



TC05264

Appeal number: TC/2016/01476

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

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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BPL (GLOBAL) LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE
PETER R SHEPPARD FCIS FCIB CTA AIIT**

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The Tribunal determined the appeal on 1 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 7 March 2016 with attachments, and HMRC's Statement of Case dated 14 April 2016 with attachments. The Tribunal wrote to the Appellant on 22 April 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.

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DECISION

Introduction

1. This considers an appeal against a default surcharge of £600 levied by HMRC for the late submission and payment by the due date of 7 September 2015 of the appellant's VAT return for the period ended 31 July 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. 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.

5. 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."*

6. 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.
7. Section 70 VAT Act 1994 covers what is not to be considered a reasonable excuse.
8. Finance Act 2009 Section 108.
9. **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 7 March 2016 the appellant states:

“See letters

We discussed this matter with a person from the VAT helpline. It should be noted that it took us several attempts and 23 minutes on ‘hold’ to speak to someone (7th September 2015).

There are no grounds for a surcharge as payment was agreed with the VAT Office on 7/9/15”.

11. The letters referred to are i) a letter dated 10 November 2015 which was sent to HMRC Debt Management and Banking, at Chesterfield, and ii) a letter dated 12 February 2016 also to HMRC Debt Management and Banking but to a different Office.

12. Those letters both contained almost identical wording to that included in a previous letter dated 24 September 2015 to HMRC Department 200 VAT S0483 (LC DS Appeals) Newcastle. That letter stated:

“We write to contest the surcharge imposed on our latest VAT return (period ref 07/15).

Our return was submitted by the due date and payments were made on 7th, 8th and 9th September all on a same day basis.

This was discussed with a person from the VAT helpline (0300 200 3700) on the 7th September.

We only have an online banking facility and as a small company the maximum we can pay out in any one day is £20,000. No mention of any surcharge was mentioned.

This return is exceptional for us as we sold several vehicles during the VAT quarter.

We request that this surcharge be cleared in this instance and ask you to refer to the conversation held on 7th September with the help line.”

HMRC's submissions

13. HMRC state that the VAT return and relative payment for the period to 31 July 2015 were both due by 7 September 2015. In fact the return was received electronically on 7 September 2015 so was on time. In respect of payment HMRC say that full payment of £48,536.67 was received in three amounts all sent by the faster payment service. The amounts were £18,536.67 received in time on 7 September 2015; £15,000 received one day late on 8 September 2015; and a further £15,000 received two days late on 9 September 2015.

14. The net amount of VAT due for the period to 31 July 2015 is stated on the appellant's VAT return as £48,536.67. By the due date of 7 September 2015 the appellant had paid £18,536.67 of this leaving £30,000 outstanding. Therefore on 11 September 2015 HMRC assessed the surcharge as 2% of the amount outstanding on the due date being £600. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4).

15. A schedule in the papers provided to the Tribunal shows that in one previous quarter the appellant submitted a late return and payment. This was in the quarter ended 31 October 2014. The return and payment was due by 7 December 2014. The return was received one day late on 8 December 2014. The payment due was £23,486.15. The appellant paid this in two amounts by the faster payment service, £10,000 one day late on 8 December 2014, and the balance of £13,486.15 was paid the following day. This brought the appellant into the default surcharge regime. HMRC issued the appellant with a surcharge liability Notice V160 which warned that future failures may result in a default surcharge being levied.

16. 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.”

17. 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’ ”.

18. 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).

19. HMRC state they have no record of a phone call from the appellant on 7 September 2015. They say that they spoke to Mr Steve White (sole director) on the telephone on 30 March 2016. Their “Summary Note of Call” states:

“Spoke to Mr White and explained that we had no record of any telephone call from him and asked if he could provide evidence of the call by way of an itemised phone bill.

Mr White said that he would contact his provider to see if he could obtain one.

When asked why he had sought a Time to Pay he advised that it was solely down to payment limit on the company’s bank account.”

20. On 7April 2016 HMRC again telephoned the appellant. They left a voicemail message asking for an update regarding the itemised phone bill.

21. HMRC say that by the date of submission of their statement of case 14 April 2016 no evidence had been received.

22. HMRC consider that the return and payment were made late and no reasonable excuse for the late payment has been established and request that the appeal be dismissed and the surcharge 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 15 above. The Tribunal does not consider that a penalty of £600 which is 2% of the tax due which follows from a previous failure to submit a VAT return and/or payment of VAT due on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

25. Two VAT payments each of £15,000 (total £30,000) were received late by faster payments on 8 and 9 September 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. The appellant defaulted in respect of this period. 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.

27. The only excuse offered by the appellant is that on 7 September 2015 they telephoned HMRC and made arrangements to pay by three instalments. HMRC said that they had no record of that conversation. However on 30 March 2016 they invited the appellant to provide evidence in support of their submission in the form of an itemised telephone bill as they realised such evidence could provide the appellant with a reasonable excuse for the late payment. As at the date of the hearing no such evidence had been provided by the appellant.

20. 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 previously received a surcharge liability notice for a previous failure which warned of potential surcharges for future failures the directors should have been

particularly alert to the need to ensure that subsequent returns and payments were submitted on time.

21. It is evident that in respect of the period ending 31 October 2014 the appellant made payment by two instalments paid on consecutive days. This indicates that the appellant was aware at that time that his bank imposed restrictions on the amount that could be debited to his account on any one day. Therefore when considering making payment for the return due by 7 September 2015 the appellant should have commenced making payments earlier than he did. The banks requirements were not unexpected or unforeseeable. Payment was not something outside of the appellant's control. Leaving payment until the last possible date in the hope that an arrangement can be made on that date with HMRC is brinksmanship. Such brinksmanship carries the risk that no time is left to make alternative arrangements should anything not go according to plan.

28. Thus the appellant has not established any reasonable excuse for his failure to submit his VAT return and VAT payment for the period ended 31 July 2015 on time.

29. In the light of the Upper Tribunal decision in *Total Technology (Engineering) Ltd* as explained in paragraph 15 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 £600 being 2% of the outstanding tax of £30,000 at the due date in respect of the appellant's tax return for the period ended 31 July 2015.

30. In the Tribunal's opinion the appellant's failure to provide evidence to support his contention that he telephoned HMRC on 7 September 2015 to make arrangements to pay by instalments is fatal to his case. The appellant has established no reasonable excuse for the late VAT payment for the period ending 31 July 2015. Therefore the appeal is dismissed and the surcharge upheld.

31. 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: 21 JULY 2016