



TC04229

Appeal number: TC/14/01968

Value Added Tax – Surcharges for late submission of VAT returns; whether reasonable excuse – yes for the first two periods, no for the third; appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT P SLIGHT & SONS LTD

Appellant

- and -

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

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

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

Douglas Slight, Managing Director for the Appellant

Elizabeth McIntyre, Officer of HMRC, for the Respondents

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DECISION

Introduction

1. The Appellant's business is that of a building contractor, specialising in joinery
5 and maintenance work. This considers an appeal by the appellant dated 8 April 2014
against a series of VAT default surcharges totalling £8,639.07.

Preliminary Matter

2. The total of £8,639.07 includes a surcharge dated 13 July 2012 for £1,946.35 for
10 the late submission of payment for the appellant's VAT return for the quarter ended
31 May 2012.

3. This surcharge, and surcharge notices issued on 14 October 2011 and
13 January 2012, had been the subject of an earlier appeal to the Tribunal. The
appellant had decided not to attend that hearing and on the facts before it the Tribunal
found in favour of the Respondents. *Robert P Slight & Sons Ltd v Revenue &*
15 *Customs* [2013] UKFTT 472 (TC) TC/02873.

4. The presiding member explained that in the current hearing an appeal against that
surcharge and the previous surcharge liability notices could not be considered. The
appellant said that until he received the bundle of papers for this hearing he had not
received a copy of that decision. The business had moved premises at about the time
20 the decision had been issued and one or two items of mail had gone astray. The
chairman explained that if the appellant now wished to appeal that decision to the
Upper Tribunal he should lodge an appeal but would need to explain the reasons for
the appeal being out of time.

5. The presiding member confirmed that the Tribunal was prepared to hear the
25 appellant's appeal against surcharges raised by the respondents covering late
payments and/or returns for VAT return periods ending after 31 May 2012.

Statutory Framework

6. The VAT Regulations 1995 Regulation 25(1) contains provisions for the making
of returns.

30 7. Section 59 of the VAT Act 1994 sets out the provisions whereby a Default
Surcharge may be levied when 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
35 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%
5 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
10 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
15 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)
20 direction to the contrary."

9. Section 59(7) covers the concept of a person having reasonable excuse for failing to submit a VAT return or payment therefor on time.

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

25 **Case law**

Energys Holdings UK Ltd [2010] UKFTT 20 (TC) TC 0335

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

C&E Commissioners v J B Steptoe CA July 1992, [1992] STC 757

Electrical Installation Solutions Ltd v HMRC [2013] UKFTT 419 (TC) TC 02813

30 *European Development Company (Westhill Hotel) Ltd; European Development Company (Hotels) Ltd. v HMRC* [2013] UKFTT 671 (TC) TC 03053

The Clean Car Company Ltd. v The Commissioners of Customs and Excise VATTR 234 VTD 5695

Appellant's submissions

35 11. During the appellant's submissions Mr Slight spoke in detail about what he regarded as the mis-selling to the appellant by The Royal Bank of Scotland plc of an interest-rate hedging product. This has caused him much anguish and is the subject of litigation. He expressed acrimonious views about The Royal Bank of Scotland and

towards some of its staff. This had not been alluded to in the bundle of papers provided to the Tribunal before the hearing. The presiding member interrupted the appellant's submissions to explain that he had been employed by The Royal Bank of Scotland Group for many years, received a pension from their pension fund and was
5 both an account holder and shareholder. In the circumstances he offered to recuse himself and the hearing would have to be rescheduled for a later date with a different chairman.

12. Both the appellant and respondents were content that the hearing should continue with the members of the Tribunal unchanged.

10 13. Mr Slight said that he was not disputing HMRC's record of the dates they received the returns or the dates they received payment. He considered that the circumstances faced by the appellant constituted reasonable excuse for the late payments.

15 14. By the time of the hearing Mr Slight had read the previous decision and realised that the comments in the Court of Appeal decision in the case of *J B Steptoe* might be applicable to the appellant's position. For example, the appellant's primary customer is a public body, the NHS.

20 15. In respect of contracts with the NHS, Mr Slight explained that over the past couple of years the appellant has experienced big fluctuations in its cash flow both out and in. He explained that this is mainly due to late payments from NHS. He said that if the person at NHS in charge of invoice payment for his company is absent, then the appellant has to wait until the person returns or is replaced.

25 16. He explained that he was concerned that if the appellant created too much fuss with the NHS, it runs the risk of not being used as a contractor again. He said that the period ending 30 November 2012 was typical of the late payments experienced. There was negative cash flow but the appellant was assured that payments were 'in the pipeline' and would be paid within 4/5 days; as it was, it was considerably longer. In the letter to HMRC dated 4 March 2014 the appellant mentioned this difficulty. The letter said, "We have been experiencing slow paying again from our mostly
30 government customers whom we cannot pursue with vigour for fear of losing their business."

17. The Tribunal observes that this situation had been discussed at the earlier hearing but it appears that firstly the appellant did not receive the decision and secondly HMRC did not subsequently pursue the point with them.

35 18. Mr Slight provided details of an interest-rate hedging product that the appellant had entered into. The appellant had entered into a property venture involving 21 houses and had borrowed over £2 million to fund this. Repayment was to come from rentals from the properties in the portfolio. The loan, it later turned out, was conditional on entering into an interest-rate hedging product. The purpose of such a
40 financial product was supposed to protect the appellant against interest rate rises. However, it turned out that interest rates went the other way and property prices

dropped. This left the appellant with interest rate adjustment payments and the bank with what they considered insufficient security for the loan advanced.

5 19. Mr Slight said that during the said period the bank put enormous pressure on him to meet the interest rate adjustment payments, telephoning every day to see what money might be paid in. At its worst, the bank was telephoning twice a day.

10 20. He considered that the bank had pressured him into selling three of the houses at what he considered was not the right time purely to reduce the borrowing. The bank had also exerted pressure on Mr Slight to sell his family home and business but he had resisted this because the appellant employed twenty people and he did not wish to let them down.

21. He said that after a considerable period The Royal Bank of Scotland had eventually accepted there had been mis-selling of this financial product, and in respect of the appellant had offered a compensation settlement of £265,000 which his legal advisers had suggested he should reject as inadequate. The litigation is continuing.

15 22. The adverse effect of all this pressure from the bank had caused Mr Slight much anxiety and had resulted in his ill health such that he had been admitted to hospital twice. He said that the reason he had not attended the previous hearing referred to above was that he did not feel strong enough to face it.

20 23. One consequence of the bank's concern over the asset cover for the overdraft was that unexpectedly it had reduced the appellant's overdraft facility from £150,000 to £110,000. This reduction of over 25% had put considerable additional pressure on the appellant's cash flow.

24. On 23 August 2012 the appellant wrote to HMRC appealing against the default surcharge. In the letter they say:

25 "R. P. Slight is a small contracting company with mainly Government maintenance contacts, we experience good demand in the early part of the year – April 2012 which resulted in a larger than usual VAT payment due on 7th July (38k approximately)."

30 25. The appellant sent an e-mail to the Tribunal on 25 June 2013 which included the following paragraph:

35 "Our primary customers are public bodies mostly councils, the Scottish Office and NHS. We operate now under strict controls from our bank (RBS group) whom in the past have exercised a bit of leeway when it came to allowing us extended overdraft facilities with state payments eg Tax/VAT. We are very aware of the way the system now works with no allowances exceptions."

26. Mr Slight complained that the level of the default surcharges is unfair, and he made the point that if payment was just a few days late or six months late the surcharge is the same. He considered that if one realised payment was going to be one

day late the system gave no encouragement to pay as soon as possible because the surcharge for paying months later is the same.

Respondent's submissions

5 27. Mrs McIntyre for HMRC referred to a schedule in the bundle, which detailed incidences of late payments by the appellant in the periods ended 31 August 2011, 30 November 2011, 31 May 2012, 31 August 2012, 30 November 2012, and 30 November 2013. In the light of the comments in paragraphs 1 to 4 above it is only the surcharges that were levied for the periods ending 31 August 2012, 30 November 2012, and 30 November 2013 that now fall to be considered.

10 28. The appellant's VAT return for the quarter ended 31 August 2012 was due by 30 September 2012. A further seven days' grace is given where payment is made electronically. The return was received by HMRC on 28 September 2012 (ie: in time) but the payment which was made by the Clearing House Automated Payment System (CHAPS) was not received by HMRC until 13 November 2012 (ie: thirty-seven days
15 late). The effect of the Tribunal's decision in respect of the appeal against the earlier defaults was that the statutory default surcharge rate of 5% used for the period ended 31 May 2012 was confirmed. It follows that the statutory surcharge rate for the default for period ended the 31 August 2012 was increased to 10%. A default surcharge of £2,333.15 was assessed by HMRC, being 10% of the tax of £23,331.54
20 shown as due on the appellant's VAT return for the quarter ended 31 August 2012.

29. The appellant's VAT return for the quarter ended 30 November 2012 was due by 7 January 2013, assuming electronic payment. Both the return and payment by CHAPS were received by HMRC on 7 February 2013 (ie: thirty-one days late). It follows that the statutory surcharge rate for this further default was increased to 15%.
25 A default surcharge of £706.19 was assessed by HMRC, being 15% of the tax of £4,707.97 shown as due on the appellant's VAT return for the quarter ended 30 November 2012.

30. The next three returns and payments were submitted timeously. However the return for the quarter ended 30 November 2013 was due by 7 January 2014 assuming electronic payment. Both the return and payment by CHAPS were received by HMRC on 5 February 2014 (ie: twenty-nine days late). The statutory surcharge rate for this further default remained at the maximum rate of 15%. A default surcharge of £3,653.38 was assessed by HMRC, being 15% of the tax of £24,355.92 shown as due on the appellant's VAT return for the quarter ended 30 November 2013.

35 31. Mrs McIntyre submitted that the appellant was not the only business that had been involved in an interest-rate hedging product. She pointed to the Tribunal decision in *European Development Company (Westhill Hotel) Ltd*. In that decision the appellant had entered into an interest-rate hedging agreement. Interest rates had moved against them which was disadvantageous to them. However the unpredictable
40 movement in interest rates is the reason hedging instruments are sold. This was a risk an investor should have been aware he was taking .

32. In respect of the appellant's reference to the Court of Appeal decision in *J B Steptoe* she drew attention to the First-tier Tribunal decision in the case of *Electrical Installation Solutions Ltd*. In that decision the Tribunal comments on decisions in a number of similar cases including *J B Steptoe*.

5 33. She pointed out that the appellant's level of debtors was not particularly high.

34. She said that the appellant had given insufficient information to establish a reasonable excuse and asked for the appeal to be dismissed

Decision

10 35. The appellant made comment that the level of the surcharge is unfair. The level of the penalties, and whether or not they are unfair or disproportionate, is discussed at length in the Upper Tribunal's decision in the case of *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
15 not merely harsh, but plainly unfair, then the penalty can be discharged. For example in *Energys Holdings Ltd* the Tribunal discharged a potential penalty of £130,000 for the late submission of a return and payment of the related VAT by one day.

20 36. The level of the penalties has been laid down by Parliament and unless the Default Surcharge has not been issued in accordance with the relevant legislation or has been calculated inaccurately, the Tribunal has no powers to discharge or adjust it, other than in circumstances where the appellant establishes that he has reasonable excuse for his failure as contemplated by Section 59(7) VAT Act 1994.

37. The Tribunal finds that the surcharges have been issued by HMRC in accordance with the legislation and calculated accurately.

25 38. In considering whether the appellant had a reasonable excuse for the failures, the Tribunal was conscious that more than one factor which individually might not provide a reasonable excuse when combined might form a reasonable excuse.

30 39. The Tribunal notes that Section 71(1) (a) of the VAT Act 1994 states that "*an insufficiency of funds to pay any VAT due is not a reasonable excuse*". Whilst insufficiency of funds is not a reasonable excuse following the decision of the Court of Appeal in *J B Steptoe*, the *reason* that gives rise to the lack of funds might constitute a reasonable excuse.

35 40. In *European Development Company (Westhill Hotel) Ltd*, the Tribunal was rightly critical of the appellant for not taking independent professional advice before entering into the interest-rate hedging agreement. In the present case Mr Slight criticised the bank for what he described as "bully-boy" tactics. Whilst fishing in the River Tweed he received a call from the bank on his mobile phone requiring him to make a decision there and then on whether or not to accept the agreement. He had no opportunity to take independent professional advice. He assumed there would be a

cooling off period in which he could cancel the agreement, as with insurance policies, but was surprised to find there was not.

41. The Tribunal finds that the combination of the mis-selling of the interest-rate hedging product, the unexpected reduction of the overdraft facility by over 25%, the
5 ill health of the appellant's managing director, and the delays in payment of bills by government bodies together provide the appellant with a reasonable excuse for the late payments and therefore allows the appeal against the surcharges for the periods ended 31 August 2012, and 30 November 2012.

42. However, it appears to the Tribunal that the appellant was able to take measures
10 to adjust for the problems experienced in 2012 because it was able to submit the next three returns and payments on time. No other reason was offered by the appellant for the lateness of both the return and the payment for the period ended 30 November 2013. Whilst there was clearly a delay in payment by the NHS, the Tribunal accepts Mrs McIntyre's argument that the level of debtors was not
15 particularly high, and that delayed payments from debtors is not unusual and should be considered as part of the normal hazards of trade. The Tribunal observes that both the return and payment were late for this period. Even if the appellant could establish that the late payment by the NHS gave them a reasonable excuse for the late payment, it does not give them any reasonable excuse for the late return. The Tribunal therefore
20 considers that reasonable excuse for the late return and payment has not been established for this period.

43. Thus the appeal is allowed for the periods ending 31 August 2012 and 30 November 2012 but is dismissed for the period ended 30 November 2013. The Tribunal observes that as the appellant has established reasonable excuse for the
25 periods ending 31 August 2012 and 30 November 2012 the appellant came off the surcharge liability scheme after 31 May 2013. The default for the period 30 November 2013 brings the appellant back into the scheme. This default should trigger a surcharge liability notice but no monetary penalty.

44. This document contains full findings of fact and reasons for the decision. Any
30 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)"
35 which accompanies and forms part of this decision notice.

**PETER R SHEPPARD
PRESIDING MEMBER**

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RELEASE DATE: 15 January 2015