



TC03417

Appeal number: TC/2013/07010

VAT – penalty for late submission of EC Sales List– section 66 Value Added Tax Act 1994 – four month delay by HMRC after 100 day penalty period in issuing penalty notice - whether reasonable excuse – fairness – proportionality – Hok and Total Technology decisions of Upper Tribunal applied - appeal dismissed- comments on four month delay

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAYKNIGHT ENTERPRISES LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
MR MOHAMMED FAROOQ**

Sitting in public at Cambridge on 27 February 2014

Gary Knight, Director, for the Appellant

Erica Carroll, Presenting Officer, for the Respondents

DECISION

Introduction

- 5 1. This is an appeal against a penalty charged under section 66 Value Added Tax Act 1994 ("VATA") for the late submission of an EC Sales List ("ESL") for the period ending 30 September 2012 ("09/12"). The penalty was charged in the amount of £500.

Legislation

- 10 2. Schedule 11 paragraphs 2 and 3 VATA require VAT registered traders who make supplies of goods to registered traders in other EC Member States to submit ESLs.

3. Section 66 VATA imposes penalties for failure to submit an ESL. Section 66 VATA provides:

15 (1) If, by the last day on which a person is required in accordance with regulations under this Act to submit an EC sales statement for any prescribed period to the Commissioners, the Commissioners have not received that statement, that person shall be regarded for the purposes of this section as being in default in relation to that statement until it is submitted.

20 (2) Where any person is in default in respect of any EC sales statement the Commissioners may serve notice on him stating—

(a) that he is in default in relation to the statement specified in the notice;

25 (b) that (subject to the liability mentioned in paragraph (d) below) no action will be taken if he remedies the default before the end of the period of 14 days beginning with the day after the service of the notice;

30 (c) that if the default is not so remedied, that person will become liable in respect of his default to penalties calculated on a daily basis from the end of that period in accordance with the following provisions of this section; and

35 (d) that that person will become liable, without any further notices being served under this section, to penalties under this section if he commits any more defaults before a period of 12 months has elapsed without his being in default.

(3) Where a person has been served with a notice under subsection (2) above, he shall become liable under this section—

40 (a) if the statement to which the notice relates is not submitted before the end of the period of 14 days beginning with the day after the service of the notice, to a penalty in respect of that statement; and

(b) whether or not that statement is so submitted, to a penalty in respect of any EC sales statement the last day for the submission of which is after the service and before the expiry of the notice and in relation to which he is in default.

5 (4) For the purposes of this section a notice served on any person under subsection (2) above shall continue in force—

(a) except in a case falling within paragraph (b) below, until the end of the period of 12 months beginning with the day after the service of the notice; and

10 (b) where at any time in that period of 12 months that person is in default in relation to any EC sales statement other than one in relation to which he was in default when the notice was served, until a period of 12 months has elapsed without that person becoming liable to a penalty under this section in respect of any EC sales statement.

15 (5) The amount of any penalty to which a person who has been served with a notice under subsection (2) above is liable under this section shall be whichever is the greater of £50 and—

20 (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 in respect of any other statement, a penalty of the relevant amount for every day for which the default continues, up to a maximum of 100 days.

25 (6) In subsection (5)(b) above “the relevant amount”, in relation to a person served with a notice under subsection (2) above, means—

30 (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;

35 (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.

(7) If a person who, apart from this subsection, would be liable to a penalty under this section satisfies the Commissioners or, on appeal a tribunal, that—

40 (a) an EC sales statement has been submitted at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit; or

(b) there is a reasonable excuse for such a statement not having been dispatched,

5 he shall be treated for the purposes of this section and sections 59 to 65
and 67 to 71, 73, 75 and 76 as not having been in default in relation to
that statement and, accordingly, he shall not be liable to any penalty
under this section in respect of that statement and any notice served
under subsection (2) above exclusively in relation to the failure to
submit that statement shall have no effect for the purposes of this
section.

(8) ...

10 (9) In this section "EC sales statement" means any statement which is
required to be submitted to the Commissioners in accordance with
regulations under paragraph 2(3) of Schedule 11.

4. There are a couple of points in relation to these provisions which should perhaps
be noted. First, a trader who has previously defaulted in respect the submission of an
ESL will be liable to a penalty "without any further notices being served" if it defaults
15 again within a 12 month period (subsection 2 (b)). Secondly, the trader is not liable to
a penalty if it has a reasonable excuse for the failure to submit a return by the due date
(subsection 7 (b)).

The facts

5. It was common ground that, in the appellant's case, the due date for submission
20 of the ESL for the period 09/12 was 14 October 2012 for a paper return and 21
October 2012 for an electronic return.

6. It was not seriously in dispute that the appellant did not file its ESL by the due
date. Mr Knight said he did not recollect whether he had submitted an ESL for that
period and HMRC, for their part, had no record of the return being received by the
25 due date. We find that the ESL was not submitted before the due date and was only
received by HMRC as recorded in paragraph 9 below.

7. A penalty notice was issued by HMRC on 22 May 2013. The penalty was
calculated at the rate of £5 per day for a maximum period of 100 days (i.e. the period
22 October 2012 to 29 January 2013) in accordance with section 66(5).

30 8. It will be noted that the appellant was only notified by a notice issued on 22
May 2013 (and presumably received a day or two later) whereas the default period of
100 days ended on 29 January 2013. Ms Carroll was unable to explain to us why
HMRC delayed for almost 4 months before notifying the appellant of its £500 penalty
in respect of the period over 9/12. The point is important because by this stage a
35 penalty in respect of the next period might be accruing if the appellant had not
submitted its ESL for that period. Thus there was, in total, a period of approximately 7
months from the date of the original due date before the appellant received a notice
from HMRC informing it that it was in default in respect of the period 09/12. We
shall return to this point later.

40 9. After receiving the penalty notice issued on 22 May 2013, the appellant wrote a
letter to HMRC dated 3 June 2013 enclosing a completed ESL and this was received
by HMRC on 7 June 2013. Mr Knight stated, and we accept, that as soon as the

appellant received the penalty notice it completed and submitted the ESL (which Mr Knight described as only having two entries) immediately.

10. The appellant had also been late in submitting its ESL for the period 12/11. Accordingly a penalty liability notice ("PLN") was issued to the appellant in respect
5 of that period on 21 March 2012. The PLN, which was contained in the bundle of documents before us, stated:

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

11. Because the alleged default in respect of the period 09/12 occurred within 12 months of the PLN, HMRC issued the penalty notice on 22 May 2013.

12. According to Mr Knight, the appellant had been submitting ESLs for the last 5 to 6 years. In fact, the bundle of documents included in the papers before us contained
15 a PLN dated 25 June 2004, which indicated that the appellant may have been submitting PSLs for a longer period of time. Usually, HMRC sent the ESL forms quarterly to the appellant. Mr Knight had no record of the ESL form to the period 09/12 being received and had no record of a paper return having been submitted for that period. Mr Knight told us, and we accept, that the appellant was not aware that
20 the ESL for the period 09/12 had not been submitted until it received the penalty notice of 22 May 2013.

13. Mr Knight told us that the penalty of £500 was greater than the value of the exports shown on the return. It was, in his view, not worthwhile to continue exporting.

Discussion

25 14. Mr Knight complained that HMRC had failed to advise the appellant that its ESL had not been received by the due date. As soon as the appellant realised HMRC had not received the return, it was submitted within days.

15. In Mr Knight's view the failure by HMRC to notify the appellant, which was unaware that it was in default, until the maximum penalty period of 100 days had
30 expired indicated that HMRC which to "extort money" from the appellant. He likened HMRC to "wheel clampers."

16. In the event, the return consisted of two entries and the penalty of £500, in the circumstances, seemed to Mr Knight to be unjust.

17. In this case, the legislation is clear. Our jurisdiction is, if HMRC prove that a
35 penalty is *prima facie* due, confined by section 66 (7) to considering whether the ESL had been received by HMRC in time or whether the appellant had a reasonable excuse for failing to deliver it by the due date. Only the latter ground of appeal is relevant in this case in the light of our finding that the ESL was not submitted until June 2013.

18. In our view, the appellant did not have a reasonable excuse for its failure to submit the ESL in respect of the period 09/12 by the due date. HMRC is under no obligation to send paper returns to the appellant. The appellant had been completing and submitting ESLs for 5 to 6 years or longer. It must have known that it was due to submit an ESL and should have contacted HMRC if the relevant form failed to arrive in the post.

19. Furthermore, it is clear from the legislation (section 66 (2) (d)) that a penalty can be imposed under section 66 (5) without further warning after a PLN had been issued in respect of an earlier default. Moreover, the PLN issued in respect of the default to the period 11/12 made this clear.

20. We have some sympathy with Mr Knight that, in a case where a taxpayer is unaware of its default, it seems harsh that a penalty should be allowed to clock up for the full 100 day period without the taxpayer being informed and given an opportunity to comply at the earliest opportunity. Nonetheless, there is no statutory obligation for HMRC to notify the appellant and their failure to do so cannot, in our view, constitute a reasonable excuse within the meaning of section 66 (7).

21. The decision of the Upper Tribunal in *Hok Ltd* [2012] UKUT 363 (TCC) makes it clear that this Tribunal does not have jurisdiction to consider questions of fairness and reasonableness in the judicial review sense, unless specifically authorised by statute. In this case there is no such specific statutory authority and accordingly we have no judicial review jurisdiction. In addition, the Upper Tribunal's decision in *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) was relied on by Ms Carroll as authority for the proposition that, in relation to the argument by Mr Knight that the penalty was disproportionate, this Tribunal should not readily substitute its review of what is fair for the penalty which Parliament has imposed. We have reviewed the principles set out in the *Total Technology* decision we consider that there is no basis for concluding that the penalties specified by Parliament in section 66 are disproportionate.

22. Accordingly, we dismiss this appeal.

23. There is, however, one further matter on which we should comment. As we have noted above, after the 100 day penalty period expired, HMRC waited for almost another four months before issuing a penalty notice on 22 May 2013. By this stage it is possible that another penalty period was running in respect of the period 12/12.

24. It was presumably the intention of Parliament that the penalties imposed by section 66 should be effective in deterring non-compliance with the statutory obligation to submit ESLs. Indeed, in HMRC's skeleton argument it was stated that the penalty regime "is intended to deter non-compliance with the obligation to submit ESLs." In cases where the compliance obligation has been overlooked by a taxpayer it is hard to understand how Parliament's purpose has been furthered by this four-month delay. In our view, unless there are compelling reasons which explain why the four-month delay was necessary (and we note that, when asked by the tribunal, Ms Carroll

was unable to offer any explanation), we consider that this further delay after 29 January 2013 was unsatisfactory.

25. It was clear that as soon as Mr Knight became aware of the appellant's non-compliance in relation to the period 09/12 he submitted the relevant ESL. Had he
5 been notified on or shortly after 29 January 2013 he might well have been prompted to have taken immediate action in respect of the period 12/12 as well, if he was in default in respect of that period. However, since this delay affects a potential penalty for a period which is not under appeal we have no jurisdiction to consider the point. If necessary, Mr Knight would have to pursue this matter (i.e. in relation to the period
10 12/12) with the Adjudicator's Office (www.adjudicatorsoffice.gov.uk), having first exhausted HMRC's own complaints procedures.

26. 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
15 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.

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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 19 March 2014