



TC04168

Appeal number: TC/2013/07536

VAT – late submission of payment of VAT due on returns –whether surcharge should be reduced - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STIRLING HUNTER STEWART t/a NETHER ABBEY HOTEL Appellant

- and -

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

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

**Sitting in Public at George House, 126 George Street, Edinburgh on Friday
25 April 2014 & Thursday 23 October 2014.**

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DECISION

Introduction

5 1. This considers an appeal against a default surcharge of £3,596.44 levied by HMRC for the late filing by the appellant of its Value Added Tax return for the period ended 31 January 2012.

2. The appellant submitted a Notice of Appeal dated 5 November 2013 to the Tribunal, it was received on 6 November 2013. This was late but the appellant wrote
10 to the Tribunal stating that he had suffered two bereavements and his son had suffered an injury at the time he should have lodged the appeal. No objection was raised by HMRC so the Tribunal allowed the appeal to proceed.

3. The appellant runs the Nether Abbey Hotel in East Lothian. The hotel is popular because of its proximity to golf courses notably Muirfield.

15 Statutory Framework

4. 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.

5. Regulation 40(2) provides for payment of such returns to be made
20 electronically. Regulations 40(3) and (4) permit HMRC to allow additional time for a payment to be made by electronic communication. Accordingly HMRC allow a further 7 days for those making payment by electronic means.

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

7. Section 59 of the VAT Act 1994 sets out the provisions whereby a Default
25 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.

8. A succinct description of the scheme is given by Judge Bishopp in paragraphs
30 20 and 21 of his decision in *Energys Holdings UK Ltd* **Error! Hyperlink reference not valid.** UKFTT 20 (TC) TC 0335 which are set out below.

35 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.*"

9. 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.

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

Case law

HMRC v Total Technology (Engineering) Ltd [2011] UKFTT 473 (TC)

Energys Holdings UK Ltd **Error! Hyperlink reference not valid.** UKFTT 20 (TC) TC 0335

20 The appellant's submissions.

11. The appellant said he was aware that there had been a series of defaults. He had no complaints and had not challenged them. However in respect of the last default surcharge his wife had tried to make payment on Wednesday 7 March 2012 by using the faster payment system on the online banking system. The payment had for some reason been delayed until Friday 9 March 2012. He considered the failure to be a banking problem and that this constituted a reasonable excuse for the default.

12. The appellant requested a review HMRC conducted a review and wrote to the appellant on 27 July 2012. The letter advised that without evidence that the payment was delayed due to a banking issue HMRC could not consider the appellant had reasonable excuse for the default. The letter gave the appellant 30 days to appeal to the Tribunal

13. The appellant stated that he was aware of HMRC's time to pay arrangements and had used it on occasions in the past. However he had found using a product marketed by Lease Direct Finance (a subsidiary of Investec) (hereafter LDF) more suitable. This gave a short term loan and was specifically designed to help traders meet VAT return payments.

14. Mr Stewart drew attention to an email dated 30 August 2012 from Bank of Scotland to the appellant. It stated "I am emailing to confirm that due to the Bank migrating customers from one system to another in September 2011 this resulted in

difficulties in processing certain payments. It appears that your business (Nether Abbey Hotel) was directly impacted by this and on checking my records I can see that we made a small redress payment to you of £50 due to the inconvenience around payments being delayed. From speaking with you I understand that this had a knock
5 on effect and you are endeavouring to appeal the penalty charge for late payment of VAT. Please feel free to forward this email as evidence that our system problems impacted the delivery of your VAT payment.

15. The appellant said that he had not thought that he would have to provide evidence to support his contentions. He had overlooked the advice to this effect which is given in the information provided by the Tribunal prior to the hearing. He said
10 HMRC had not requested this information. Mrs McIntyre for HMRC very fairly said that HMRC would have no objection to the Tribunal issuing directions for this evidence to be produced. Accordingly the Tribunal issued directions which included the following:

- 15 (a) By noon on 31 May 2014 the appellant shall provide to the Tribunal (copy to HMRC).
- (i) Written confirmation from its bankers that the problem resulting from the change of system in September 2011 persisted until March 2012 and in particular affected the payment that the appellant tried to make
20 by 7 March 2012.
- (ii) Bank statements to show the payment received from LDF and the payment to HMRC.
- (iii) A copy of the agreement with LDF and any other documentation with LDF relevant to the VAT return for the period ending 31 January
25 2012;
- (b) By noon on 30 June 2014 HMRC shall indicate to the Tribunal (copy to the appellant) whether it accepts that the evidence provided by the appellant in compliance with direction i) above constitutes reasonable excuse for the late payment in respect of the appellant's VAT return for the period ended
30 31 January 2012.
- (c) In the event that HMRC do not accept the evidence supplied provides reasonable excuse for the late payment the hearing shall be resumed at a date to be arranged.

15. By noon on 31 May 2014 the appellant had complied with direction 6(a)(ii) and
35 (iii) but not with direction 6(a)(i). After prompting from the Tribunal the appellant forwarded an e-mail from the Bank of Scotland dated 27 May 2014 which said "In relation to your tax claim I can advise that there were problems in processing certain payments in September 2011 and that these problems may have persisted into March 2012". There was no specific confirmation that the problem affected attempts to make
40 the VAT return payment in the period 7 to 9 March 2012.

16. As HMRC did not accept the evidence supplied provided reasonable excuse for the late payment the hearing was resumed on 23 October 2014.

HMRC's submissions

5 17. HMRC state that the VAT return and payment for the period to 31 January 2012 was due by 7 March 2012 assuming payment was made electronically. In fact the return was received on 28 February 2012, but payment was not received until 9 March 2012.

10 18. A schedule in the papers provided to the Tribunal shows that the appellant has a history of late payments starting with the period ended 31 October 2008. The significance of this is that it demonstrates that continued late payments have had the cumulative effect of increasing the surcharge liability rate to the maximum of 15%. The penalty for the quarter ended 31 January 2012 HMRC calculate as £3,596.44 being 15% of the tax unpaid at the due date of £23,976.28 as shown on the appellant's
15 VAT return for the period .

19. HMRC states that it holds no evidence to suggest that the appellant had requested a time to pay arrangement before the date the tax was due to be paid.

20. HMRC submit that the appellant has received surcharge notices for previous defaults and should be aware from the advice on them of the financial consequences
20 of any further default.

21. HMRC submit that Section 71(1)(a) of the VAT Act 1994 specifically excludes insufficiency of funds from being a reasonable excuse for the late payment of VAT.

22. After reviewing the evidence submitted in response to the directions, HMRC observed that the loan from LDF had not been agreed until 7 March 2012, the last
25 date for payment of the VAT return. The bank statements provided showed that the loan had been credited to the appellant's bank account on that date. They also showed payment by faster payment had been debited on 9 March 2012 which was the date they received it. In the circumstances HMRC could not accept that the appellant had reasonable excuse for the delay. HMRC requested that the appeal be dismissed.

30 The Tribunal's observations

23. At the resumed hearing Mrs McIntyre explained that HMRC could not accept that there were banking difficulties on the period 7 – 9 March 2012. Whilst it was clear that from September 2011 there had been difficulties the letter from Bank of Scotland was vague in saying "these problems may have persisted into March 2012."
35 The letter did not specifically say that attempts to make payment to HMRC on 7 March 2012 were effected.

Appellants observation's at resumed hearing

24. Mr Stewart produced an undated letter from his wife, which included

5 “As the bookkeeper at the Nether Abbey I am responsible for the revenue at the hotel and also the payments to suppliers and payments to HMRC. I can confirm that I processed this payment on 4 March which would normally have meant that the payment would have been received in HMRC account on the appropriate date.

I can also confirm that Bank of Scotland had a number of IT problems over a number of months which caused a large increase in my workload; however this did not effect my timely payment to HMRC.”

10 25. Mrs McIntyre commented on Mrs Stewart’s letter observing that as the money from LDF had not arrived in the appellant’s bank account until 7 March 2012 it was unlikely that Mrs Stewart attempted to make payment on 4 March 2012. The Tribunal observed that the bank statements provided showed that at 6 March 2012 the appellant had already exceeded its overdraft limit and cheques had been bounced, if an attempt to make a payment in that time had been made it was more likely not to
15 succeed because of lack of funds than for reasons of software problems.

26. Mr Stewart said Bank of Scotland was aware of the arrangement with LDF and could have allowed a temporary increase in the overdraft.

27. 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
20 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
25 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 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
30 for the reasons as outlined in paragraphs 29 and 30 below. The Tribunal does not consider that a penalty of 15% of the tax due (£3,596.44) which is the culmination of a series of failures to submit VAT returns and/or payments of VAT due on time for a period of over three years, is wholly disproportionate to the gravity of the offence nor plainly unfair.

35 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. Section 71(1)(a) of the VAT Act 1994 specifically excludes insufficiency of funds from being a reasonable excuse for the late payment of VAT.

40 31. The Tribunal has considered the evidence submitted by the appellant.

32. The Tribunal accepts that the appellant organised a short term loan from LDF to enable him to meet the liability on the return for the period ended 29 February 2012. The loan agreement is dated 7 March 2012 and the money was transferred to his account the same day. Two days later on 9 March 2012 the appellant's account was debited with the sum due on the VAT return which was sent by faster payment to HMRC who received it that day. In these circumstances, although payment was made and received only two days late it was nevertheless late. The lender's payment to the appellant of the money on 7 March 2012 which was the date of the agreement demonstrates that the banking system was working satisfactorily as does the faster payment debit to the appellant's account which was received the same day by HMRC.

33. When considering the response to direction (i) above the Tribunal accepts Mrs McIntyre's observation that the letter from the appellant's bank is vague in saying that a fault dating back to September 2011 may have affected payment in March 2012. It does not provide the specific confirmation requested that attempts to make a payment (by faster payment on the online banking system) on 7 March 2012 were affected.

34. The Tribunal considers that any attempt by Mrs Stewart to make payment on 4 March 2012 would have failed because the appellant would have exceeded its overdraft limit by more than 50% and therefore it would be more likely for an attempt to fail through lack of funds than for reasons of computer software problems.

35. The money from LDF was not credited to the bank account until 7 March 2012 in the Tribunal's view it is more likely that payment would have been made on or after that date. It is over two years since the events took place and Mrs Stewart's recollection of the precise dates on which she attempted payment is probably inaccurate.

36. In all these circumstances the Tribunal cannot accept the appellant's submission that he had reasonable excuse because the late payment was due to delays caused by his bank. The evidence clearly shows that the appellant left the arranging of the loan until the last possible moment. It appears that this left insufficient time to make the payment to HMRC.

37. In the light of the Upper Tribunal decision in *Total Technology (Engineering) Ltd* as explained in paragraph 11 above this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated. HMRC has applied the legislation correctly and has calculated the surcharge accurately as £3,596.44 being 15% of the tax of £23,976.28 shown as due on the appellant's tax return for the period ended 31 January 2012. The appellant has not established a reasonable excuse for the late submission of the VAT return for the quarter ended 31 January 2012. The appellant accepted the penalties for earlier periods were appropriate, he said he had no reasonable excuse for those late payments. Therefore the appeal is dismissed.

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
TRIBUNAL PRESIDING MEMBER

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RELEASE DATE: 4 December 2014

