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TC04351

Appeal number: TC/2014/06529

10 *VAT – late submission of payment of VAT due on returns Whether
reasonable excuse for late submission of payment due on return - No.–*

15 **FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID R YEAMAN & ASSOCIATES LIMITED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS

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

25 **The Tribunal determined the appeal on 1 April 2015 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 letter dated 27 November 2014, and HMRC's Statement of Case received
30 by the Tribunal on 7 January 2015 with attachments. The Tribunal wrote to the
Appellant on 7 January 2015 indicating that if they wished to reply to HMRC's
Statement of Case they should do so within 30 days. No reply was received.**

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DECISION

1. Introduction

This considers an appeal against a default surcharge of £1,076.09 levied by HMRC for the late payment by the appellant of the amount outstanding on the due date of 7 September 2014 in respect of its Value Added Tax return for the period ended 31 July 2014.

2. Statutory Framework

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 7 days for those paying electronically.

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

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.

A succinct description of the scheme is given by Judge Bishopp in paragraphs 20 and 21 of his decision in *Enersys 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.”*

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.

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

Finance Act 2009 Section 108 covers the suspension of penalties during currency of agreement for deferred payment.

3. Case law

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

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

4. The appellant's submissions.

In the Notice of Appeal the Appellant states

“My case is clearly stated in my letter to HMRC Default Surcharge Appeals dated 23/9/2014, copy enclosed. To summarise:-

1. Telephoned HMRC in the week preceding 7th September deadline, to make payment of VAT in 2 instalments of £4,000.00 and £3,173.97 (to be made 2 weeks after the first payment)
2. Unable to make the payments on the 7/9/2014 as this was a Sunday, so I made the first payment of £4,000.00 at 10 a.m. on Monday morning stating the balance of £3,173.97 would follow within 2 weeks. This I was informed would be acceptable and I was thanked for the payment.
3. On 22nd September I telephoned to make my second paymentand was informed by Mrs. Odhams that there would be a surcharge and that there was no record of my earlier call. She was however sympathetic and advised me I could appeal against the surcharge.
4. I am completely up to date with all my VAT payments and would be grateful if this appeal procedure will fairly acknowledge the steps I have taken to make the agreed payments and dismiss the surcharge which is very unfair and punitive for a small architectural practice working its way out of the recent recession.

On 23 September 2014 the appellant wrote to HMRC appealing the assessment and making the points set out above. HMRC replied on 29 October 2014. They stated that they did not accept the appellant had reasonable excuse for the default because although they do “cancel surcharges where a time to pay contract is requested by the due date and agreed to. Our records show you did not request time to pay until 08/09/2014 which is after the due date.

They continued “You were advised in our letter dated 29/11/2013 that you needed to request time to pay by the due date. You have previously been given time to pay and had surcharges cancelled as a result and were told on 09/06/2014 not to expect any more concessions.”

7. HMRC’s submissions

HMRC state that the VAT return and payment for the period to 31 July 2014 was due by 7 September 2014 assuming payment was made electronically. In fact the return was received electronically on 4 August 2014 so was well in time. In respect of payment HMRC accept that a payment of £4,000 was made on 8 September 2014 but state that the appellant telephoned them on 8 September 2014 requesting deferral of payment of the balance until 22 September 2014 which they agreed to

8. The net amount of VAT due on the return for the period to 31 July 2014 is stated as £7,173.97. At close on 7 September 2014 this was unpaid. Therefore on 12 September 2014 HMRC assessed the surcharge as 15 % of this sum being £1,076.09. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

9. A schedule in the papers provided to the Tribunal shows that the appellant has made previous late payments and has been in the default surcharge regime since period 07/2012. These ultimately had the effect of increasing the surcharge liability rate to 15%.

10. HMRC point out that from the beginning of 2013 the reverse of surcharge liability notices has included the following standard paragraphs:-

Submit your return on time
Make a note of when your return is due.

Pay your VAT on time
Don’t rely on HMRC to remind you – go to www.hmrc.gov.uk/paying_hmrc/vat.htm

Problems paying your VAT?
If you can’t pay the full amount on time, pay as much as you can and before the payment is due, contact the Business Payment Support Service.

11. HMRC say that because of the previous default history and previous time to pay history the appellant would know there is no liability to a default surcharge where time to pay arrangements are made by the due date.

12. HMRC say their “Business Support Service is available Monday- Friday 08.00 - 20.00 and Saturday & Sunday 08.00-16.00, excluding Bank Holidays. Had the Appellant contacted HMRC on 6 or 7 September then they would likely have avoided receiving a surcharge.

13. HMRC say they have no record of the telephone call in the week prior to the due date. They say they have asked the appellant if he has an itemised telephone bill which would show this but the appellant is unable to provide one.,

14. HMRC consider that no reasonable excuse for the late payment has been established and request that the appeal be dismissed.

15. The Tribunal's observations

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 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 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. The Tribunal does not consider that a penalty of 15% of the tax due which is the culmination of six previous failures to submit VAT returns and/or payments of VAT due on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

17. 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.

18. The Tribunal has considered the submissions in respect of the time to pay arrangements. In view of the submissions made by the appellant it is necessary to consider carefully the legislation, which is to be found in the Finance Act 2009 Section 108.

The parts of this Section which are relevant here state

- (1) This Section applies if-
 - (a) A person ("P") fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due or payable,
 - (b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and
 - (c) An officer of Revenue and Customs agrees that payment of that amount may be deferred for a period ("the deferral period")
- (2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if –
 - (a) The penalty falls within the table, and

(b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.

In respect of Section (1) the Tribunal notes that it only applies if P fails to pay an amount of tax. That can only happen if payment is not made by the due date. So in the case in point there is no failure to pay until 8 September 2014. The appellant had not paid the outstanding tax by 7 September 2014.

The Table in subsection (5) includes Value Added Tax.

HMRC accept that the appellant made a request to an officer of HMRC by telephone on 8 September 2014 and that it was agreed that a payment of £4,000 be made that day with the balance on 22 September 2014.

Therefore the conditions in subsection (1) are all fulfilled.

In respect of subsection (2) (a) surcharges under section 59 (4) of VAT Act 1994 fall within the Table.

In respect of subsection (2) (b) it is necessary to consider whether the appellant would become liable to the penalty between the date on which he makes the request and the end of the deferral period.

It is clear that the appellant became liable to the penalty first thing on 8 September 2014 therefore because the appellant did not make the request until 10 a.m on 8 September 2014 this section does not apply. The appellant had already become liable to the penalty before he requested time to pay.

A partial payment in the amount of £4,000 was paid one day late on 8 September 2014, with the balance of £3,173.97 paid on 22 September 2014

The Tribunal agrees with HMRC that there is no liability to default surcharge where time to pay arrangements have been made prior to the due date for payment. Unfortunately the Appellant made the arrangements with HMRC the day after the due date and so is liable to the surcharge. The Appellant has not been able to provide evidence that he telephoned HMRC during the week prior to the due date.

The fact that time to pay arrangements were made the day after the due date for payment cannot be accepted as a reasonable excuse for the late payment which had already occurred.

19. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 15 above this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated. Following a review HMRC applied the legislation correctly and has calculated the surcharge accurately as £1,076.09 being 15% of the outstanding tax of £7,173.97 at the due date in respect of the appellant's tax return for the period ended 31 July 2014. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

20. 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.

PETER R. SHEPPARD
TRIBUNAL JUDGE

RELEASE DATE: 15 April 2015

TRIB 39 FORM TO ACCOMPANY ALL DECISION NOTICES

This part of this form is to be completed by the Judge and attached to all decision notices, whether short, summary or full. Sending the decision notice with a TRIB 39 will indicate to listing that the decision is ready for release. There is NO requirement for a decision notice to be signed.

Appellant: David R Yeaman & Associates Limited	TC/2014/06529
Date of submission to listing: 1 April 2015	

Result: ALLOWED <input type="checkbox"/> DISMISSED <input checked="" type="checkbox"/> ALLOWED IN PART <input type="checkbox"/>
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Substantive appeals and substantive applications: I attach a decision notice as follows:

FINAL FULL (132), SUMMARY (131), or SHORT (130)

IN PRINCIPLE FULL (134), SUMMARY (160)

PRELIMINARY ISSUE¹ FULL (173), SUMMARY (172), or SHORT (173)

Interlocutory matters: I attach a decision notice AND/OR directions as follows:

HARDSHIP application: Hardship allowed (53) or not allowed (51)

All other INTERLOCUTORY matters (133) release attached directions (74)

PUBLICATION ² : for publication <input type="checkbox"/> with website code 48.1 , or not for publication <input checked="" type="checkbox"/>

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2. To LISTING OFFICE for completion: Copies of the attached decision were released to both parties on
-
3. To DECISIONS CLERK : Decision number:

Footnotes:

1. Preliminary issues refers to any issue which would arise in the substantive appeal but which has been directed to be heard first. It does not include stand alone applications such as hardship / postponement of tax / applications for permission to appeal late.
2. Substantive appeals: short and summary decisions should never be published. All full decisions should be published unless they were basic or default paper cases where the sole issue was liability to penalties and they are not of public interest.
Interlocutory decisions: publication depends on whether the judge considers them to be of public interest but if they are to be published the judge must use the "full" substantive decision template.

