispute this decision you have 30 days.....” etc.

The letter of 5 November referred to provides no further assistance.

On 23 January 2013 HMRC wrote to the appellant. The second sentence of the second paragraph on Page 2 of that letter states:

20 “under the circumstances, as you did receive incorrect advice I will arrange for the four penalty charges of £200 each, that have been made for the paper returns you submitted (for the periods 03/11, 03/12, 06/11 and 12/11) to be removed and they will no longer be payable”.

25 Thus the four penalties appealed against in the 21 November 2012 letter are no longer payable. This only leaves one thing outstanding that could be appealed against and that is the statement

“VAT returns are still outstanding for VAT periods 09/11, 06/12 and 09/12”.

13. The notice of appeal dated 7 February 2013 has not been completed properly.

Section 3 is headed “Details of the Decision(s) you are appealing” the second box asks Date of Decision(s) this has been left blank.

30 The next box says type of Tax. It has been answered “VAT penalty”.

In Section 7 Grounds of Appeal is written the following:

“No official VAT return forms were sent to us. We submitted our own VAT returns and related cheques by post. These have not been acknowledged. The VAT position is up to date and your surcharge should be removed”.

14. This statement was puzzling to the Tribunal. The Notice of Appeal dated
5 7 February 2013 was submitted following the rejection by the Tribunal of the appeal
letter of 21 November 2012 and after the letter of 23 January 2013 from HMRC
removing the penalties. In the absence of any specific detail from the appellant it
appears that it is continuing to appeal against the surcharges that it has already been
notified have been removed. However it may be that it is appealing against other
10 surcharges but has not specified any. The Tribunal notes that a penalty notice dated 13
June 2013 for failing to submit online a VAT return for the period ending 31 March
2013 is included in the bundle of papers. However this is dated over four months after
the Notice of Appeal so cannot have been included in that appeal. The Tribunal
cannot consider an appeal which does not specify the particular decision being
15 appealed against. To do otherwise would be unfair to HMRC who would have been
given no opportunity to prepare a response. In the circumstances the Tribunal was left
with the appeal against the statement “VAT returns are still outstanding for VAT
periods 09/11, 06/12 and 09/12”.

15. The appellant says “We submitted our own VAT returns and related cheques by
20 post”. The bundle of papers provided to the Tribunal, a copy of which was supplied to
the appellant, contains a number of copy letters from the appellant to HMRC
enclosing paper VAT returns as detailed below. None of these are VAT returns for the
three periods referred to as outstanding in the decision letter of 20 November 2012.

16. The returns that are there are made on paper by adjusting old returns. The
25 appellant complains that “no official VAT returns were sent to us”.

17. The appellant points to a letter dated 21 August 2012 from HMRC Debt
Management which includes the statement “You are mandated to submit paper
returns”. There is also a letter dated 31 August 2012 from HMRC Debt Management
Debt Enforcement Unit which states “Re your request for paper copies of VAT
30 returns, you will need to register to submit VAT returns online (electronic VAT
returns), and submit outstanding VAT returns online as soon as possible.”

18. Despite the legislation on the matter the appellant, a firm of solicitors, states in a
letter dated 24 September 2012 “We do not know how to proceed. We therefore
appeal your various letters as we are dissatisfied.

35 **Facts**

19. The bundle of papers contain the following copies of paper VAT returns
submitted by the appellant:

A return for the period 03/10 also labelled September 2010 dated 12 September 2012

A return for the period 03/10 also labelled 30.12.10 unsigned and undated

A return for the period 03/11 dated 24 August 2012

A return for the period 06/11 dated 28 August 2012

A return for the period 12/11 dated 15 August 2012

A return for the period 03/10 also labelled 30.3.12 dated 6 September 2012

- 5 The Tribunal notes that it appears that all of these returns were submitted much later than required by Regulation 25, ie the last day of the month following the end of the period to which they relate.

Respondent's submissions

- 10 20. Mrs McIntyre submitted that in respect of the penalties appealed there was no amount in dispute following the removal of the four surcharges by HMRC's letter to the appellant dated 23 January 2013. She also noted that on the Notice of Appeal box 8 headed "Result" the narrative reads "Please say below what you think the decision should have been if you do not already make that clear in box 7". Box 8 has been left blank. In respect of "Result" the only statement made in box 7 is "The VAT position is up to date and your surcharge should be removed".

- 15 21. Mrs McIntyre took the Tribunal to The VAT Regulations 1995 Regulation 25A(3) which states:

20 "Subject to paragraph (6) below, a person who is registered for VAT must make a return required by Regulation 25 using an electronic return system whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern)."

Paragraph (6) of Regulation 25A states:

"A person

- 25 a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or
- b) to whom an insolvency procedure described in any of paragraphs (a) to (f) of Section 81(4B) of the Act is applied

30 is not required to make a return required by regulation 25 using an electronic return system."

22. Mrs McIntyre said that HMRC had not received any intimation from Mr Gray that his religious beliefs were incompatible with the use of electronic communication. In addition HMRC had not received any advice that the appellant was insolvent.

23. There was therefore no reason why the appellant should not submit its VAT returns by an electronic system.

24. Mrs McIntyre advised the Tribunal that the appellant had not submitted any returns by use of the electronic system. She advised that technically all quarterly
5 returns from and including that for the quarter ended 30 September 2009 were outstanding. However she acknowledged that there was no penalty for returns not filed electronically until after 1 April 2010. She also acknowledged that some of the technically outstanding returns which had been sent on paper had nevertheless been
10 accepted by HMRC. There appeared to be no consistency in this but Mrs McIntyre explained that some of the amended paper returns did not make it clear what period was covered so these were rejected. Examples are referred to in paragraph 19 above.

25. She considered that besides the three returns which are the subject of this appeal the returns for the periods 09/09, 12/09, 06/10, 09/10, 12/12 and 06/13 are outstanding.

15 26. Mrs McIntyre accepted that the letter dated 21 August 2012 from HMRC Debt Management contained erroneous advice. The appellant should have been mandated to make ‘online returns’ not as the letter said ‘paper returns’.

Decision

27. From 2002 the government advised that from 2010 it would require submission
20 of forms electronically. This period was to give time to those affected to set up systems and educate themselves so as to comply. Since then HMRC have issued various Business Briefs and notices drawing attention to the changes which came into effect on 1 April 2010 including the requirement to submit VAT returns online. Examples include VAT Notes No. 3 of 2009; a supplement to VAT Notes 4 of 2009
25 headed Changes to VAT in 2010 which advises that VAT returns are moving online from 1 April 2010; VAT Notes 1 of 2010 and VAT Notes 2 of 2010 also alert VAT registered businesses to the changes. The Tribunal notes the following from VAT Notes 4 2009 Supplement “From 1 April 2010 VAT registered businesses with an annual turnover of £100,000 or more (exclusive of VAT), and all businesses newly
30 registering for VAT, irrespective of turnover will have to file their VAT returns on line and pay any VAT due using an approved electronic method. This has now become law – so if you have an annual turnover of £100,000 or more (exclusive of VAT) then you must comply or you will face penalties. Notice to file VAT returns online and pay electronically. In February 2010 we will send a notice to all businesses
35 affected by this change.” Mrs McIntyre asserts that such a notice was sent to the appellant.

28. The appellant complains that “no official VAT returns were sent to us”. This is obviously because they were required to submit them online. In view of the plethora of information provided by HMRC the Tribunal finds it difficult to believe that the
40 appellant was not aware of this requirement.

29. The appellant complains about the fact that he was mandated to complete returns on paper (see para 26 *supra*). HMRC have accepted that the advice was inaccurate and removed the four penalties. The appellant is very fortunate. All of the four penalties were made for returns which were already late when the incorrect advice was given and thus there was no need for the penalties to be removed.

30. The Tribunal considers it highly likely that the appellant will use electronic means in the normal conduct of its business. It has used e-mail to contact the Tribunal.

31. The Tribunal considers that throughout the period the appellant has been determined to avoid submitting VAT returns by means of an electronic return system. The appellant has not provided any reason for failing to use the electronic return system ie to file on line. The appellant has not submitted the VAT returns for VAT periods 09/11, 06/12 and 09/12 by use of an electronic return system as required by Regulation 25A(3) of the VAT Regulations 1995. The returns are therefore still outstanding and the appeal is dismissed.

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
PRESIDING MEMBER**

RELEASE DATE: 28 August 2013