



TC05278

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Appeal number: TC/2016/02239

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VAT – late submission of payment of VAT due on return - whether reasonable excuse for late payment -Yes.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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McNAMARA JOINERY LTD

Appellant

- and -

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

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**TRIBUNAL: PRESIDING MEMBER
 PETER R SHEPPARD FCIS FCIB CTA AIT**

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The Tribunal determined the appeal on 18 July 2016 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 14 April 2016, and HMRC's Statement of Case dated 6 May 2016 with attachments. The Tribunal wrote to the Appellant on 12 May 2016 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. No reply was received by the Tribunal.

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DECISION

Introduction

1. This considers an appeal against a default surcharge of £490.62 levied by HMRC for the late payment by the due date of 7 February 2016 of the appellant's VAT return for the period ended 31 December 2015.

Statutory Framework

2. 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 seven days for those paying electronically, and a further three days for those paying by means of a direct debit arrangement.

3. Regulation 25A(3) requires the provision of returns using an electronic system.

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

5. 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.

6. A succinct description of the scheme is given by Judge Bishopp in paragraphs 20 and 21 of his decision in *Energys 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."*

7. 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.

8. Section 70 VAT Act 1994 covers what is not to be considered a reasonable excuse.

9. The Finance Act 2009 Section 108 provides for the suspension of penalties during the currency of an agreement for deferred payment of tax.

Case law

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

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

The appellant's submissions.

10. In the Notice of Appeal dated 14 April 2016 the appellant's agent states:

“As agent I am taking this appeal to the First-tier Tribunal due to telephoning HMRC in time for an extension to pay the VAT due to cash flow problems for the quarter to 31st December 2015.

I myself tried to telephone on 5th February 2016 however the line kept disconnecting. After the weekend the same applied on 12th February 2016 I finally got through and arranged a two week extension. The call is logged with HMRC.

My clients VAT returns are never late and when there is cash flow problems it is always dealt with and not ignored. I feel the decision was unfair and only adds to my client's future cash flow problems.

I have included a copy of my appeal letter to HMRC.

I also feel that the extension should not have been agreed at the time if a penalty would be given.”

11. The appeal letter to HMRC referred to is dated 2 March 2016 and is similar to the above but also includes

“I myself telephoned for an extension on 5th February 2016, however couldn't get through it kept going dead. I continued to try after the weekend and over the next few days, without success.

I then telephoned again on 12th February 2016 and arranged a 2 week extension, which is logged with yourselves.

My client wasn't aware he would not be able to pay this until 7th as he was promised by debtors to pay, however this did not happen.

They paid within the two week extension.”

HMRC's submissions

12. HMRC state that in respect of the VAT return for the period to 31 December 2015 the return and payment were both due by 7 February 2016. In fact the return was received electronically on 2 February 2016 and so was on time. In respect of payment HMRC say that payment of £4,906.28 was received 19 days late on 26 February 2016. It was sent by Bill Pay.

13. The net amount of VAT due for the period to 31 December 2015 is stated on the appellant's VAT return as £4,906.28. By the due date of 7 February 2016 this amount remained outstanding. Therefore on 12 February 2016 in accordance with the VAT Act 1994 Section 59 (5)(c) HMRC assessed the surcharge as 10% of the amount outstanding on the due date being £490.62. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4).

14. A schedule in the papers provided to the Tribunal shows that on three previous occasions the appellant had submitted returns on time but made payment late. The first occasion was in the quarter ended 30 June 2014. The return and payment was due by 7 August 2014. The return was received on 17 July 2014 and so was in time. The payment due was £8,328.56 and this was sent by Bill Pay and was received by HMRC one day late on 8 August 2014. This brought the appellant into the default surcharge regime. HMRC issued the appellant with a surcharge liability Notice V160. This was the appellant's first default so HMRC did not levy a surcharge but the notice warned that future failures may result in a default surcharge being levied.

15. The second failure was made in respect of the return for the period ended 31 December 2014 which was due by 7 February 2015. The return was received on 27 January 2015 so was in time but payment by Bill Pay was not received by HMRC until 9 February 2015 so was two days late. The tax due was £9,175.24 and in accordance with the VAT Act 1994 Section 59 (5)(a) a surcharge of 2% of this sum could have been levied by HMRC. However HMRC usually adopt a policy of waiving surcharges amounting to under £400 which they did on this occasion. Instead on 13 February 2015 they issued a surcharge document V161 warning of the possibility of surcharges at 5% for future failures and extending the surcharge liability period.

16. The third failure was made in respect of the return for the period ended 30 September 2015 which was due by 7 November 2015. The return was received on 6 November 2015 so was in time but payment by Bill Pay was not received by HMRC until 9 November 2015 so was two days late. The tax due was £2,189.60 and in accordance with the VAT Act 1994 Section 59 (5)(b) a surcharge of 5% of this sum could have been levied by HMRC. However as that also gives a surcharge of under £400 HMRC again waived it. They again issued a surcharge document V161 warning of the possibility of surcharges at 10% for future failures and extending the surcharge liability period.

17. HMRC point out that for periods 01/13 onwards 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 the person who normally does your VAT return will be absent, make alternative arrangements. If you can't pay the full amount on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether.”

18. From 1 April 2015 the reverse of surcharge liability notices V160 has included the following standard paragraphs:-

“How you can avoid surcharges

Submit your return and pay your VAT on time

For information about how to complete and submit your return go to www.gov.uk and search for 'VAT return'.

Think ahead

If the person who normally does your VAT return will be absent, make alternative arrangements. If you can't pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge.

Paying HMRC

Allow enough time for payment to clear HMRC's bank account by the due date.

Problems paying your VAT

If you can't pay the full amount of VAT due on time Contact the Business Payment support Service **before** the due date for payment.

For more information go to www.gov.uk and search for 'can't pay tax on time' ”.

19. HMRC state that the reverse of the surcharge notices details how surcharges are calculated and the percentage used in determining surcharges in accordance with the VAT Act 1995 s 59(5).

20. Whilst acknowledging that the appellant's agent attempted to make contact on the days prior to the due date HMRC submit that the fact remains that contact was not made on or before the deadline. The appellant and their agent should have been aware that there was a strong likelihood that there would be a large volume of calls being made to the respondents on the days immediately prior to the due date and that as a result the appellant and agent could reasonably have expected delays in being able to make contact.

21. HMRC contend that agreeing a TTP request does not offset the issue of a surcharge if the agreement has been made after the due date of the period in question.

The appellant is only entitled to relief if the request for deferment was made on or before the due date, which it was not.

22. HMRC consider that payments were made late and no reasonable excuse for the late payment has been established and request that the appeal be dismissed and the surcharge of £490.62 be upheld.

The Tribunal's observations

23. 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 *Energys Holdings Ltd* the Tribunal discharged a potential penalty of £130,000 for the submission and payment of a return submitted one day late.

24. 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 22 above. The Tribunal does not consider that a penalty of £490.62 which is 10% of the tax due which follows from previous failures to submit payments of VAT due on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

25. 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. It is clear that the appellant defaulted in respect of the period ended 31 December 2015. The question for the Tribunal is whether the appellant had a reasonable excuse for this default as contemplated by Section 59(7) VAT Act 1994.

26. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the appellant's control. Insufficiency of funds is not regarded as a reasonable excuse although the reason for the insufficiency might be. It is unfortunately part of the hazards of trade that debtors fail to keep promises to pay. These submissions cannot be regarded as establishing for the appellant a reasonable excuse for the late payment.

27. However, faced with the problem of not having received promised payments, the appellant through its agent did all that it could do in the circumstances. Commencing on 5 February 2016, its agent tried repeatedly to contact HMRC by telephone but was unsuccessful until 12 February 2016 when a time to pay agreement was made and subsequently the arrangements made were adhered to. In the Tribunal's view this repeated failure to contact HMRC was unexpected and unforeseeable.

28. The Tribunal does not accept HMRC's submission that the appellant and their agent should have been aware that there was a strong likelihood that there would be a

large volume of calls being made to the respondents on the days immediately prior to the due date and that as a result the appellant and agent could reasonably have expected delays in being able to make contact. HMRC do not publish times when their lines are likely to be busy. Rather than expecting delays it is reasonable for a taxpayer to expect telephone calls to HMRC to be answered without delay. In the Tribunal's view HMRC are in a better position than the appellant to know when there is a likelihood of a large volume of calls and they should have arrangements in place to deal with the higher volume of calls promptly.

29. Had the appellant's agent been successful in making contact on 5 February 2016 then a time to pay agreement would have been made on that day making the submissions about payments by Bill Pay or the Faster Payment service superfluous.

30. Whilst the Tribunal accepts HMRC's comment that Time to pay agreements should be made on or before the due date, if the appellant establishes that unexpectedly it could not make telephone contact with HMRC on or before the due date in order to make time to pay arrangements that must be worthy of consideration as a reasonable excuse for the late payment.

31. In the Tribunal's opinion the appellant has established a reasonable excuse for the late VAT payment for the period ending 31 December 2015. Therefore the appeal is allowed.

32. 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: 27 JULY 2016