



TC04928

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Appeal number: TC/2015/03640

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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M.P.BURKE TRANSPORT LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER:
PETER R. SHEPPARD FCIS FCIB CTA
MEMBER: CHARLOTTE BARBOUR CA
CTA**

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Sitting in public at Eagle House, 215 Bothwell Street, Glasgow on 11 January 2016

Mr. M. Burke a director for the Appellant

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Mrs. Elizabeth McIntyre, HMRC Officer, for the Respondents.

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DECISION

1. Introduction

The Appellant is a haulage contractor based in Paisley, Renfrewshire. The appeal concerned a VAT default surcharge of £732.74 for the late payment of VAT due on the Appellant's VAT return for the period ended 31 January 2015.

2. Legislation

VAT Act 1994, in particular Sections 59, 70 and 71
VAT Regulations 1995 in particular Regulations 25, 25A and 40.

3. Case law

Garnmoss Limited T/A Parham Builders v HMRC [2012] UKFTT 315 (TC)
HMRC v Total Technology (Engineering) Ltd. [2012] UKUT 418 (TCC)
Trinity Mirror plc v HMRC [2015] UKUT 421 (TCC)

4. Facts

HMRC produced a Schedule of Defaults by the Appellant. This showed two defaults. The first was for the period ended 31 July 2014 and the second for the period ended 31 January 2015. However during the hearing reference was made to the return for the intervening period ending 31 October 2014 which was made on time. It is therefore appropriate to set out the details of each of these returns.

- 4.1 The first default was in respect of the quarter 31 July 2014 which was due by Sunday 7 September 2014 assuming payment was made by electronic means. The return was made in time, on 29 August 2014, showing an amount due of £38,866.85. Payment was not received by HMRC until Monday 8 September 2014, that is 1 day late. HMRC issued a Surcharge Liability Notice Form V160 warning that further defaults might result in the levying of a surcharge. At the hearing Mr. Burke accepted that he had probably received this Notice.
- 4.2 In respect of the quarter ended 31 October 2014 this was due by 7 December 2014. The amount due was £9,172.35. Both the return and payment were received on time by HMRC.
- 4.3 The return for the period ended 31 January 2015 was due by Saturday 7 March 2015 again assuming payment by electronic means. The amount due was £36,637.27. The return was received in time by HMRC on 2 March 2015 but payment was not received until Monday 9 March 2015, that is 2 days late. As this was the first default after the original surcharge liability notice a surcharge rate of 2% of the tax due applied. HMRC sent the Appellant a form V162 Notice of Assessment of Surcharge and Surcharge Liability Notice Extension. The amount of the surcharge was £732.74 being 2% of £36,637.27.
- 4.4 On each occasion the appellant had more than sufficient funds in its bank account to pay the VAT due.

5. Appellant's submissions

On 30 March 2015 Maurice P. Burke, a director of the Appellant, wrote to HMRC requesting a review of the default surcharge. That letter includes:

“As far as we can see the trouble appears to lie with the bank as there is no consistency in their payments process.

The VAT payment we made on 5/9/14 at 12pm, did not pay HMRC until 8/9/14. All other payments made from the business account that day, before and after that particular payment was made, paid and cleared from the account that day, all bar the HMRC payment.

The payment we made to HMRC on the 4/12/14 at 14.30 pm paid out to HMRC on that day, bringing us to the latest VAT payment that we made to you on the 6/3/15 at 9 am and it did not pay out until 9/3/15. Again any other payment made from the account before and after that payment was made left and cleared the account.....

....There is a problem with timing with the bank and there is also an issue with how the bank is processing certain payments and that is something that we, as a company will have to discuss with the bank in order to prevent this happening to us.....”

6. HMRC replied on 30 April 2015 and requested the Appellant to provide confirmation from the Appellant's bank that the late payments were due to processing errors on their part. The letter imposed a deadline of 19 May 2015 for provision of that confirmation. As this was not forthcoming on 20 May 2015 HMRC wrote to the Appellant confirming the surcharge.

7. In the Notice of Appeal dated 27 May 2015 Martin Burke states

“I feel that this decision is wrong as the payments are out of my control as to when they pay from my bank account. I contacted my bank requesting the information that was asked of us by HMRC and the bank have said that they would not state that it's down to processing errors.

There have been a couple of occasions in the past where payments for VAT have not left the account until later & I now know why but until last week I did not know why. As stated in my original enclosed appeal letter, I am making my payments in good faith and I am expecting the payments I make to be made, especially when there is more than enough money in the account to pay my bills.

Originally while investigating this, the bank told me that HMRC was not set up to receive faster payments and this is why there was a delay, but I have since found out from my own accountant that they do and have been doing so for about a year now. It has only come to light to me while investigating the payments process myself, that the bank sets limits on the amounts going out of your account. Payments under £10-15000, can leave your account up to 2 hours from you making the payment and anything larger than that amount can take up to 2 business days. This is why payments are delayed and why the payment messages change. This is not information I was aware of either. I now know that when I make faster payments, there are messages on the screen that tell you when the payments will be made. I always have and always assumed that when I make payments to bills directly from my bank using the faster payments system, then these bills are paid within that day. To be honest and fair, everything else I pay does pay out on the same day.

I always strive to pay all my debts on time and without delay. We have been given a large additional charge now on top of our VAT bill that I feel is unfair.”

He further comments

“I feel that the fine should not have been imposed. We have never delayed payments or withheld payments to HMRC for any taxes. There was never a question or doubt if we had the money to clear the outstanding balance that was due to HMRC. The balance due by us that I paid on the Friday morning was paid straight to you the following Monday morning when the bank cleared the amount to leave the account.”

8. The Appellant had provided payment requests receipts issued by the Bank of Scotland in respect of his payment instructions for each of the three returns detailed above. All three are headed in bold and enlarged type “Payment successful”.

Mr. Burke explained that on each occasion he had gone to make payment of the amount due on the Appellant’s VAT return, and on seeing this heading he was happy that payment had been successfully made.

It was only after he had received the assessment for £732.74 for the return for the period ended 31 January 2015 that he started investigating the reason why the payments which he thought had been made successfully and on time were in fact received late. He then read the small print at the end of the receipts headed “Payment successful”.

In respect of the payment for £38,866.85 31 for the VAT due for the period ended 31 July 2014 the small print on the receipt dated 5 September 2014 said

“Date ASAP (This payment will reach the recipient’s account the next business day.) This payment will reach the recipient’s account before close of the next business day.”

In respect of the payment for £9,172.35 for the VAT due for the period ended 31 October 2014 the receipt looked very similar but the small print on the receipt dated 4 December 2014 was different in one respect it said

“Date ASAP (This payment will usually reach the recipient’s account within the next 2 hours.) We’ve successfully processed your payment to HMRC for £9,172.35. The money will usually reach the recipient’s account within 2 hours.”

In respect of the payment for £36,637.27 for the VAT due for the period ended 31 January 2015 the small print on the receipt dated 6 March 2015 said.

“Date ASAP (This payment will reach the recipient’s account the next business day.) This payment will reach the recipient’s account before close of the next business day.”

Mr. Burke said that he makes regular use of the faster payment system in connection with running the business. The amounts involved are usually under £10,000 and in such cases the receipt from the bank are headed “Payment successful” and the small print says “The money will usually reach the recipient’s account within 2 hours.” It is only after investigation of his bank’s payment process that he now realises that the bank differentiates between the way it treats payments of over £15,000 and those for under that amount.

9. HMRC's submissions

HMRC state that the liability to a surcharge is governed by the VAT Act 1994 Section 59. HMRC submit that the Appellant has accepted that he received the surcharge notices and so they contend that the surcharges were correctly issued in accordance with Section 59 (4).

10. HMRC point out that included in the notes on the reverse of Surcharge Liability Notices are details of how the surcharges are calculated and the percentages used. Also included is advice about submitting and paying returns on time. They also include guidance on how to avoid surcharges.

11. HMRC refer to Notice 700 'The VAT guide' at paragraph 21.3.1 includes the following.

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

If your payment arrives late you may be liable to a surcharge for late payment. To make sure that your payment clears our account in time, you should check with your bank or building society to find out:

If there are any single or daily limits to how much you can transfer from your account.

If there is a cut off time for processing payments on the same day?

How long your payment will take to clear into HMRC's bank account?

Checking these details will help to ensure that you do not incur any unnecessary late payment surcharges."

12. The HMRC website www.gov.uk/hmrc.states:

"i. Payments made by Faster (online or telephone banking) will usually reach HMRC on the same or next day, including weekends and bank holidays.

ii. Check your bank's transaction limits and processing times before making payment."

13. HMRC point out that there have been previous returns where the VAT due by the Appellant has exceeded £15,000 but payment has been received on or before the due date, examples include:

Period ending 31 January 2013: £26,345.19 received on the due date of 7 March 2013.

Period ended 30 April 2013: £26,203.15 received on the due date of 7 June 2013.

Period ended 31 July 2013: £26,595.03 received on 6 July 2013 one day before the due date.

Period ended 31 January 2014: £34,089.18 received on 6 March 2014 one day before the due date.

14. HMRC submit that the Appellant did not take appropriate or sufficient steps to ensure that the company met its VAT payment obligations. The Appellant should have made themselves aware of their bank's procedures and conditions relating to its Faster Payment Service. Having received a previous surcharge liability notice the Appellant should have been aware of the financial consequences should a VAT payment be received after the due date.

14. HMRC say that genuine mistakes such as occurred in this case cannot be considered as acceptable as a reasonable excuse and refer to the case of Garnmoss Ltd t/a Parham Builders in support.

15. Tribunal's observations

The subject of the level of VAT default surcharges is covered in detail in the decision of the Upper Tribunal in the case of Total Technology (Engineering) Ltd. That case also addressed a situation where a payment was only one day late. It is clear that the First-tier Tribunal has no power to mitigate, discharge, or adjust a penalty. The level of the default surcharges has been laid down by Parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the Appellant has reasonable excuse for the failure as contemplated by the VAT Act 1994 Section 71.

16. The onus lies with the Appellant to prove it had reasonable excuse for the late payment. The Tribunal found the clear large type headings "Payment successful" on the payment request receipts from the Bank of Scotland to be extremely misleading. At the time they were issued, same day payment for amounts over £15,000 had not been successful at all.

However the late payment for the period 31 January 2015 was not the first time this had happened. The payment for the period ended 31 July 2014 had also been received late in similar circumstances. When asked by the Tribunal Mr. Burke accepted that he had received the Surcharge Liability Notice sent to the Appellant by HMRC advising him of the late receipt of payment. When the Appellant received that notice it should have made investigations to find out the reason why what was thought to have been a successful same day payment had in fact been received three days later. Had that been done the appellant would have been able to avoid the surcharge in the later period.

17. Although the Appellant clearly tried to make payments on time he should have made himself aware of his banks procedures in respect of faster payments. Unfortunately mistakes and oversights of this nature do not provide a reasonable excuse for the late payment of the amount due on the appellant's VAT return for the period. The Appellant has not challenged the accuracy of the calculation of the amount of the surcharge.

18. Whilst the Tribunal has some sympathy with the Appellant the Tribunal does not consider the appellant has established a reasonable excuse and therefore dismisses the appeal and confirms the default surcharge of £732.74.

19. 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: 1 MARCH 2016