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TC04491

Appeal number: TC/2015/02295

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ASHA BANGLADESHI CUISINE LIMITED

Appellant

- and -

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

Respondents

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

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The Tribunal determined the appeal on 12 June 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 March 2015, and HMRC's Statement of Case dated 16 April 2015 with attachments. The Tribunal wrote to the Appellant on 22 April 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 £807.57 levied by HMRC for the late payment by the due date of 7 December 2014 of the amount outstanding on its VAT Return for the period ended 31 October 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.

3. 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)

4. The appellant's submissions.

In a letter to HMRC bearing the date 7 January 2014 but which the Tribunal considers was intended to be dated 7 January 2015 the appellant's agent Tarafder & Co. Accountants requested that their client be excused from paying the surcharge. They wrote

“The VAT owed has been paid. The money did not clear from my client's account in time. After further discussion with my client he will now arrange a direct debit from now onwards. He paid online and thought that he could pay by the 10th of the month but he needed to arrange the transaction by the 7th of the month for it to clear by the 10th. It was an honest mistake and my client can ill afford to pay the surcharge. He understands the seriousness of this matter and assures you with the use of a direct debit this won't happen again.

5. HMRC responded on 6 February 2015 saying they did not accept the appellant had a reasonable excuse.

6. The Appellant's agent wrote again to HMRC on 18 February 2015 This letter repeats some of the points made in the 7 January 2015 letter but also includes

“The due date (7/12/2014) fell on a Sunday so the 6th and 7th December 2014 fell on a weekend. Both of these days are not considered working days. The money was placed before this but only reached you on 8th December so it was paid before the deadline was due but simply did not reach you on Monday as Saturday/Sunday are not considered 'working days'.

My client paid in good faith not considering that this would have an effect on the payment which is why it reached you a day later. Had he known this he certainly would have made sure that it got to you before. In fact he will in the future have payments taken by direct debit to ensure this does not happen in the future.

In the Notice of Appeal dated 4 March 2015 the appellant's agent makes similar comments.

7. HMRC's submissions

In HMRC's letter of 6 February they point out that the VAT Public Notice 700/50 "Default Surcharge" states

"genuine mistakes, honesty, and acting in good faith are not accepted as reasonable excuses for surcharge purposes."

Therefore they did not accept the appellant had reasonable excuse for the default and because they had not received payment by the due date a surcharge is due.

8. HMRC state that the VAT return and payment for the period to 31 October 2014 was due by 7 December 2014 assuming payment was made electronically. In fact the return was received electronically on 29 November 2014 so was on time. In respect of payment HMRC say this was not received until 8 December 2014 that is one day late.

9. The net amount of VAT due on the return for the period to 31 October 2014 is stated as £8,075.73. Therefore on 12 December 2014 HMRC assessed the surcharge as 10% of this sum being £807.57. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

10. A schedule in the papers provided to the Tribunal shows that in all of the three previous quarters the appellant made late payments and has been in the default surcharge regime since period 01/2014. These ultimately have had the effect of increasing the surcharge liability rate to 10%. HMRC had issued three surcharge liability notices to the appellant although no financial penalty was levied.

11. 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.

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

13. 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 *Energys Holdings Ltd* the tribunal discharged a potential penalty of £130,000 for the submission and payment of a return submitted one day late.

14. 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 10% 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.

15. 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.

16. The payment was received by HMRC one day late on 8 December 2014. The Act provides that a person is to be regarded as being in default if he fails to pay the amount of VAT shown on the return as payable by him. The date shown on the return was 7 December 2014. The appellant therefore defaulted in respect of this period. The question for the Tribunal is whether the appellant had a reasonable excuse.

The appellant states that the late payment was an honest mistake. He did not understand that the payment he made on Friday 5 December would not reach HMRC until Monday 8 December. The Tribunal accepts that it was an honest mistake but considers that a prudent person having already been notified of three previous defaults on the three previous quarters would have made sure that the payment would be received by the due date. The return was received by HMRC on 29 November 2014 so the appellant knew the amount he was due to pay but delayed making the payment. Whether honest mistakes can be considered a reasonable excuse was considered by the Tribunal in *Garnmoss Ltd. t/a Parham Builders v HMRC* [2012] UKFTT315 (TC)

The Tribunal stated at paragraph 12 of that decision

“ 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 that this confusion was a reasonable excuse. Thus this default cannot be ignored under the provisions of subsection (7). ”

This Tribunal considers that these comments are also appropriate for the present case.

17. The Tribunal also accepts that HMRC publish plenty of guidance literature advising taxpayers to ensure that payments get to HMRC's account on time. For example the VAT Guide Notice 700 November 2013 edition includes at paragraph 21.3.1.

“If your due date falls on a bank holiday or weekend, your payment must clear HMRC’s bank account before then.....”

Thus the appellant has not established any reasonable excuse for his failure to make payment on time for his VAT return for the period ended 31 October 2014.

20. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 13 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 £807.57 being 10% of the outstanding tax of £8,075.73 at the due date in respect of the appellant’s tax return for the period ended 31 October 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: 22 June 2015