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TC04500

Appeal number: TC/2015/01982

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VEAL & SON

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 22 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 dated 19 February 2015, and HMRC's Statement of Case dated 25
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 £916.08 levied by HMRC for the late payment by the due date of 7 August 2014 of the amount outstanding 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.

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

4. Facts

In an undated letter the Appellant requested a review of the surcharge.

The letter includes the following:

The reason the VAT submission was only one day late was because on the day it should have been submitted the HMRC web site would not accept the submission. The message on the screen was that I should log back into the web site later to check submission – which I did. However the screen indicated that the return was still in submission process.

I logged into the web site the following day and the submission appeared to have been completely lost. I therefore re-submitted the return and paid the outstanding VAT straight away.

5. HMRC replied on 28 October 2014 saying that they did not consider the trader had reasonable excuse

HMRC say “The return and payment were both submitted on 11 August 2014 which was four days after the extended due date of 7 August 2014. If you made these submissions the day following when you had previously tried, this would imply that the original attempt at submission was already after the due date.”

6. In an undated letter annotated “HMRC received 18.12.14” the appellant states

“ In our additional request for a review we indicated that we had logged on to submit the VAT return on the due date but had failed to obtain a confirmed submission receipt from the website and that we logged in the following day to check on progress. Actually the following day was a Friday and we did not actually log back in until the following Monday which was August 11th, the day that we had to make a new submission and made the payment. We had been ready and willing to make the payment on the due date and had attempted to do so.”

7. HMRC do not normally conduct a second review but exceptionally they did so on this occasion. However they remained of the view that the Appellant had no reasonable excuse for the late submission of the return and payment.

8. The Appellant's submissions

In the Notice of Appeal dated 4 March 2015 the appellant states.

“ I believe HMRC's decision to be very harsh especially in view of the fact that Veal and Son have always submitted on time and made any payments due. Especially as there were issues with the web site.

Our accountant, Veronica Russell of G.T.R.S. deals with all of our tax issues and makes all payments on our behalf.

She has written to you twice, but I think the first letter was misleading, but she attempted to clarify this in her second letter.

I believe Veronica Russell attempted to log on to your web site to pay the tax on Thursday 7th August 2014 but was unable to submit

She tried to log on again later but was still unable to submit, and then again the next day.

She was eventually successful when she logged in again on Monday 11th August 2014.

The amount of surcharge – (5%) that is being charged to us we feel is extremely unreasonable for a small business such as ours to bear for a very slight delay in submitting - especially in view of the fact that this was beyond our control due to the problems experienced with your web site.

In future we will ensure all our submissions and payments are made well before the due date to allow for any mishaps...”

9. HMRC's submissions

HMRC say the Appellant acknowledges that the return and payment for period 06/14 were both made late.

10. HMRC say that the Appellant's preferred method of payment has consistently been via Bill Pay as used for the period 06/14.

11. 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 11 August 2014 so was four days late. In respect of payment HMRC say this was also received four days after the due date on 11 August 2014 so was late.

12. A schedule in the papers provided to the Tribunal shows that in two previous quarters the Appellant submitted a late return/payment 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 5%. HMRC had issued two surcharge notices

to the appellant although no financial penalty was levied on either occasion. HMRC say that the schedule shows that in fact the Appellant has not always submitted on time.

13. The net amount of VAT due on the return for the period to 30 June 2014 is stated on the return as £18,321.74. Therefore on 18 August 2014. HMRC assessed the surcharge as 5% of this sum being £916.08. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

14. HMRC point out that up to and including the 12/12 period the surcharge liability notices included the following standard paragraphs:-

i. **Please remember:** Your VAT returns and any tax due must reach HMRC by the due date.

ii If you expect to have any difficulties contact either your local VAT Office, listed under HM Customs in the phone book as soon as possible or the National Advice Service on 0845 010 9000

They also point out that the notes on the reverse of surcharge liability notices from period 01/13 onwards contain 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.

From period 01/13 the reverse of the surcharge liability notice advises how the surcharges are calculated and the percentages used.

HMRC therefore submit that the Appellant should have been aware of the possible financial consequences of further late returns or payments.

15. HMRC suggests that the Appellant may not have realised what the default notices were because they did not contain a financial element.

16. HMRC say they have no knowledge of any major access problems to their website on the 7th August 2014. This had been confirmed by a member of HMRC's Respondents Digital Services Team. That team confirmed that the Appellant's online account was not logged into between 1 July 2014 and 11 August 2014 when the return for the period 09/14 was submitted and paid.

17. HMRC say that even if the Appellant had difficulties logging in that would not have prevented them making payment of the tax due.

18. HMRC say that if the Appellant had difficulty with on line submission of the return they should have contacted HMRC for advice and assistance. They have no record of any such contact being made.

19. 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.

20. 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.

21. 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 20 above. The Tribunal does not consider that a penalty of £916.08 which is 5% of the tax due which is the culmination of three 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.

22. Parties agree that the VAT return and payment of £18,321.74 were received four days late on 11 August 2014. The Act provides that a person is to be regarded as being in default if he fails to pay by the due date the amount of VAT shown on the return as payable by him. In this case the date shown on the return was 7 August 2014. The Appellant therefore defaulted in respect of this period. The question for the Tribunal is whether the appellant had a reasonable excuse for these failures as contemplated by Section 59 (7) VAT Act 1994.

23. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the Appellant's control.

24. There appears to be some confusion over the dates on which the Appellant states submission of the return was attempted. The due date was Thursday 7th August 2014 and it appears that submission was attempted but failed on that day. It is then unclear whether a further attempt was made on Friday 8th of August. Submission and payment were made successfully on Monday 11th August 2014.

25. HMRC are not aware of any submission problems during the 7th August neither are they able to trace any attempt to log in by the appellant until 11 August 2014

It appears that the Appellant experienced some difficulty with HMRC's website. If a taxpayer is experiencing difficulty submitting a return or payment on the due date the

Tribunal would expect the taxpayer to contact HMRC on the day he is having difficulty. Failing that contact the next day would be expected, but the Appellant did not make any contact with HMRC to explain the difficulty being experienced. Whilst it could be argued that the difficulty was outside the Appellant's control the solution to the difficulty ie contacting HMRC by telephone was available to the Appellant though not taken.

22. The Tribunal also accepts that HMRC publish guidance literature advising taxpayers to ensure that payments get to HMRC's account on time. In the Tribunal's view the Appellant should have been aware of these matters. As they had received two surcharge liability notices for previous failures warning of potential surcharges for future failures the Appellant should have been particularly alert to the need to ensure that the return and correct payment were submitted on time.

24. Thus the Tribunal considers that the Appellant has not established any reasonable excuse for his failure to submit his VAT return and payment for the period ended 30 June 2014 on time.

25. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 20 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 £916.08 being 5% of the outstanding tax at the due date of £18,321.74 in respect of the Appellant's tax 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.

26. 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: 25 June 2015