



TC04150

Appeal number: TC/2013/09131

Value Added Tax – Surcharges for late payments of Tax; whether reasonable excuse for failures - No; appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TREVOR BOYD t/a BOYD'S TRANSPORT

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER
PETER R SHEPPARD FCIS, FCIB, CTA
DR HEIDI POON CA, CTA, PhD**

Sitting in public at George House, Edinburgh on 23 October 2014

The Appellant was unrepresented

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

Introduction

1. Boyd's Transport is a long distance road haulage business established in 1979. It offers storage and nationwide distribution with daily services to and from Dundee, Manchester, Birmingham and London.
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2. This considers an appeal dated 27 November 2013 made by the Appellant against surcharges originally totalling £1,630.26 assessed by the Respondents for the late submission and late payment of the Appellant's VAT return for the period ending 31 March 2013. By the date of the hearing the surcharges had been reduced by HMRC to £650.
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3. The appeal was originally categorised as a default paper case but the Appellant requested a hearing. Accordingly a hearing was scheduled for 14 July 2014 but the Appellant requested a postponement for reasons of ill health. The postponement was granted but medical evidence was not submitted.
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4. The re-scheduled hearing was set down for 23 October 2014 and this was advised to the Appellant in a letter dated 11 August 2014. In a letter dated 20 October 2014, sent by second-class post, and received by the Tribunal on 22 October 2014, the day before the hearing, the Appellant said he was unable to attend on the grounds of ill health. He said he had an appointment with a specialist on 12 November 2014.
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5. On 22 October 2014 the Tribunal telephoned the Appellant who confirmed he had received the notice of the hearing sent on 11 August 2014. The Appellant was asked to send medical evidence to show he could not attend the next day. He said that travel out of his home town of Dundee was difficult. The Tribunal offered to arrange a hearing in Dundee. None of the requests or suggestions seemed acceptable to the Appellant who eventually agreed that the hearing should go ahead without him. It was suggested that he might like to send in further written submissions but he did not do so.
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6. The Appellant did not attend the hearing and did not send a representative.
7. At the hearing HMRC objected to the Appellant's very late request for postponement without medical evidence. They requested that the hearing should proceed under the terms of Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which states;
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 "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal-
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 (a) Is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
 (b) Considers that it is in the interests of justice to proceed with the hearing.

8. As the Tribunal had ascertained that the Appellant had received notification of the hearing and as this was the second occasion on which a postponement had been sought by the Appellant with no medical evidence, and in view of the lateness of the request for postponement, the Tribunal decided that it was in the interests of justice to proceed with the hearing and granted HMRC's request.

Legislation

9. 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.

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

11. 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.

12. 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."*

13. 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.

14. Section 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

5 **Case law**

HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC)

The Clean Car Company v HM Customs and Excise LON/90/138X

Appellant's written submissions

10 15. The Appellant wrote to HMRC Default Surcharge Appeals team on 11 October 2013, appealing against the surcharges for the periods ending 31 December 2012 and 31 March 2013. The letter included

15 “The appeal is based on my continuing ill health over the past two and a half years which has affected my ability to run the business efficiently and profitably. This has resulted in financial difficulties and the stress related has added to my existing health problems.....”

I have continued in business despite the aforesaid difficulties when many people greater than me would have called it a day. I have already made progress in paying off the debt due to HMRC and in the circumstances there seems little point in adding to this by way of penalties.”

20 This letter was taken by HMRC as a request for a review.

16. HMRC conducted a review and wrote to the Appellant on 31 October 2013 confirming that they do not accept that the Appellant had a reasonable excuse for the defaults in periods 12/12 and 03/13.

25 17. They said that whilst they sympathised with the Appellant's “circumstances during the last two and a half years, there is a limit to the length of time allowable before we would expect affairs to be restored to order. If there exists an ongoing problem and you were unable to manage then it would be expected that alternative arrangements would be in place in order to achieve compliance. This is especially the case as the business has continued to trade despite the situation described.”

30 18. In the Grounds of Appeal section of the Notice of Appeal dated 27 November 2013 the Appellant states:

“I am trying to get back to normal after a prolonged period of ill health which was detrimental to the efficient and profitable running of the business which made paying bills on time very difficult.”

19. The Appellant submits he has been incapacitated by serious ongoing medical conditions and by an accident that has left him permanently disabled.

20. On 7 March 2014 the Appellant wrote to the First-tier Tax Tribunal. In respect of the surcharge for the period ending 31 March 2013 he states “The return was late. An instalment of £3,000 was paid by cheque on 20 September 2013. We have just this week entered into an instalment arrangement with HMRC to pay off the balance.”

21. The letter repeated the health difficulties experienced by the Appellant and gives details of the drop in the turnover of the business in each of the years to June 2011, June 2012 and June 2013.

10 Respondent’s submissions

22. Mrs McIntyre for the Respondents referred to a schedule in the bundle which detailed a series of late payments and late returns. Failures had effectively occurred starting with the return for the period ending 30 June 2011.

23. The details of the surcharges being appealed are as follows:-

15 1. In the quarter ended 30 June 2011 tax declared as due on the Appellant’s VAT return was £8,668.67. The return was due on 31 July 2011 but was not received by HMRC until 16 August 2011. The amount due was paid on 16 August 2011. The Appellant had sent the return and payment late so a surcharge was due. As this was the first failure a Surcharge liability notice was issued but no penalty was levied.

20 2. In the quarter ended 31 December 2011 tax declared as due on the Appellant’s VAT return was £7,332.53. The return was due on 31 January 2012 but was not received by HMRC until 14 February 2012. The amount due was paid in two parts £3,661.26 on 12 March 2012 and £3,661.27 on 30 April 2012. The Appellant had sent the return and payment late so a surcharge of 2% was due. HMRC adopt a policy of not collecting any surcharges that are less than £400. As 2% of £7,332.53 is less than £400 no penalty was levied but the surcharge liability period was extended a further 12 months and the surcharge rate for a future failure was increased to 5%.

25 3. In the quarter ended 31 March 2012 tax declared as due on the Appellant’s VAT return was £7,276.05. The return was due on 30 April 2012. It was received by HMRC on 7 May 2012. The amount due was paid on 10 May 2012. As explained above where payment is made electronically the due date is extended by seven days. Although the return was submitted within this period the payment was made three days later. Nevertheless HMRC incorrectly accepted that the return and payment had been made on time and no surcharge was levied.

30 4. In the quarter ended 31 December 2012 tax declared as due on the Appellant’s VAT return was £6,552.63. The return was due on 31 January 2013 but was not received by HMRC until 27 February 2013. The amount was paid in

two parts. Firstly £3,852.49 on 27 February 2013 and £2,700.14 on 8 May 2013. The Appellant had sent the return and both payments late so a surcharge was incurred. Thus the Respondents initially assessed a surcharge of 10% of the tax paid late that is £655.26. However the knock on effect of the error referred to in paragraph 16 above was that the surcharge rate was later reduced to 5%. Thus HMRC calculated a surcharge of 5% of the tax due of £6,552.63 that is £327.63. As this is less than £400 no penalty was levied but the surcharge liability period was extended by 12 months and the surcharge rate for a future failure was increased to 10%.

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5. In the quarter ended 31 March 2013 tax declared as due on the Appellant's VAT return was £6,500.02. The return was due on 30 April 2013 but was not received by HMRC until 29 May 2013. The sum of £3,000.02 was paid on 20 September 2013 but the remaining £3,500 remained unpaid at the date of the hearing. Thus the Respondents initially assessed a surcharge of 15% of the tax paid late of £6,500.02 that is £975. However the knock on effect of the error referred to in paragraph 16 above was that the surcharge rate was later reduced to 10% and the amount of the surcharge reduced to £650.00.

24. In considering whether the Appellant had reasonable excuse HMRC drew attention to the comments of Judge Medd in *The Clean Car Company Ltd* case, where he wrote:

“One must ask oneself: was what the tax-payer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the tax-payer and placed in the situation that the tax-payer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question; was what the tax-payer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the tax-payer found himself, to do?”

It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a tax-payer, but who in other respects shared such attributes of the particular appellant as the Tribunal considered relevant to the situation being considered.

Thus, though such a tax-payer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.”

25. HMRC submit that from his e-mail dated 10 July 2014, it is evident that the Appellant has been able to run his business. His ill health may prohibit him from

driving but the suggestion is that he does administration work. It is therefore suggested that there is no reason that the administration work does not extend to submission and payment of VAT returns.

5 26. HMRC submit that the Appellant has had health problems for some considerable time. Nevertheless the business has traded reasonably successfully. HMRC consider that they have been very fair with the Appellant by making substantial reductions to surcharges on a number of occasions. They consider that the Appellant has had ample opportunity to arrange help with the business. They therefore consider that the Appellant has no reasonable excuse for this latest failure and request the appeal be
10 dismissed.

Decision

15 27. The level of the penalties and whether or not they are disproportionate is discussed at length in the Upper Tribunal's decision in *HMRC v 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
20 penalty of £130,000 for the submission and payment of a return submitted one day late.

28. The level of the penalties has been laid down by parliament and unless the surcharges have not been issued in accordance with legislation or have been calculated inaccurately the Tribunal has no power to discharge or adjust it other than for the reason outlined in paragraph 19 below.

25 29. 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 59(7) VAT Act 1994.

30 30. In the correspondence the Appellant has accepted that the return and payment for the VAT return for the period to 31 March 2013 had both been made late. He offered no reasonable excuse for the delay other than his ongoing health problems and financial difficulties.

35 31. Whilst the Tribunal sympathises with the difficulties faced by the Appellant it is clear that despite his health problems the business has continued to trade. The Appellant has had ample opportunity to arrange help with the business if that is necessary.

40 32. The VAT Act 1994 Section 71(1) specifies that an insufficiency of funds in itself is not regarded as a reasonable excuse. However, the reasons for the lack of funds might be. The Appellant has offered no reason for the lack of funds other than a drop in turnover resulting from his ill health. Whilst this could constitute a reasonable excuse the Tribunal accepts that there must be a limit to the length of time allowable before one would expect affairs to be restored to order. If there exists an ongoing

5 problem then it would be expected that alternative arrangements would be in place in order to achieve compliance. This is especially the case as the business has continued to trade despite the situation described. In addition this occurred during a period of recession where many traders have experienced a drop in turnover. This is considered to be a normal hazard of trade and does not constitute reasonable excuse.

10 33. The Tribunal has considered the comments of Judge Medd quoted above and notes that the Appellant has been able to continue to run a business. Part of running a business is to ensure VAT returns and VAT payments are submitted on time. For a reasonable excuse to be established there must be something that is unexpected or unforeseen. Whilst initially ill health can be regarded as a reasonable excuse where there is an ongoing problem the difficulties are not unforeseen and it is to be expected that a responsible trader would make arrangements to ensure compliance. It is evident from the bundle of papers that as early as 2011 the Appellant was aware of the time to pay arrangements operated by HMRC. The Tribunal considers that the Appellant has not given reasonable priority to complying with his duties in regard to VAT.

20 34. As set out earlier in this decision the level of the penalties has been calculated inaccurately. It is within the power of this Tribunal to reinstate the penalty of £655.26 for the period ending 31 December 2012. This would have the result of increasing the surcharge rate to 15% for the period ending 31 March 2013 and increasing the surcharge for that period by £325. However in view of the fact that HMRC have expressed the wish not to reinstate the surcharge for the period to 31 December 2012, the Tribunal will agree to HMRC's request not to reinstate it. Thus the Appellant has been relieved of surcharges totalling £980.26.

25 35. The remaining surcharge of £650 for the quarter ending 31 March 2013 has been assessed by HMRC. It has been calculated as 10% of the tax due of £6,500.02 as reported by the Appellant on its VAT return for that period.

36. The Tribunal does not consider a surcharge of £650 which resulted from a series of late returns and/or late payments is wholly disproportionate to the gravity of the offence nor is it unfair.

30 37. The Appellant has not established that there was a reasonable excuse for the late submission of the return for the period ending 31 March 2013 or for the late payment of the VAT due some of which remains outstanding and therefore the Tribunal has no alternative but to dismiss this appeal.

35 38. 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.

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**PETER R SHEPPARD
PRESIDING MEMBER**

RELEASE DATE: 27 November 2014