



5

TC04456

Appeal number: TC/2015/00894

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**

STEVE ASHALL LIMITED.

Appellant

- and -

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

20

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

25

**The Tribunal determined the appeal on 27 May 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 4 February 2015, and HMRC's Statement of Case dated 2
March 2015 with attachments. The Tribunal wrote to the Appellant on 4 March
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 by the Tribunal.**

35

DECISION

1. Introduction

This considers an appeal against a default surcharge of £564.99 levied by HMRC for the late submission by the due date of 7 November 2014 of its VAT Return and for the late payment by the appellant of the amount outstanding in respect of that Value Added Tax return for the period ended 30 September 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.

Section 98 VAT Act 1998 Covers the service of Notices.

Section 7 of The Interpretation Act 1978 covers services of notices by post

3. Case law

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

Trinity Mirror PLC v HMRC [2014] UKFTT 355 (TC),

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

4. The appellant's submissions.

In a letter dated 26 November 2014 to HMRC the appellant wrote

“We would like to appeal against a recent VAT surcharge of £564.99 for the period ending 30 September 2014.”

Our accountant submits our VAT returns on our behalf and on this occasion neglected to forward the return to us by email. Ordinarily I would have realised this but at the time of the submission I was working in Hong Kong.

On my return the submission was requested and paid immediately – I believe this left our account on 16th November so only 9 days after the due date.

We are a small business comprising myself and a part time administrator, so we rely heavily on prompts from professionals such as our accountant, we also don't have the workforce to pick up on such matters during times when I am absent from the day to day running of the business, and this year has seen me spending seven weeks working internationally.

In addition we have very little surplus and simply don't have the funds available to pay a surcharge of the size, which I believe to be an unfair amount for a 9 day overrun.”

5. In the Notice of Appeal dated 4 February 2015 the Appellant repeats many of the points made in his letter of 26 November 2014 and repeats his claim that the level of the surcharge is unfair. He makes comparison of the level of surcharge with the interest charged for late submission by one month of corporation tax. The appellant claims to have no recollection of receiving previous surcharge liability notices.

6. HMRC Submissions

HMRC state that the VAT return and payment for the period to 30 September 2014 was due by 7 November 2014 assuming payment was made electronically. In fact the return was received electronically on 7 November 2014 so was on time. However in respect of payment HMRC state that this was received 11 days late on 18 November 2014.

7. The net amount of VAT due for the period to 30 September 2014 is stated on the appellant's VAT return as £11,299.88. Therefore on 14 November 2014 HMRC assessed the surcharge as 5% of this sum being £564.99. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

8. 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 12/2013. In respect of the first default HMRC say they issued a Surcharge liability notice to the appellant on 14 February 2014 but no surcharge was levied. The second default was in the period 06/2014 when payment of £1,433.47 was due on 7 August 2014 but was received 12 days late on 19 August 2014. A potential surcharge of 2% of the tax due i.e. £28.66 was not levied by HMRC but a surcharge document was issued. These ultimately have had the effect of increasing the surcharge liability rate to 5%.

9. The appellant claims to have not received the first two surcharge liability notices but HMRC say they sent them to the appellant's principal place of business which has remained the same since their VAT registration in February 2013. HMRC say the notices were issued in accordance with the legislation Section 98 VAT Act 1994 and Section 7 of the Interpretation Act 1978 and are deemed to have been delivered unless the contrary is proved. They say the appellant has produced no proof to support his contention. HMRC included in the bundle of papers a note that the appellant telephoned them on 28 February 2014 in respect of default surcharge penalties and suggest this was prompted by the notice sent on 14 February 2014.

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 the surcharge is levied under Section 59 VAT act 1994 and therefore cannot be compared to interest rates which may be payable in respect of other taxes.

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

13. The Tribunal's observations

The Tribunal notes that in both their letter of 26 November 2014 and in their Notice of Appeal dated 4 February 2015 the appellant accepts that payment was sent 9 days late on 16 November 2014.

14. The Appellant claims that the level of the surcharge is unfair. 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.

15. 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 5% of the tax due which is the culmination of 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.

16. 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.

The appellant states "Our accountant submits our VAT returns on our behalf and on this occasion neglected to forward the return to us by email. Ordinarily I would have realised this but at the time of the submission I was developing a leadership Development programme in Hong Kong".

The Tribunal observes that the trip to Hong Kong is unlikely to have been an unexpected event and therefore would have expected a prudent business man to make arrangements for the tax to be paid on time before he left for Hong Kong.

The VAT ACT 1994 Section 71 (1) (b) states

"where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse".

Therefore the failure by the appellant's accountant to forward the return to the appellant by email cannot be regarded as giving the appellant a reasonable excuse. It

is the responsibility of the directors of the appellant company to ensure that their tax obligations are met timeously.

17. The return was received by HMRC on time on 7 November 2014 but payment was received 11 days late on 18 November 2014.

18. 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. HMRC applied the legislation correctly and has calculated the surcharge accurately as £564.99 being 5% of the outstanding tax of £11,299.88 at the due date in respect of the appellant's tax return for the period ended 30 September 2014. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

19. 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: 2 June 2015