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TC04501

Appeal number: TC/2015/02038

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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**

ANDREW PAUL BEAR

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 22 February 2015, and HMRC's Statement of Case dated 19
March 2015 with attachments. The Tribunal wrote to the Appellant on 27 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 £522.08 levied by HMRC for the late submission and payment by the due date of 7 February 2015 of the appellant's VAT return for the period ended 31 December 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.

Finance Act 2009 Section 108.

3. Case law

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

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

Commissioners of Customs and Excise v Salevon [1989] STC 907

4. The appellant's submissions.

In the Notice of Appeal dated 22 February 2015 the appellant states

“The business has been struggling and Mr. Bear had to pay VAT, half yearly tax bill, PAYE, and Games Tax all at the same time. I struggled to raise the funds and had to borrow money for all the above from savings that weren't mine, missing payment by days.”

5. HMRC's submissions

HMRC state that the VAT return and payment for the period to 31 December 2014 was due by 7 February 2015 assuming payment was made electronically. In fact the return was received electronically on 10 February 2015 so was three days late. In respect of payment HMRC say this was also received three days after the due date on 10 February 2015 so was late.

6. A schedule in the papers provided to the Tribunal shows that in three previous quarters the appellant submitted a late return/payment and has been in the default surcharge regime since period 03/2013. These ultimately have had the effect of increasing the surcharge liability rate to 10%. HMRC had issued three surcharge notices to the appellant although no financial penalty was levied on those occasions.

7. The net amount of VAT due on the return for the period to 31 December 2014 is stated on the return as £5,220.80. Therefore on 13 February 2015 HMRC assessed the surcharge as 10% of this sum being £522.08. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

8. 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.

9. HMRC state that the reverse of the surcharge notices details how surcharges are calculated and the percentage used in determining surcharges. HMRC submit that the appellant should have been aware of the possible financial consequences of further late returns or payments.

10. HMRC state that Section 108 of the Finance Act 2009 specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date to discuss late payment. HMRC state that their records indicate that the appellant did not contact them prior to the due date to discuss late payment. They observe that the appellant has made no assertion to the contrary.

11. HMRC State that insufficiency of funds is excluded from providing reasonable excuse for a default under Section 71 (1(a) of the VAT Act 1994.

12. HMRC say

“The nature of the business is a public house which would also indicate that this is ostensibly a cash business so any VAT would in fact be collected at the point of sale and therefore prior to the due date. This cash/money was therefore available to the business to meet its VAT obligations. If the business chose to treat this as an interest free loan until the VAT became payable, but which was not available at the due date because of cash flow problems, that is a risk the business took upon itself and HMRC would contend cannot be used as a reasonable excuse..”

In support of this view HMRC draw attention to the Court of Appeal decision in the case of Commissioners of Customs and Excise v Salevon [1989] STC 907.

In particular they quote from the opinion of Nolan LJ

“...the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of “reasonable excuse” must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to it to invoke s19(6)(b). In other words he will be hard put to it to persuade the

commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian.”

13. 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.

14. 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.

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 £522.08 which is 10% of the tax due which is the culmination of three 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. Parties agree that a VAT Payment of £5,220.80 was received three days late on 10 February 2015. 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 February 2015. 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.

17. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the appellant’s control. In the Tribunal’s opinion the appellant has not put forward any circumstances that occurred that were unforeseeable or out of his control. The appellant knew the dates his VAT return, half yearly tax bill, PAYE, and gaming tax were due and should have made provision accordingly. The Tribunal accepts HMRC’s comments that the appellant’s business is ostensibly a cash business so he had received the VAT at the point of sale. If the appellant uses it for another purpose he takes the risk he will not have the money available to pay the VAT at the due date. As Nolan LJ states “...*he will be hard put to it to persuade..... the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian*”

18. 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 directors of the appellant should have been aware of these matters. As they had received at least three surcharge liability notices for previous failures warning of potential surcharges for future failures the directors should have been particularly alert to the need to ensure that the return and correct payment were submitted on time.

19. The Appellant could have avoided a surcharge if he had made contact with HMRC prior to the due date to discuss late payment. He did not do so.

20. Thus the Tribunal considers that the appellant has not established any reasonable excuse for his failure to submit his full VAT payment for the period ended 31 October 2014 on time.

21. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 14 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 £522.08 being 10% of the outstanding tax of £5,220.80 at the due date in respect of the appellant's tax return for the period ended 31 December 2014. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

22. 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