



TC05701

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Appeal number: TC/2016/06372

VAT – late submission of payment of VAT due on return - whether level of surcharge unjust and inequitable – No. Whether reasonable excuse for late payment due on return - No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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COMPOSITE TECHNOLOGIES LTD.

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AIIT**

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The Tribunal determined the appeal on 28 February 2017 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 18 November 2016, and HMRC's Statement of Case dated 5 January 2017 with attachments. The Tribunal wrote to the Appellant on 11 January 2017 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 £775.63 levied by HMRC for the late submission and payment by the due date of 7 August 2016 of the appellant's VAT return for the period ended 30 June 2016.

2. Statutory Framework

The VAT Regulations 1995 S.I. 2518/1995 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.

Regulation 40 covers the payment of VAT by the due date.

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 70 VAT Act 1994 covers the mitigation of penalties

Section 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

3. Case law

Garnmoss Limited t/a Parham Builders v HMRC [2012] UKFTT 315 (TC)

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

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

4. The appellant's submissions.

In the Notice of Appeal dated 18 November 2016 the appellant states

“HMRC have issued the default assessment for late payment of VAT. The due date for the payment was 7 August 2016 (a Sunday). The full payment was made by bacs faster payments on line at approx 08.00 am on Monday 8th August. I had every intention of making the online payment on Sunday 7th August , but became distracted by a family matter and it was on the Monday morning I realised that I had not made the payment. Before I left home on the Monday morning I logged on to on line banking and made the payment at that time. To be penalised to the tune of £775.63 for being approx. 8 hours late I find totally unjust and inequitable. I have put this case to HMRC but it has been rejected.”

The appellant also states

“ I would reluctantly accept a small penalty as technically the payment was not paid on the 7th. However payment was in the HMRC account very close to the opening of business on Monday 8th. I would live with a £100 penalty fee. Anything above I would feel is wholly inappropriate for the 8 hours of lateness.”

5. HMRC contacted the appellant to ascertain what was the family matter that distracted the appellant from making payment on 7th August in case that provided the appellant with a reasonable excuse for making the payment late. This is covered below in HMRC's submissions.

6. HMRC's submissions

HMRC state that the VAT return and payment for the period to 30 June 2016 was due by 7 August 2016 assuming payment was made electronically. In fact the return was received electronically on 27 July 2016 so was on time. In respect of payment both parties agree this was received the day after the due date on 8 August 2016 and so was late.

7. A schedule in the papers provided to the Tribunal shows that in six previous quarters in the period 31 March 2012 to 31 March 2016 the appellant submitted a late payment and has been in the default surcharge regime since period 03/2012. These ultimately have had the effect of increasing the surcharge liability rate to 15%. HMRC had issued surcharge notices to the appellant although no financial penalty was levied on the first three of those occasions. Although they contained no financial penalty these notices had the effect of increasing the surcharge percentage rate as explained above. In the period ended 31 March 2014 a default surcharge of £200 was levied as 10% of the tax of £2,000 outstanding and was paid. In the period ended 31 March 2015 payment of tax of £2,533.32 was made 8 days late on 15 May 2015 and a default surcharge of £379.99 was levied being 15% of the tax due. In the period ended 31 March 2016 the tax due by 7 May 2016 was £11,363.61. The appellant paid £7,063.61 of this on time on 6 May 2016 leaving £4,300 outstanding and this was paid 16 days late on 23 May 2016. A default surcharge for £645 being 15% of the tax paid late was issued to the appellant who paid it.

8. The net amount of VAT due on the return for the period to 30 June 2016 is stated on the return as £5,170.93. Therefore on 12 August 2016 issued an assessment for a surcharge of 15% of this sum being £775.63. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

9. 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.

10. 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.

11. HMRC state that the appellant has not made reference to non-receipt of the earlier surcharge notices they therefore conclude they were received. HMRC observe that the fact that some of the earlier default surcharge notices did not contain a financial element and the appellant did not realise they were default surcharge notices because of this. However the notices issued from period 03/14 onwards included a financial element so the appellant should have been aware that they were in a default surcharge period from then onwards.

12. 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.

13. HMRC say that whilst the appellant acted in good faith by making payment early on 8 August 2016 they consider genuine mistakes, honestly and acting in good faith are not acceptable as reasonable excuses. They quote a statement made by Judge Hellier in the case of Garnmoss Ltd t/as Parham builders in support of this.

“What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.”

14. HMRC say that in order to give due consideration to the appellant being “distracted by a family matter they attempted unsuccessfully on 16 December 2016 to contact Mr. Benbow. He called back on 19 December 2016 to advise that the circumstances were that his mother in law had been diagnosed with cancer and his brother in law had suffered a heart attack. HMRC asked for medical evidence to support the statement. It was arranged that the parties would speak again later in the week. HMRC telephoned the appellant on both 23 and 29 December 2016 but only got an answerphone message in reply. As at the date of preparation of their statement of case (5 January 2017) HMRC had not received any medical evidence.

15. HMRC say that the directors have ultimate responsibility for the timely submission of the VAT return and payment of any tax due thereon. The appellant has three directors. HMRC say that any trader who leaves payment of VAT liabilities until the last possible moment must accept the consequences of any unanticipated delay.

16. 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.

17. 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.

18. 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 17 above.

19. The Appellant considers “To be penalised to the tune of £775.63 for being approx. 8 hours late I find totally unjust and inequitable”

The Tribunal observes that if this had been a first failure to pay on time the surcharge would have been nil. In fact it was the seventh occasion in a period of just over 4 years that the appellant had paid late. The rate of surcharge had risen from 0% to the maximum of 15%. That maximum had been levied and paid in respect of the period immediately preceding the period which is the subject of this appeal so the appellant should have been well aware of the consequences of further late payments. The penalty is not levied for a one off failure by 8 hours rather it is a result of persistent late payment. The due date is the last day by which payment should have been made. In leaving payment until the last possible day the appellant is guilty of brinkmanship. The practice leaves little time to do anything if something unexpected occurs such as the family matter referred to in this case.

The Tribunal does not consider that a penalty of £775.63 which is 15% of the tax due which is the culmination of seven 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.

20. Parties agree that a VAT Payment of £5,170.93 was received late on 8 August 2016. 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 August 2016. 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.

21. 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 with supporting evidence any circumstances that occurred that were unforeseeable or out of his control. The appellant knew the dates its VAT return was due and should have made provision accordingly.

22. The appellant says that he did not make payment on 7th August 2016 because he was distracted by a family matter. HMRC fairly pursued this with the appellant to see if this provided a reasonable excuse. Mr. David Benbow, one of the directors of the appellant, said that the circumstances were that his mother in law had been diagnosed with cancer and his brother in law had suffered a heart attack. HMRC had asked Mr. Benbow to provide medical confirmation but by the time of the hearing this had not been forthcoming. In the absence of any supporting evidence this cannot be taken as a reasonable excuse. HMRC point out that there are other directors who could have stepped in to make sure payment was made on time.

23. 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 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. This particularly so in view of the fact the appellant had had to pay a surcharge for late payment in respect of the previous quarter.

24. The Appellant could have avoided a surcharge if he had made contact with HMRC prior to the due date to discuss late payment. This was not done because Mr. Benbow believed he would make payment on time.

25. 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 30 June 2016 on time.

26. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 17 above this Tribunal has no statutory power to adjust the level of a penalty payable unless it is incorrectly levied or inaccurately calculated. HMRC applied the legislation correctly and has calculated the surcharge accurately as £775.63 being 15% of the outstanding tax of £5,170.93 at the due date in respect of the appellant's tax return for the period ended 30 June 2016. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

27. 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 PRESIDING MEMBER

RELEASE DATE: 2 MARCH 2017