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TC04492

Appeal number: TC/2015/01758

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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 - Yes.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PROFOUND DECISIONS 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**

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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 10 February 2015, and HMRC's Statement of Case dated 18 March 2015 with attachments. The Tribunal wrote to the Appellant on 24 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.

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DECISION

1. Introduction

This considers an appeal against a default surcharge of £482.69 levied by HMRC for the late payment by the due date of 7 November 2014 of the amount outstanding on its VAT 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.

Regulation 40 of the VAT Regulations 1995 covers VAT to be accounted for on returns and payment of VAT.

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 response to the Surcharge notice Dr. Matthew Pennington a director of the appellant wrote to HMRC on 26 November 2014 requesting a review. He wrote

“...My VAT payments are set up to go out by direct debit – leaving the responsibility to take payment with yourselves. I have paid successfully by direct debit for many years but since I moved my bank account I have experienced continuous problems with you accessing my account.

As a result, the direct debit was reset at the start of this year following and my bank statement clearly shows that you took payment by direct debit on 25th February. I have enclosed a copy of my bank statements for this date which clearly shows that you successfully took payment by direct debit.

There was a problem with the following payment as we submitted late – and that appeared to cause yet more problems with the direct debit system and I had to phone up and pay manually. However I was told that this problem was caused by the late submission, there was no suggestion that there was a problem with the direct debit mandate.

For this quarter we submitted our VAT submission on time – and I have been checking my bank account every day waiting for you to take payment. You can imagine my surprise then to discover that HMRC had opted to not to take payment using the existing direct debit mandate and instead issue me with a fine.

I contacted your call centre and they confirmed that no attempt to take payment had been made but were unable to provide a reason for this – or indeed any assistance beyond “check with your bank” I have checked my online bank account and that clearly shows that the direct debit mandate is still in place. I have spoken to my bank manager and she confirms that you have not attempted to take payment using the existing direct debit mandate, but was unable to provide any reason why you might have failed to do this.

I am appealing this surcharge on the grounds that this late payment is entirely due to the failure of HMRC to take payment by direct debit – as per the standing instructions on my account – and using the valid direct debit mandate that exists.

(I have enclosed copies of my bank statement showing the direct debit mandate as it exists on my bank account and the successful payment on February 2014, as well as an email from my bank manager confirming that no attempt was made to take payment despite the direct debit mandate being in place).”

5. The Tribunal notes that included with the papers was evidence from Barclays Bank in the form of a schedule of direct debit payments which included one in favour of HMRC for £3,001.59 bearing the date 25 February 2014. The Tribunal notes that no bank statements were provided with the papers which showed that the bank account was debited successfully. There was no evidence in the form of an instruction to Barclays to set up this direct debit.

6. In their Notice of appeal dated 10 February 2015 the appellant states

“In January 2014 we changed the bank account that our VAT payment was to be drawn from. We cancelled the direct debit and notified HMRC of the new bank details. We have successfully paid our VAT payments by direct debit for many years and have previously found the scheme to work excellently. We asked them to switch our direct debit mandate to the new account, assuming that everything would work as normal

In their review decision HMRC note that on receipt of our new bank direct debit mandate they opted to set this up as a one off instruction. This was not at our request – and we were not informed that this decision had been taken. We asked for a normal direct debit mandate - wishing to replace the existing one which had been in place for many years. This review decision is the first time that any official from HMRC has informed us that our direct debit had been set up incorrectly by them.

Payment was then taken correctly for 12/13 period

Regrettably we submitted our VAT forms late on the 13th May for the 03/14. To our surprise payment was not taken then until 9th June. When we rang HMRC to query why they had not taken payment they informed us that this was standard when any submission was late. They did NOT inform us that our direct debit mandate had been set-up incorrectly and that no payment would have been taken even if we had submitted on time. They gave us the clear impression that had we submitted the forms on time, then payment would have been taken by direct debit.

For the 06/14 period we submitted just in time, but sufficiently close to the deadline that I was concerned that HMRC would again neglect to take the payment as I was not sure precisely when the deadline was nor how early the forms had to be filed for HMRC to take payment. Therefore I phoned HMRC and paid by card.

For the 09/14 period we submitted our forms in plenty of time and I did not make electronic payment because I assumed that the existing direct debit mandate – still

fully visible at that time in my bank account list of existing direct debit mandates would operate normally – as it has for many years previously.

In Summary HMRC incorrectly set-up our Direct Debit mandate as a “one –off” payment. This was categorically not requested by us, we were not aware such a system even existed and certainly would not have requested it. Given that VAT payments happen every quarter – and that we have been paying successfully by direct debit for some time – there is no reason that we would have wanted a “one-off” direct debit arrangement. There was also no way we could have known that HMRC had made this mistake.

At no point did HMRC make us aware that they had set our direct debit payment as a one-off payment – despite us phoning HMRC to query why payment had not been taken for the period 06/14. Had they informed us at that time that they had incorrectly processed our direct debit mandate then we could have corrected their mistake at that point.”

7. HMRC’s submissions

HMRC say that from period 06/10 to 12/13 the appellant’s preferred method of payment was consistently via direct debit.

8. HMRC say that they received two telephone calls on 8 January 2014 from Alison Pennington concerning direct debits. In the first HMRC explained the Direct Debit amendment process through a bank. In the second HMRC advised that setting up a direct debit would need to be done on line.

On 9 January 2014 HMRC wrote to the appellant advising that the direct debit arrangement had been cancelled.

The Tribunal notes that there is no explanation in the letter as to why HMRC took this action. The letter refers to a different bank account number than that which was debited on 24 February 2014 to make the payment for the return for the period ended 30 September 2014.

9. On 14 January 2015 HMRC wrote to the appellant stating that the result of the requested review was that HMRC did not accept that the appellant had a reasonable excuse for the default. They pointed out that they had issued Non financial default surcharge liability notices for the periods 12/13 and 03/14.

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.

10. 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. In respect of payment HMRC say this was not received until 26 November 2014 that is nineteen days late.

11. The net amount of VAT due on the return for the period to 30 September 2014 is stated as £9,653.83. On 14 November 2014 HMRC assessed the surcharge as 5% of this sum being £482.69. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

12. A schedule in the papers provided to the Tribunal shows that in two of the three previous quarters the appellant made late payments and has been in the default surcharge regime since period 12/2013. These ultimately have had the effect of increasing the surcharge liability rate to 5%. HMRC had issued two surcharge liability notices to the appellant although no financial penalty was levied. They stated that these include an explanation of the default surcharge system and a statement as to the potential financial consequences of future failures.

13. In respect of period 12/13 HMRC state that there is a difference in the types of Direct Debit Instruction which can be set up on their systems. A taxpayer can set up a one off direct debit for a specific payment which quantifies the amount and date of payment. Alternatively a taxpayer can set up an ongoing direct debit mandate for future VAT return liabilities but the amounts are unspecified. HMRC include in the papers a specimen of each type of direct debit instruction. They say the forms are clearly different. However there is no copy of the form actually completed by the appellant. HMRC merely state in their review “It appears that the mandate used to draw funds on your 12/13 liability was set up as a “one off” instruction not as an ongoing instruction.”

14. In respect of period 03/14 HMRC say that they sent the appellant a default surcharge notice on 16 May 2014 yet payment was not made until 9 June 2014.

15. In respect of period 09/14 HMRC say The appellants would have been aware that a Direct Debit instruction was not in place as on submission of the period 06/14 VAT return HMRC did not collect payment of VAT due by Direct Debit. The fact that the Appellant contacted HMRC and made payment by telephone would not have inhibited the collection of payment via a Direct debit instruction.

16. 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.

17. HMRC consider that payment was made late for period 09/14 and no reasonable excuse for the late payment has been established and request that the appeal be dismissed.

18. The Tribunal's observations.

The Tribunal has been hampered in its task by the lack of evidence from both parties which would substantiate statements made. For example samples of both of the alternative direct debit mandates are not evidence to show which alternative the appellant used. The appellant says that bank statements are enclosed but these were not included in the papers before the Tribunal.

19. 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.

20. 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 18 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.

21. In respect of the return for the period ended 31 December 2013 the return was received by HMRC on 7 February 2014 that is on time. HMRC took payment by direct debit on 24 February 2014.

The appellant telephoned HMRC twice concerning direct debit arrangements on 8 January 2014. It is clear that HMRC notified cancellation of a direct debit arrangement on 9 January 2014 but there is no explanation by them as to the reason for this action. HMRC took payment by direct debit on 24 February 2014 and the schedule provided by Barclays suggests that it was debited to the appellant's account the following day. Therefore at some time between 8 January 2014 and 24 February 2014 a new Direct Debit mandate for a different account at the same branch of Barclays was in place For this period whether that was a one off or an ongoing instruction is not relevant.

It is difficult to imagine that the appellant would apply for a direct debit arrangement to be cancelled on one account and not then institute a direct debit on the new account. However if the appellant had put in place a new direct debit instruction on 9 January 2014 it is unclear why when they knew the amount due on 7 February 2014 HMRC delayed collecting it until 24 February and thereafter considered the appellant was in default.

22. In respect of the return for the period ended 31 March 2014 the appellant has accepted that it sent in the return late on 13 May 2014. The appellant did not make payment until 9 June 2014 because it was expecting HMRC to collect payment by direct debit. They telephoned to find out why HMRC had not taken payment by direct debit and was told this was standard for returns sent in late. They were not told that there was no direct debit mandate in place.

23. In respect of the return for the period ended 30 June 2014 HMRC accept that both the return and payment were received on time.

24. In respect of the return for the period ended 30 September 2014 the electronic return was received by HMRC on 7 November 2014 that is on time. However payment was received by HMRC nineteen days late on 26 November 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 November 2014. The appellant therefore defaulted in respect of this period.

The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for this default as contemplated by Section 59 (7) VAT Act 1994.

In respect of the return for the period ended 30 September 2014 the crucial point is the notification by the appellant of its changed bank account details and how HMRC dealt with that notification. Unfortunately neither party has produced any evidence to substantiate their statements on the matter.

What is clear from the paper submissions is that after the date of the letter in which the appellant states it changed its bank account HMRC collected one payment by direct debit from that account which serves to demonstrate that a notification was sent by the appellant and that HMRC received it. The specific details of that notification, how it was made, and what it actually said have not been provided. How accurately HMRC implemented the notification is also not clear.

It does not appear to be disputed that the appellant had paid its VAT return liabilities to HMRC by means of a direct debit arrangement for many years. This arrangement had been successful. Against that background The Tribunal considers it entirely logical that on change of bank account the appellant would wish to continue with an ongoing direct debit arrangement. It is not as logical that it would wish to enter in an arrangement for just one payment by direct debit.

HMRC say that they can accept that the direct debit instruction for just one payment rather than for all future payments was an honest mistake. They point out that 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).”

The problem with this argument is that there is no evidence that the appellant made a mistake it is just as possible that HMRC made an honest mistake in processing the notification.

25. The Tribunal does not accept HMRC’s argument that the appellant would be aware that the Direct Debit Instruction was not in place because on submission of the period 06/14 VAT return HMRC did not collect payment of the VAT due by Direct Debit. In the Tribunal’s view the appellant, having telephoned HMRC and made payment by an alternative method, would expect HMRC to inhibit the direct debit on that occasion and not take payment twice.

26. 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. The Tribunal is not satisfied that there was a default in the period ending 31 December 2013. A return was submitted on 7 February 2014 which although this was the last possible date it is still in time. Enquiries had been made by telephone on behalf of the appellant about the direct debit system on 8 January 2014. On 9 January 2014 HMRC wrote to the appellant cancelling the direct debit arrangement. The Tribunal considers it more likely than not that the appellant set up a new direct debit mandate on or around 8th or 9th January 2014. There is no clear explanation of why the money was not collected by HMRC until 24 or 25 February 2014. The Tribunal has considered the possibility that it was a date specified by the appellant, but the appellant believed he was setting up an ongoing direct debit. It is hard to believe that the appellant would set up an ongoing arrangement which would cause him to default every quarter. Thus the Tribunal concludes that there was no default for the period 12/13. The effect of this is that the surcharge liability rate of 5% used to calculate the surcharge for period 09/14 is incorrect and should be 2%.

27. In respect of the period 09/14 The Tribunal considers that it is more likely than not that the appellant was confused by the choice of direct debit instructions available on line. Although it is clear to the Tribunal that the appellant’s intention was to set up an ongoing direct debit instruction in fact a one off instruction was completed. This was an honest mistake. Unfortunately the mistake did not come to light until the 09/14 return because of the circumstances outlined above concerning the 03/14 and 06/14 returns. In accordance with Garnmoss decision referred to above The Tribunal cannot accept a simple honest mistake as providing a reasonable excuse.

However on or around the beginning of June 2014 in respect of the 03/14 return HMRC had advised the appellant that when a return was sent in late it was standard practice not to take payment under a direct debit instruction. This may well be a true statement of HMRC practice but because HMRC neglected to point out that the appellant had no direct debit instruction in place it clearly gave the appellant the impression that a direct debit instruction was in place but had not been acted on

because of the lateness of the return. The appellant therefore proceeded in the belief that a direct debit instruction was in place. The 06/14 return and payment by alternative means were both made on time. Thus in the 09/14 the appellant acted on the belief that a direct debit instruction was in place.

The Tribunal considers that the appellant has established a reasonable excuse for the late payment of the VAT. Therefore the appeal is allowed.

28. The appellant remains in the default surcharge regime because of the late return and late payment for period 03/14.

29. 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