



TC04999

Appeal number: TC/2015/02194

*VALUE ADDED TAX – EC Sales Statements – appeal against penalties –
whether reasonable excuse*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEREOMATIC LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE V L NICHOLL
IAN PERRY**

Sitting in public at Centre City Tower, Birmingham on 15 February 2016

Mr Andrew Kirk in person for the Appellant

Ms Patel, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This appeal is against penalties imposed by the Respondents (“HMRC”) on the Appellant (“Stereomatic Limited”) under section 66 (5) Value Added Tax Act 1994 in respect of defaults in submitting EC sales statements.

Background and facts found

2. Stereomatic Limited sells gas injectors and turned parts to customers in the UK, EU and outside the EU. Mr Kirk is an owner of the company and he deals with the company’s VAT accounting. Mr Kirk presented the case for Stereomatic Limited and gave evidence that was cross-examined by Ms Patel. From this oral evidence and the evidence in the tribunal bundle we found the following facts:

3. As Stereomatic Limited supplies goods to customers who are registered for VAT in another member State, it is required to submit an EC sales statement every quarter given the level of its EU supplies. The statements must be submitted not later than 14 days from the end of the period to which the statement relates if they are submitted on paper. All the statements for the periods relevant to this appeal were submitted on paper forms. The forms to be used were sent to Stereomatic Limited by HMRC prior to the end of each VAT quarter, together with an envelope for return.

4. Stereomatic Limited files its VAT returns online and Mr Kirk arranges payment of the VAT due over the telephone. The VAT returns are due by the 7th of the month following the end of the month after the end of the VAT quarter. This is some three weeks after the EC sales statements are due to be filed. Mr Kirk does not prepare the VAT returns until shortly before they are due to be filed.

5. At some time after the VAT return has been filed for a quarter Mr Kirk completes the EC sales statements in manuscript on the paper forms sent to him by HMRC. The information required to be included on the statements is a list of the value of each EU supply made and the customers’ country and VAT registration number. Mr Kirk takes this information from the VAT return, which is prepared using the record of invoices in the company’s SAGE accounting system. This timing results in the statements being prepared at least three weeks after the date on which it should be dispatched.

6. On 23 September 2011 HMRC issued a penalty liability notice for the period of 06/11. This was not in the tribunal bundle but Ms Patel told the tribunal that she had checked HMRC’s computer record earlier in the day and was able to confirm that this showed that it had been issued. Mr Kirk did not dispute the receipt of this notice or the receipt of the civil penalty notices referred to in paragraph 7 below when asked, and we therefore accepted that they had been received by Stereomatic Limited.

7. As Stereomatic Limited did not file the EC sales statement for the 06/11 period within 14 days of the service of the penalty liability notice a penalty period began. HMRC then issued nine subsequent civil penalty notices for the periods 09/11, 12/11,

03/12, 06/12, 09/12, 12/12, 03/13, 06/13 and 09/13 between March 2012 and March 2014 as the EC sales statements for these periods were not received by HMRC. The aggregate amount of the penalties is £13,000. In each case the penalty was calculated based on 100 days' delay in filing (giving rise to the maximum penalty) and the penalty notice was issued over four months after the filing date. This meant that the 100 days' delay in filing had elapsed by the date of issue of the penalties and that the penalties could not have been avoided by promptly filing of the relevant EC sales statements at that stage.

8. Stereomatic Limited entered into time to pay arrangements with HMRC in 2012 and throughout this period Mr Kirk understood (from information provided by HMRC) that he should send all VAT correspondence to HMRC's VAT office in Belfast. Mr Kirk was in regular telephone contact with HMRC throughout 2012 and 2013 about Stereomatic Limited's liabilities. He asked for a breakdown of Stereomatic Limited's VAT liabilities on a number of occasions but these were not forthcoming. He was not told to file the EC sales statements on any of these calls as he was speaking to HMRC's debt management team who do not deal with the issue of the civil penalty notices or with appeals.

9. It was not until an officer from HMRC (Mr Craig Beardsmore) attended the offices of Stereomatic Limited in July 2014 that Mr Kirk became aware that the liabilities that related to EC sales statements had not been appealed and he then sought to appeal these penalties. Mr Kirk then engaged the company's accountant to prepare duplicate statements and these were filed with HMRC in October 2014. A civil penalty review concluded on 8 September 2014 that the penalties had been correctly charged and a review decision confirmed this finding on 20 November 2014. The letter of 20 November 2014 was resent to Stereomatic Limited on 21 January 2015 as the original was not received. Stereomatic Limited filed its appeal out of time on 24 February 2015.

The law

10. Section 66 Value Added Tax Act 1994 ("VATA") provides for penalties for the failure to submit EC sales statement as follows:

"(1) If, by the last day on which a person is required in accordance with regulations under this Act to submit an EC sales statement for any prescribed period to the Commissioners, the Commissioners have not received that statement, that person shall be regarded for the purposes of this section as being in default in relation to that statement until it is submitted.

(2) Where any person is in default in respect of any EC sales statement the Commissioners may serve notice on him stating—

(a) that he is in default in relation to the statement specified in the notice;

(b) that (subject to the liability mentioned in paragraph (d) below) no action will be taken if he remedies the default before the end of the period of 14 days beginning with the day after the service of the notice;

- (c) that if the default is not so remedied, that person will become liable in respect of his default to penalties calculated on a daily basis from the end of that period in accordance with the following provisions of this section; and
- (d) that that person will become liable, without any further notices being served under this section, to penalties under this section if he commits any more defaults before a period of 12 months has elapsed without his being in default.
- (3) Where a person has been served with a notice under subsection (2) above, he shall become liable under this section—
- (a) if the statement to which the notice relates is not submitted before the end of the period of 14 days beginning with the day after the service of the notice, to a penalty in respect of that statement; and
- (b) whether or not that statement is so submitted, to a penalty in respect of any EC sales statement the last day for the submission of which is after the service and before the expiry of the notice and in relation to which he is in default.
- (4) For the purposes of this section a notice served on any person under subsection (2) above shall continue in force—
- (a) except in a case falling within paragraph (b) below, until the end of the period of 12 months beginning with the day after the service of the notice; and
- (b) where at any time in that period of 12 months that person is in default in relation to any EC sales statement other than one in relation to which he was in default when the notice was served, until a period of 12 months has elapsed without that person becoming liable to a penalty under this section in respect of any EC sales statement.
- (5) The amount of any penalty to which a person who has been served with a notice under subsection (2) above is liable under this section shall be whichever is the greater of £50 and—
- (a) in the case of a liability in respect of the statement to which the notice relates, a penalty of £5 for every day for which the default continues after the end of the period of 14 days mentioned in subsection (3)(a) above, up to a maximum of 100 days; and
- (b) in the case of a liability in respect of any other statement, a penalty of the relevant amount for every day for which the default continues, up to a maximum of 100 days.
- (6) In subsection (5)(b) above “the relevant amount”, in relation to a person served with a notice under subsection (2) above, means—
- (a) £5, where (that person not having been liable to a penalty under this section in respect of the statement to which the notice relates) the statement in question is the

first statement in respect of which that person has become liable to a penalty while the notice has been in force;

5 (b) £10 where the statement in question is the second statement in respect of which he has become so liable while the notice has been in force (counting the statement to which the notice relates where he has become liable in respect of that statement); and

(c) £15 in any other case.

(7) If a person who, apart from this subsection, would be liable to a penalty under this section satisfies the Commissioners or, on appeal a tribunal, that—

10 (a) an EC sales statement has been submitted at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit; or

(b) there is a reasonable excuse for such a statement not having been dispatched,

15 he shall be treated for the purposes of this section and sections 59 to 65 and 67 to 71, 73, 75 and 76 [and Schedule 24 to the Finance Act 2007]² as not having been in default in relation to that statement and, accordingly, he shall not be liable to any penalty under this section [or that Schedule] in respect of that statement and any notice served under subsection (2) above exclusively in relation to the failure to submit that statement shall have no effect for the purposes of this section.

20 (8) If it appears to the Treasury that there has been a change in the value of money since 1st January 1993 or, as the case may be, the last occasion when the sums specified in subsections (5) and (6) above were varied, they may by order substitute for the sums for the time being specified in those subsections such other sums as appear to them to be justified by the change; but an order under this section shall not apply to any default in relation to a statement the last day for the submission of which
25 was before the order comes into force.

(9) In this section “EC sales statement” means any statement which is required to be submitted to the Commissioners in accordance with regulations under paragraph 2(3) of Schedule 11.

30 [(10) This section applies in relation to a statement which is required to be submitted to the Commissioners in accordance with regulations under paragraph 2(3A) of Schedule 11 as it applies in relation to an EC sales statement.]”

Submissions

35 11. Stereomatic Limited submits that it dispatched the EC sales statements to HMRC some three weeks after each was due (shortly after the relevant VAT quarterly return was filed online). HMRC have lost the statements and wrongly imposed penalties by reference to over 100 days’ delay in filing. The penalties are disproportionate.

12. Mr Kirk queried the penalties during the course of many telephone calls with HMRC and was not told to file the statements. Mr Kirk explained on a number of occasions that he prepares the EC sales statements when he has completed his online VAT return for the relevant period as this shows the relevant information required to be completed on the statement. He does not consider that it is practical to prepare the EC sales statements before the VAT quarterly return. Mr Kirk understands that this means that he sends in the statements after the due date but, as they are simply a record of sales and not determinant of liability to VAT, he does not think that this should be an issue.

13. HMRC claim that they did not receive any of the EC sales statements for the periods 03/11-09/13 until at least 100 days after each was due. The onus of proof is on Stereomatic Limited to prove that it did submit the forms as HMRC did not receive the statements until October 2014.

14. Schedule 11 paragraph (2) VATA 1994 and regulation 22 of the VAT General Regulations 1995 require UK VAT registered traders who make supplies of goods to registered traders in other EC member states to submit EC sales statements. Section 66 VATA provides for the imposition of penalties for failure to submit statements on time. The penalties are statutory and not at the discretion of HMRC.

Discussion

15. We noted that the only basis of appeal open to Stereomatic Limited under section 66(7)(b)VATA is if it can show that it has a reasonable excuse for failing to dispatch the EC sales statements by the appropriate dates. This is because Stereomatic Limited accepts that the EC sales statements were all dispatched at least three weeks late (after the VAT returns were filed online), and it cannot therefore claim that the statements were dispatched in a time and manner such that it would be reasonable to expect that they would be received within the appropriate time limit under section 66(7)(a)VATA.

16. We also noted that the provisions of section 70 VATA 1994 do not apply to give the tribunal power to mitigate penalties imposed under section 66 VATA 1994. However, even if those provisions were in point, they specifically provide that the tribunal cannot take into account the facts (i) that there has been no, or no significant, loss of VAT; or (ii) that the person liable to the penalty or a person acting on his behalf has acted in good faith, both of which were raised by Mr Kirk. We are restricted to considering whether Stereomatic Limited had a reasonable excuse for the statements not having been dispatched within the appropriate time limit.

17. We considered that it would be compatible with the overriding objective to give permission for Stereomatic Limited's appeal to be made late. Mr Kirk's lack of knowledge of the law led him to believe that his calls to HMRC's debt team were also dealing with the penalties. HMRC failed to correct Mr Kirk's understanding or to provide Stereomatic Limited with the breakdown of the VAT liabilities requested on the calls. Mr Kirk only became aware of the need to appeal the EC sales statements penalties after the VAT visit in July 2014. After this date Mr Kirk pursued the appeal,

with only a short delay in filing the appeal with the tribunal. We weighed up the reason for, and the length of, the delay against the purpose of the time limit to provide finality and the consequences for HMRC, and concluded that in these circumstances it would be fair and just to give Stereomatic Limited the opportunity to put forward its submissions as to why it had a reasonable excuse for the late filing of the EC sales statements.

18. As noted above, Mr Kirk explained on a number of occasions why he prepares the EC sales statements after the VAT quarterly online returns, but he acknowledged that he could prepare them the other way round even though this would generate more work. He also explained why he considers that the penalties are disproportionate given that no VAT is payable by reference to the forms.

19. We have some sympathy with Mr Kirk's submission about why it suits his systems to prepare the EC sales statements after the VAT quarterly returns. However, he was aware that this resulted in the late filing of the statements. Indeed each late filing civil penalty notice received stated that "[t]here will be additional penalties, without further notices being served, whenever we do not receive an EC Sales List from you by the relevant due date". Further, by the time that each penalty notice was received by Stereomatic Limited the late filing of the relevant EC sales statement at that stage would not have reduced the penalty as the maximum 100 day penalty had already been imposed. The calls with HMRC could not therefore have assisted Stereomatic Limited in relation to the penalties already imposed.

20. In these circumstances we did not find that the timing within which the statements have to be filed, nor the information, or absence thereof, provided by HMRC on calls with Mr Kirk constitute a reasonable excuse for the failure to dispatch the EC sales statements by the relevant due dates. The company had received the forms to complete, with reply envelopes to the correct address, and had received the penalty notices that contained information about the penalties and how to appeal. As in the case of *Samantha Holmes v HMRC* [2014]UKFTT 265 (TC) we have no alternative but to conclude that there was no reasonable excuse as the taxpayer had "made a mistake in not making the submission of ESLs a necessary priority".

21. We considered whether the nine EC sales statements that gave rise to the penalties the subject of this appeal were, on the balance of probabilities, received prior the expiry of the 100 day periods for calculating the maximum penalty. If so, the penalties imposed would be in excess of what they should have been. Mr Kirk claims that he sent the ten statements to HMRC by post some three weeks after the due date for filing but that he did not keep a copy of any of them. While Stereomatic Limited was in a time to pay arrangement Mr Kirk said that he sent the statements to Belfast, but that all other returns were sent using the reply envelope provided by HMRC. In conflict with this evidence, HMRC advised that they did not receive any of the ten EC sales statements until October 2014. HMRC also confirmed that statements sent in error to Belfast would have been scanned and found their way onto Stereomatic Limited's VAT records if they had been received at the Belfast VAT office.

22. On balance, taking account of the fact that none of the EC sales statements were received by HMRC and that no copies of the statements or record of posting were kept, we found that the EC sales statements had not been received by HMRC until the copies prepared by the company's accountant were sent in October 2014. The company was therefore in default under section 66(1) VATA.

23. We considered whether the penalties were disproportionate. We are bound by the Upper Tribunal decision in *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) which sets out the test to be applied in considering issues of proportionality. The purpose of the EC sales statements regime is to provide information necessary to monitor the operation and, in some cases, the availability, of UK VAT free exports to VAT registered traders in the EU. We noted that the legislation provides for a maximum penalty per late filing and that there is a defence of "reasonable excuse", although there is no discretion to waive or reduce the penalties. In all the circumstances of this case the penalties are significant in aggregate as a result of the repeated late filings, but we found that they were the proportionate result of "applying the rational scheme of calculation" in the legislation as described in *HMRC v Total Technology (Engineering) Limited*.

Decision

24. For the reasons set out above, we decided that Stereomatic Limited did not have a reasonable excuse for failing to dispatch the EC sales statements the subject of this appeal. It is therefore liable to pay the civil penalties and the appeal is dismissed.

25. 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.

**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 1 APRIL 2016