



TC02931

Appeal number: TC/2012/07456

TYPE OF TAX – VAT – late submission of VAT Returns and payment of VAT due on returns –whether surcharge should be reduced - surcharge reduced £1 due to inaccurate calculation. Whether reasonable excuse for late submission of return - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PURO VENTURES LIMITED

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD
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The Tribunal determined the appeal on 6 September 2013 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 27 June 2012 with enclosures, and HMRC's undated Statement of Case received by the tribunal on 19 June 2013, with enclosures. The Tribunal wrote to the Appellant on 19 June 2013 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 £959.45 levied by HMRC for the late filing by the appellant of its Value Added Tax return for the period ended 31 December 2011. By a direction of the Tribunal dated 21 August 2012 the appeal was stood over until 60 days after the issue of its decision by the Upper Tribunal (Tax & Chancery Chamber) in the matter of Total Technology (Engineering) Ltd. That decision was released on 29 November 2012.

2. Statutory Framework

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 7 days for those paying electronically.

Regulation 25A (3) 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 *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 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

3. Case law

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 a letter dated 25 April 2012 to HMRC the appellant writes re the surcharge notice received

“I would like you to consider the Easter bank Holiday being 6th and 9th April 2012 and the fact that we can only transfer up to £20,000 .00 per day from our business bank account. I would also like to point out that Mike Le-Gallez, our finance director was in Athens, Greece during this time having a medical procedure.

Any way prior to Mike leaving the country on 1st April 2012, he had actually set up automatic electronic transfers to pay this bill, in the maximum instalment amounts possible (Taking into consideration other transfers going out over this period). Anyway, with the bank holiday weekend, the last instalment of £4,169.16 arrived on the 11th April, which I acknowledge is slightly late, the majority of my payments were scheduled for the 7th but finally went through on 10th April, which was down to our bank.”

The letter than asks HMRC to reconsider the surcharge.

In a letter dated 31 May 2012 to the appellant HMRC advise that the result of the review was that the surcharge will be maintained. Because they consider bank holidays and daily banking limits are foreseeable. And do not provide a reasonable excuse for the late payment.

5. In a letter dated 13 June 2012 to the Tribunal the Mike Gallez the finance director of the appellant states:-

“.....I would like you to consider that because I was out of the country having a last minute medical procedure from 30 March until Sunday 8 April 2012, I had personally organised automated payments to go out to you on 5 and 6 April 2012 of £20,000.00 and £19169.16 respectively, but because of the Bank Holidays on Friday 6 April 2012 (Which I didn’t realise at the time!) and Monday 9 April 2012 the £19,169.16 payment was pushed over until Tuesday 10 April 2012, and because we had other automated payments arranged for Monday 9 May* 2012 these were also pushed

forward until Tuesday 10 May* 2012 which meant that we exceeded our daily transfer limit of £20,000.00 so I had to make manual payments of £15,000 on Tuesday 10 April 2012 and the remaining balance of £4,169.16 on Wednesday 11 April 2012.”

*The Tribunal considers that the appellant meant to write April (9 May 2012 was a Wednesday)

The letter continued “Furthermore, I was the only person who was dealing with the VAT payment and because I was out of the country, I was unable to access our online banking facilities and as such, I didn’t realise that our payments hadn’t gone through on time.....”

The appellant asks for the penalty to be waived.

On 27 June 2012 the appellant submitted to the Tribunal a Notice of appeal. Box 7. headed ‘Grounds for appeal’ is marked ‘Please see attached letter’. The attached letter is a copy of the 13 June 2012 letter.

6. HMRC’s submissions

HMRC state that the VAT return and payment for the period to 28 February 2012 was due by 7 April 2012 assuming payment was made electronically. In fact the return was received on 4 April 2012, a payment of £20,000 was received on 5 April 2012 and the remaining sum was paid in two amounts received on 10 and 11 April 2012..

A schedule in the papers provided to the Tribunal shows that the appellant has a history of late payments starting with the period ended 31 May 2011. The significance of this is that it demonstrates that continued late payments have had the cumulative effect of increasing the surcharge liability rate to 5%. The penalty for the quarter ended 29 February 2012 HMRC calculate as £959.45 being 5% of the tax unpaid at the due date of £19,169.16..

7. HMRC submit that bank holidays and the daily banking limits are foreseeable and these should be taken into account when payment arrangements are being made.

8. HMRC submit that the appellant has received surcharge notices and should be aware from the advice on them of the financial consequences of any further default.

9. HMRC request the appeal be dismissed.

10. The Tribunal’s observations

The level of the penalties and whether or not they are disproportionate is discussed at length in the Upper Tribunal’s decision. 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.

11. 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 11 above. The Tribunal does not consider that a penalty of 5% of the tax due which is the culmination of a series of 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. The Tribunal does find that there has been a very slight inaccuracy in the calculation of the default surcharge. In the schedule of defaults the surcharge of £959.45 is said to be 5% of the amount outstanding at the due date for payment. The net VAT due to be paid by 7 April 2012 according to the VAT return submitted by the appellant was £39,169.16. HMRC accept that £20,000 was paid on 5 April 2012 leaving £19,169.16 outstanding and which was paid late on 11 April 2012. The Tribunal calculates 5% of £19,169.16 as £958.45 ie £1 less than the figure calculated by HMRC.

12. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by Section 59 (7) VAT Act 1994.

13. The Tribunal observes that by the end of March 2012 a number of facts were known or should have been known by the appellant. These were: the net amount that was due to be paid in respect of the VAT return; the potential for default surcharges if VAT amounts are paid late; the daily limit of £20,000 for payments; the other transfers that were going out during the period; and the dates of bank holidays.

14. Realising he would be out of the country the finance director made arrangements for transfers to be made to pay the net tax due on the VAT return by the due date. Unfortunately he overlooked both the bank holidays and the fact that other transfers going out during the period would cause the £20,000 limit to be exceeded. The bank holidays and the flows of cash were either known or should have been known by the appellant and therefore cannot be regarded as a reasonable excuse.

15. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 11. above this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated. HMRC has applied the legislation correctly but has made a small error in calculation. The Tribunal finds that the surcharge should be reduced by £1 to £958.45 being 5% of £19,169.16 which was the VAT unpaid by the due date. The appellant has established no reasonable excuse for the late submission of the VAT return for the quarter ended 28 February 2012. Therefore other than for the small adjustment of £1 the appeal is dismissed.

16. 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 October 2013