



TC02974

Appeal number: TC/2012/08985

*TYPE OF TAX – VAT – late submission of payment of VAT due on returns
whether surcharge should be reduced - No. Whether reasonable excuse for
late submission of payment due on return - No.–*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EURO RUGS UK LIMITED

Appellant

- and -

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

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

The Tribunal determined the appeal on 13 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 undated Appeal letter to the Tribunal and received 21 September 2012 with enclosures, and HMRC's undated Statement of Case with enclosures received by the tribunal on 13 June 2013, and a bundle of documents subsequently received. The Tribunal wrote to the Appellant on 13 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 £690.32 levied by HMRC for the late payment by the appellant of the amount due on its Value Added Tax return for the period ended 31 May 2012. By a direction of the Tribunal dated 18 October 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. Facts.

HMRC issued a Default Surcharge Notice on 13 July 2012 in respect of a late payment for the VAT return for the period ended 31 May 2012 due by 7 July 2012

5. The appellant’s submissions.

In a letter to HMRC dated 23 July 2012 the appellant appeals against the Surcharge Liability Notice for the period ending 31 May 2012. The letter makes the following points:

“On 27th March 2012 we were visited by Faye Brennan from HMRC who carried out a VAT inspection, I know all Companies in the UK are inspected from time to time.

During the inspection Mrs. Brennan found a small mistake in our books amounting to a underpayment by us £2,698.44

This error was made by our accountant due to a pro forma invoice and was brought to the attention of Mrs. Brennan before the audit started, I think you call this an unprompted disclosure.

It just so happened that we were due a VAT refund of almost £26,000 for the quarter ending February 2012.

Until Mrs. Brennan had finalised the audit HMRC would not refund the £25,975.88 to us, clearly this had a detrimental effect on our cashflow.

.....It was not until 24th May 2012 that I received your cheque for £25,975.88 for repayment of VAT quarter ending February 2012, almost 3 months after the quarter ended.....”

The letter ended by requesting the surcharge be waived.

6. The letter of 23 July 2012 was taken by HMRC as a request for a review. In a letter dated 11 September 2012 HMRC advised that the result of their review was that HMRC do not consider the appellant has a reasonable excuse for the default. They

stated “It is appreciated that the time taken to repay tax due to you on the 02/12 return may have caused frustration however this was repaid prior to the 05/12 VAT return payment being due and did not prevent you from paying the 05/12 return on time. Large repayment returns are often subject to checks before monies can be released, this is a normal process and the funds were released 6 weeks after the return was received, which is considered reasonable.”

7. In response to that decision the appellant sent an undated letter to the First-tier Tax Tribunal. It was received on 21 September 2012 and was taken as a notice of appeal. The grounds of appeal contain similar comments to those made in the earlier correspondence to HMRC. However the second paragraph states:

“I would like to re-iterate that we are only a small company and there is only two of us to do everything, Sometimes things do get missed as did this particular VAT payment for a few days.”

They go on to request the surcharge be waived.

In the letter the appellant has addressed the First-tier Tribunal as if it was a part of HMRC and had been involved in making the earlier decisions received by the appellant. The Tribunal would point out that this is not the case. The Tribunal is a part of the Ministry of Justice and is independent of HMRC.

8. HMRC’s submissions

HMRC state that the VAT return and payment for the period to 31 May 2012 was due by 7 July 2012 assuming payment was made electronically. In fact the return was received on time but payment was received five days late on 12 July 2012.

9. A schedule in the papers provided to the Tribunal shows that the above late payment and two previous late payments have had the effect of increasing the surcharge liability rate to 5%. The penalty for the quarter ended 31 May 2012 HMRC calculated as £690.32 being 5% of the tax unpaid at the due date.

10. HMRC contend that the appellant had received a VAT refund on 24 May 2012 which was before the due date. The appellant did not take appropriate or sufficient steps to ensure that the company met its VAT payment obligations during this busy period and that the late payment did not occur as a result of something which was entirely out of their control. The appellant failed to prioritise the submission of their VAT payment and could have done so in order to prevent the default but chose not to do so.

11. HMRC request that the appeal be dismissed.

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

13. 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 12 above. The Tribunal does not consider that a penalty of 5% of the tax due which is the culmination of three 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.

14. 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.

15. Whilst the Tribunal can understand that there may have been an unreasonable delay by HMRC in refunding the amount due to the appellant in respect of its VAT return for the period ending 29 February 2012 it notes that the repayment of £25,975.88 was made on 24 May 2012. In respect of the VAT return for the period ended 31 May 2012 the appellant was due to pay HMRC £13,806.50 by 7 July 2012 at the latest. Therefore the delayed repayment was received over 6 weeks before the payment for the period ended 31 May 2012 was due. In these circumstances the Tribunal finds it difficult to see why the delayed payment can constitute a reasonable excuse for the late payment of the return for the period ended 31 May 2012.

16. It is the responsibility of the director of the appellant to be aware of the due dates, for submission of the VAT return, and its method of payment and the time needed to complete electronic transfers. In the appeal letter the appellant accepts that "Sometimes things do get missed as did this particular VAT payment for a few days" Unfortunately for the appellant in such circumstances there is no reasonable excuse for the late payment.

17. In the light of the Upper Tribunal decision in *Total Technology (Engineering) Ltd.* as explained in paragraph 12. 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 and has calculated the surcharge accurately as £690.32 being 5% of the tax of £13,806.50 shown as due on the appellant's tax return for the period ended 31 May 2012. The appellant has established no reasonable excuse for the late payment of the VAT shown as due on the appellant's VAT returns for the quarters ended 29 February 2012 and 31 May 2012. Therefore the appeal is dismissed.

18. 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: 15 October 2013