



TC05731

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Appeal number: TC/2017/00599

VAT – late submission of payment of VAT due on returns - whether reasonable excuse for late submission of payments - No. Whether correct percentage has been used for default surcharge – Yes.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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OXFORDSHIRE MASTERS GOLF LTD –t/as YES PLEASE GOLF Appellant

- and -

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

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

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The Tribunal determined the appeal on 28 March 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 4 January 2017, and HMRC’s Statement of Case dated 3 February 2017 with attachments. The Tribunal wrote to the Appellant on 8 February 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 £648.97 levied by HMRC for the late payment by the due date of 7 August 2016 of the amount due on the appellant's VAT return for the period ended 30 June 2016.

2. Statutory Framework

The VAT Regulations 1995 Regulations 25 and 40 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 40 (2A) requires the provision of returns using an electronic system.

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 *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.”

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

Section 98 VAT Act 1994 gives the provisions for services of notices.

The Tribunal was also referred to HMRC Notice 700: the VAT guide (as updated 8 November 2016). Paragraph 21.2.2 of this discusses the Default Surcharge.

The Tribunal was also referred to HMRC Notice 700/50 Default surcharge, July 2013 edition.

3. Case law

No case law has been put forward by either the appellant or the respondent. However the Tribunal has referred to the decisions of the Upper Tribunal in the cases of:

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

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

4. The appellant's submissions.

In the Notice of Appeal dated 4 January 2017 the appellant states

“After reading the information regarding your decision to charge the 10% rate, I am still at a loss to understand your reason given with any logic. Previous defaults you have detailed (some of which are very aged) from 12/14, 12/15, and 03/16, which you have chosen at your discretion not to impose an official surcharge notice but have then issued a first surcharge notice to us and charged this first notice at 10%.

A first (officially charged) surcharge notice should be charged at 2%, which this is, is it not?? Had you previously charged 2% and then 5% then I could understand 10%.

I would give an example of the way you have applied the surcharge in the following way: A driver is stopped by the police for speeding but the officer has chosen not to charge the driver but instead to let them off with a warning. This happens on two occasions. Then the driver is stopped a third time for speeding again, but he is then given the maximum number of points and banned from driving as the officer says he has been stopped prior to this and given a verbal warning.

I would be grateful for some logical clarification on the matter, and indeed if a fine is applicable, should it not be at 2% as detailed for a first official surcharge notice?

You have yourself stated in a second response that the first two charges have not been officially given as they were less than £400, (which we knew nothing of anyway as you have never informed us at any point of these decisions on the prior unofficial charges) so no official first charge has ever been charged. Again I make the point that this is the first officially charged surcharge notice and should be charged at 2% should it not??”

The Tribunal observes that this is an appeal notice sent to the independent First-tier Tax Tribunal which has had no previous dealings with the matter. The appellant has

incorrectly assumed that the First-tier Tax Tribunal and HMRC are one and the same. The grounds for appeal are clearly addressed to HMRC.

5. On 7 September 2016 the sole director and secretary of the appellant, John Strode, wrote to HMRC (Debt Management and Banking) saying

“My business has received a letter detailing a VAT debt for the amount of £648.97.

After a telephone call to HMRC, I have been informed that the debt should be escalated in increments, the first being 2%, the next 5%, and then finally 10%. Oxfordshire Masters Golf Ltd has never had a 2% or 5% fine, so why has it jumped immediately to 10%??

The return was made only a few days late due to a family event.

Business is very tough at the minute so such a large fine is doing no-one any favours.

After speaking to your representative, and requiring some answers, he agreed with my points and suggested I put these in writing to you. Had Oxfordshire Masters Golf Ltd. received a 2% fine I wouldn't have allowed a 5% fine, and if a 5% one had ever been received I certainly would not have allowed escalation to 10%.

I would indeed be grateful for some clarification on the matter, and indeed a fine is applicable, should it not be at 2% as per my conversation?”

6. HMRC treated this as letter as a request for a review. HMRC replied on 22 November 2016 stating that the result of the review was that the appellant had established no reasonable excuse for the late payment in respect of the period ended 30 June 2016 so the surcharge was confirmed. The review makes no mention of the late payments and surcharge notices for the earlier periods.

7. The Appellant wrote to HMRC solicitors Office on 18 December 2016 making similar points to those made in the appeal notice detailed above but a further review was not considered appropriate by HMRC.

8. 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 31 July 2016 so was in time. In respect of payment HMRC say this was received eight days after the due date on 15 August 2016 so was late.

9. A schedule in the papers provided to the Tribunal shows that in three previous quarters the appellant submitted a late payment and has been in the default surcharge regime since period 12/2014. These ultimately have had the effect of increasing the surcharge liability rate to 10%.

The first failure was in respect of the period ended 31 December 2014 where the return was submitted on time but payment was made 10 days late on 17 February 2015 This being a first failure HMRC issued a Surcharge Liability Notice form V160

which placed the appellant in the Surcharge regime and warned that further failures within a period of 12 months could lead to a surcharge being levied.

The second failure was in respect of the period ended 31 December 2015 where the return was submitted on time but payment was made 31 days late on 9 March 2016. HMRC issued a Surcharge liability extension notice form V161 which extended the surcharge liability period. A default surcharge of 2% was due. The tax outstanding for the period was £9,296.82. 2% of this sum is £185.93. HMRC's practice published in the VAT guide Notice 700 is to waive 2% and 5% default surcharges if they amount to less than £400 so they waived the surcharge on this occasion.

The third failure was in respect of the period ended 31 March 2016. The return was again submitted on time but payment was made 17 days late on 24 May 2016. HMRC issued a Surcharge liability extension notice form V161 which further extended the surcharge liability period. A default surcharge of 5% was due. The tax outstanding for the period was £4,731.51. 5 % of this sum is £236.57. As this amount was also less than £400 HMRC again exercised their discretion and waived the surcharge.

Thus HMRC had issued three surcharge notices to the appellant but no financial penalty was levied.

10. The net amount of VAT due on the return for the period to 30 June 2016 is stated on the return as £6,489.73. Therefore on 12 August 2016 HMRC assessed the surcharge as 10% of this sum being £648.97. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4). They point out that £648.97 is less than 0.3% of the appellant's total value of sales net of VAT for the period being £224,421.

11. 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.

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 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 prevent you getting a surcharge altogether.

12. 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.

13. HMRC observe that the VAT return was submitted on 31 July 2016. They consider it reasonable that payment of the outstanding VAT should have been considered at the same time the return was submitted. They say the appellant's letter dated 7 September 2016 advises that payment was a few days late due to a family event. They say that during a telephone conversation dated 25 August 2016 the director confirmed the family event was a holiday.

14. HMRC note that the VAT Act 1994 Section 98 states that a notice may be served by posting to the last or usual residence or place of business. They say that the appellant has had the same correspondence address since 21 January 2013. The Surcharge liability Notices were issued to the appellant's principal place of business. HMRC say that as the Notices were not returned by Royal Mail as undelivered it has not been proved that service has not been effected. HMRC observe that it may be because the earlier surcharge notices did not impose any financial penalty the appellant failed to fully appreciate the significance of them.

15. 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.

16. 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.

17. 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 16 above. The Tribunal does not consider that a surcharge of £648.97 which is 10% of the tax outstanding for the period ended 30 June 2016 and which is the culmination of four failures to submit payments of VAT due on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

18. The Tribunal observes that HMRC have provided no evidence in the form of copy surcharge notices addressed to the appellant or an internal record showing the dates notices were issued. In addition the review by HMRC did not cover the earlier surcharges even though they are clearly referred to by the appellant. In the opinion of the Tribunal HMRC's review was deficient in that respect and was therefore incomplete.

19. However it seems to the Tribunal that it is highly unlikely that three separate surcharge liability notices were not received by the appellant who had not changed address during the period. A later letter from HMRC debt collection to that address was received. The tribunal considers the more likely explanation is that the appellant did receive the notices but failed to appreciate the significance of them because they did not include a financial penalty. Therefore the appellant did receive official notices of surcharges of 2% (£185.93) and 5% (£236.57). The notice from HMRC waived these surcharges but increased the surcharge rate for any future defaults and extended the surcharge period.

20. Parties agree that a VAT Payment of £6,489.73 was received late on 15 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 any circumstances that occurred that were unforeseeable or out of his control. The appellant knew the dates his VAT payments were due and knowing he was about to go on holiday should have made provision accordingly either by paying before going on holiday or by making arrangements for the amount to be paid before the due date.

22. 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 at least three 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. It may be that because the earlier surcharge notices did not impose any financial penalty the appellant failed to appreciate the significance of them. However this failure does not constitute a reasonable excuse for failing to pay on time

23. The surcharge is at a rate of 10% because the appellant had paid late on three previous occasions. John Strobe a director and secretary of the appellant says that had a 2% surcharge been levied he "would not have allowed a 5% fine". The Tribunal takes this to mean he would have ensured payment would have been paid on time so that a 5% fine would have been avoided. This appears to miss the point which is why did he allow payment for any of the returns to be submitted late.

24. The appellant does not dispute that payment for any of the returns was received late. The only excuses offered are for the last two failures where the sole director of the appellant said had he known the level of surcharge he would not have allowed late payment. The Tribunal does not accept this as a reasonable excuse. The level of surcharges and the default surcharge systems are part of legislation. The excuse offered in respect of the period ended 30 June 2016 was "a family event" which HMRC were told was a holiday. A holiday is not an unforeseen event.

The appellant has made much comment about the rate of the surcharge applied for the period ending 30 June 2016. The appellant has not disputed that payment for any of the returns was made late. Other than mentioned above the appellant has not offered any reason for the late payments.

25. The Appellant could have avoided a surcharge if he had made contact with HMRC prior to the due date to discuss late payment. He did not do so.

26. 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. The appellant has not established any reasonable excuse for any of the previous three late payments thus a surcharge rate of 10% of the outstanding tax for the period ended 30 June 2016 has been correctly assessed by HMRC.

27. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 16 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 £648.97 being 10% of the outstanding tax of £6,489.73 at the due date in respect of the appellant's tax return for the period ended 30 June 2016. Therefore the appeal is dismissed. The surcharge liability period is confirmed which means that any further late payments within the next 12 months may be liable to a surcharge at the maximum rate of 15% of the tax due.

28. 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: 31 MARCH 2017

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