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TC04459

Appeal number: TC/2014/06388

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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WILLIAM WALLACE

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**

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The Tribunal determined the appeal on 8 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 received from the appellant by the Tribunal on 28 November 2014, a further letter received from the appellant on 5 December 2014, and HMRC's Statement of Case dated 17 February 2015 with attachments. The Tribunal wrote to the Appellant on 19 February 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 £1,789.89 levied by HMRC for the late payment by the due date of 7 August 2014 of the amount due on its VAT Return for the period ended 30 June 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.

3. A succinct description of the Default Surcharge 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.”

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.

4.. Case law

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

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

Garnmoss Ltd. t/a Parham Builders v HMRC [2012] UKFTT315 (TC)

5. The appellant's submissions.

In an undated letter received by the Tribunal on 28 November 2014 the appellant wrote:

“I am writing to you in the hope that I can appeal against the fine on this letter I have enclosed. The only facts which I can present which are new to my appeal are that the funds used to pay the VAT in question were drawn out of an account so that in effect no time for clearance should have been necessary. It was to all effect a cash payment, one day late sadly because I genuinely believed the date was the eighth. My next VAT payment as you can see by my record was made in plenty of time. I am beginning to struggle financially and an opportunity given by yourselves to be allowed the benefit of the doubt would be enormously appreciated.”

6. In a further undated letter received by the Tribunal on 5 December 2014 the Appellant wrote

“I would like to apologise for my appeal arriving late, we are in the middle of renovations and one of the girls had put mail “tidily” or so she thought. Unfortunately this mail lay for some time before it was seen by me. There were a number of letters involved and it was not until I was questioning why this hadn't arrived that the situation came to light.....It is pertinent to the whole case that on reading your letter my mind logged in that I had thirty days to reply. This is something that happens to me on occasion and is the reason my initial payment was 1 day late. I am not medically diagnosed as having a problem but sometimes numbers do not behave properly in my mind. It may be some form of number dyslexia or something but I have lived with it all my life. Sometimes when doing simple arithmetic for example I see what should be a simple task but the answer will not form and I have to go about it in a roundabout sort of way. It is quite difficult to explain.”

7. HMRC's submissions

8. HMRC state that the VAT return and payment for the period to 30 June 2014 was due by 7 August 2014 assuming payment was made electronically. In fact the return was received electronically on time on 30 July 2014. In respect of payment HMRC say that payment was received on 12 August 2014, that is 5 days late.

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 09/2012. These ultimately have had the effect of increasing the surcharge liability rate to 15%.

10. The net amount of VAT due on the return for the period to 30 June 2014 is stated on the return submitted by the appellant as £11,932.61. Therefore HMRC say on 15 August 2014 they assessed the surcharge as 15% of this sum being £1,789.89. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4).

11. HMRC say that “As the surcharge notices are generated by an automated process it is not possible to provide copies of the actual notices issued to the appellant but examples of the notices are included within the bundle of documents”

12. In a letter to the appellant dated 22 October 2014 HMRC write

“Thank you for your letter received on 9 September 2014 and the additional information provided in our telephone conversation of 22 October in relation to the default surcharge issued for the above period.”

The Tribunal notes that neither a copy of the letter of 9 September 2014 nor details of the additional information provided in the telephone conversation are provided in the bundle of documents. However HMRC’s letter of 22 October does indicate that the appellant had made similar points to those outlined above in paragraphs 5 and 6, in particular that he made a genuine error. In the letter HMRC confirm that they do not consider that a genuine error can establish a reasonable excuse.

13. 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.

14. HMRC draw attention to the case of Garnmoss Ltd. t/a Parham Builders v HMRC (Garnmoss) and in particular to paragraph 12 where it says “What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say this confusion was a reasonable excuse. Thus this default cannot be ignored under the provisions of subsection (7)” HMRC say the appellant in this case made a genuine error but similarly it cannot be taken to provide a reasonable excuse.

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

16. 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.

17. 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 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.

18. 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.

19. The return was received by HMRC on time on 30 July but, as the appellant accepts, payment was made 5 days late on 12 August 2014.

20. The appellant has not established that he had any reasonable excuse for the late payment other than he genuinely believed the payment was due on 8th August and that he suspects he may have an undiagnosed dyslexia for numbers. The Tribunal understands that this is known as dyscalculia.

21. It is clear that the appellant made a genuine mistake as to the date the payment was due but even then because the payment was made by bank giro credit it could not have reached HMRC the same day. The appellant could have used the faster payment system to ensure same day payment but this would still have been one day late.

22. In regards to his suspicions of having dyscalculia the Tribunal has some sympathy with the appellant but regrets that without evidence of this in the form of a letter from a doctor it is unable to take the appellant's suspicions as establishing a reasonable excuse.

23. The Tribunal agrees with HMRC that the decision of the Tribunal in the case of Garnmoss at paragraph 12 is pertinent to this case. The appellant made a genuine mistake and for similar reasons the Tribunal cannot regard this as establishing for the appellant a reasonable excuse.

24. The Tribunal then considered whether or not the penalty was issued within a surcharge liability period. A form V160 VAT Surcharge liability Notice was issued to the appellant by HMRC on 16 November 2012 and they say that the default surcharge period was later extended by the issue of a Form V161 VAT surcharge liability notice extension on both 17 May 2013, and 16 August 2013. On 15 November 2013 HMRC issued the appellant with a Form V166 Notice of assessment of tax and surcharge and surcharge liability notice extension. The amount of the surcharge was later reduced by HMRC who issued a form V163A VAT notice of reduction of surcharge dated 17 January 2014.

Unfortunately only an example of each of these notices was provided by HMRC. The Tribunal finds that the submission of HMRC that “As the surcharge notices are generated by an automated process it is not possible to provide copies of the actual notices issued to the appellant” to be extraordinary. One would expect that an automated process would retain a record of the notices issued so that if necessary at a later date the system could be interrogated and a copy of each notice produced. The Tribunal notes that this is also discussed in the Garnmoss decision.

However it does appear that the appellant received the last notice as he paid the surcharge. He should therefore have been aware of the surcharge period extension.

20. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraphs 15 and 16 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 £1,789.89 being 15% of the outstanding tax of £11,932.61 at the due date in respect of the appellant’s VAT return for the period ended 30 June 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: 23 April 2015