



TC03048

Appeal number: TC/2013/01698

*EC Sales Lists – whether penalty for late returns was issued unfairly –
whether reasonable excuse for late returns - No.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

XTREME GRAPHICS LIMITED

Appellant

- and -

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

Respondents

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

The Tribunal determined the appeal on 6 November 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 13 February 2013, and HMRC's Statement of Case received on 30 July 2013 with enclosures. The Tribunal wrote to the Appellant on 1 August 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.

DECISION

1. Introduction

5 This considers an appeal against penalties totalling £1,470 levied by the respondents (HMRC) for the late filing by the appellant of its quarterly EC Sales Lists for the periods ended 31 March 2012 and 30 June 2012. The appeal was lodged outside the 30 day limit set by Section 83G of the VAT Act 1994. However HMRC have confirmed that they have no objection to the appeal being considered out of time so the Tribunal proceeded with the appeal.

10 2. Legislation

VAT Act 1994 Section 66 and Schedule 11 paragraphs 2 and 3.
VAT Regulations 1995 Regulation 22.

3. Case law

15 Benedikt Consultants Ltd. (TC/2012/07278)

4. Facts

20 The VAT Act 1994 Schedule 11 paragraphs 2 and 3 require VAT registered traders who make supplies of goods to registered traders in other EC Member States to submit EC Sales statements.

5. In respect of the quarter ended 31 March 2012 the appellant failed to submit a return until 24 July 2012. In respect of the quarter ended 30 June 2012 the appellant failed to submit a return for over 100 days. On 2 November 2012 HMRC sent the appellant two late penalty notices, one for £470 for the period ended 31 March 2012 and a second for £1,000 penalty for the period ended 30 June 2012.

30 6. In a letter dated 8 November 2012 the appellant wrote to HMRC appealing their decision. The letter complains that HMRC had issued two penalties both dated 2 November 2012 without having sent any reminders or warnings. It says the EC Sales list for the quarter ended 31 March 2012 was filed electronically on 24 July 2012 and appreciates this was late. The main thrust of the remainder of the letter is that if HMRC had issued a reminder or issued the penalty for the period ended 31 March 2012 more promptly the appellant would have ensured the return for 30 June 2012 was submitted on time. The appellant states it has not intentionally made a late return, it has been a mere oversight.

35 7. On 24 January 2013 HMRC advised the appellant of the result of the review which was that the penalties were confirmed because HMRC had not received the EC Sales Lists by the due date and the penalties had been levied in accordance with Section 66 of the VAT Act 1994.

8. Appellants submissions

In the Notice of appeal the appellant accepts that the return for the period to 31 March 2012 was late and is happy to pay the penalty of £470. The appellant offers no reason why the return for the period ended 30 June 2012 was late but says that if the penalty for the period to 31 March 2012 had been levied promptly by HMRC it would have given the appellant the opportunity to correct the position. It queries why the first penalty was not levied until the second failure had occurred. The appellant considers that the first penalty should not have been delayed in this way but because it was the appellant argues that the second penalty of £1,000 should be cancelled because it was not issued fairly.

9. HMRC Submissions

On looking at the appellant's payment history HMRC observe that in respect of the quarter ended 31 March 2011 a Penalty Liability Notice was issued to the appellant on 27 June 2011. This notice also gave the appellant until 16 July 2011 to submit an EC sales list without a penalty being incurred. As the EC Sales List was received by HMRC before this date a penalty was not raised for the period. The notice also contained the following wording:

"If you do not submit future ESLs on time, you will be issued with a penalty without any further notices being served, until there has been a clear 12 months period without default."

10. HMRC say that having issued such notice they consider that the onus is then on the appellant to ensure subsequent returns are submitted within the set time.

11. HMRC say they have applied the penalties in accordance with legislation. Section 66 (5) and (6) of the VAT Act 1994 which state

"66(5) The amount of the penalty to which a person who has been served with a noticeshall be whichever is the greater of £50 and –

(a) In the case of a liability in respect of the statement to which the notice relates, a penalty of £5 for every day for which the default continues after the end of the period of 14 days mentioned in subsection 3(a) above up to a maximum of 100 days; and

(b) In the case of a liability for any other statement, a penalty of the relevant amount for every day for which the default continues, up to a maximum of 100 days.

66 (6) In subsection 5(b) above "the relevant amount", in relation to a person served with a notice under subsection (2) above, means-

(a) £5, where that person not having been liable to a penalty under this section in respect of the statement to which the

notice relates) the statement in question is the first statement in respect of which that person has become liable to a penalty while the notice has been in force;

- (b) £10 where the statement in question is the second statement in respect of which he has become so liable while the notice has been in force (counting the statement to which the notice relates where he has become liable in respect of that statement); and
- (c) £15 in any other case.”

12. HMRC have applied this legislation to the facts of this case and concluded as stated at paragraph 10 above that no penalty is to be levied for the late return for the quarter ended 30 June 2011. As there was not a clear 12 months from the issue of the Penalty Liability Notice on 27 June 2011 to the late EC Sales list for the period ended 31 March 2012 a penalty of £5 per day is payable in respect of that return in accordance with Regulations 66(5)(b) and 66 (6) (a) above. HMRC have calculated that the penalty of £5 per day for a delay of 94 days is £470. In addition to the penalty the Penalty Liability Notice is extended and remains in force for a further 12 month period. This means that in respect of the quarter ended 30 June 2012 the penalty is £10 per day up to a maximum of 100 days in accordance with Regulations 66(5)(b) and 66 (6) (b) above. In this case as the EC Sales list was late by over 100 days HMRC have levied the maximum penalty of £1,000.

13. HMRC say that they do not consider the reasons provided by the appellant constitute a reasonable excuse for the late returns as set out in Section 66(7) of the VAT Act 1994.

14. HMRC rely on the decision in Benedikt Consultants Ltd where the Tribunal found in HMRC’s favour despite two penalties being imposed on the same day.

15. Tribunal’s Observations

The Tribunal’s has considered these submissions and comments as follows:

In the Upper Tribunal’s decision in the case of Total Technology Engineering Ltd. the level of VAT default surcharges and whether or not they are disproportionate is discussed at length. The decision also discusses the fact that there is no power of mitigation available to the First Tier 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.

16. 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.

17. In this case the Tribunal does not consider that the penalties totalling £1,470 which is the culmination of a series of failures to submit EC Sales lists on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

5 18. 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 66 (7) VAT Act 1994.

10 19. In respect of the appellants argument that the penalty for the period to 30 June 2012 was not issued fairly the Tribunal considers that the appellant must have been aware that it had a responsibility to file EC Sales Lists on time. This obligation exists whether or not HMRC issue reminders and it exists even if HMRC fail to notify penalties for previous failures promptly. It follows that HMRC's failure to levy the penalty for a previous failure promptly cannot constitute a reasonable excuse for a further failure. The Tribunal observes that the Tribunal in Benedikt Consultants Ltd. comes to a similar conclusion.

15 20. The appellant has stated that the failures to lodge the EC sales lists on time were not intentional but were oversights. Unfortunately such oversights cannot be regarded as a reasonable excuse for the late submission of the EC Sales lists.

20 21. HMRC have applied the legislation correctly and calculated the amount of the penalty accurately for the quarter ended 31 March 2012 at £470, being 94 days at £5 per day, and for the quarter ended 30 June 2012 at £1,000 which is the maximum of 100 days at £10 per day. The total of the two penalties being £1,470. The appellant has accepted that a penalty for the late return for the period to 31 March 2012 is payable and has not established a reasonable excuse for the late return for the period ended 30 June 2012. Therefore the appeal is dismissed.

25 22. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 15 November 2013