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TC04352

Appeal number: TC/2014/05981

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VAT – late submission of payment of VAT due on returns Whether reasonable excuse for late submission of payment due on return - No.–

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL EDWARD HARRISON T/A BUILDING MECHANICAL SERVICES

Appellant

- and -

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

Respondents

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

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The Tribunal determined the appeal on 8 April 2015 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 letter dated 26 October 2014, and HMRC's Statement of Case received by the Tribunal on 1 December 2014 with attachments. The Tribunal wrote to the Appellant on 26 February 2015 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. A reply by e-mail dated 22 March 2015 was received and considered by the Tribunal.

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DECISION

1. Introduction

This considers an appeal against a default surcharge of £55.62 levied by HMRC for the late submission by the due date of 7 August 2014 of its VAT Return and for the late payment by the appellant of the amount outstanding in respect of that Value Added Tax return for the period ended 30 June 2014.

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 *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 therefore 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

Garnmoss Ltd. t/a Parham Builders v HMRC [2012] UKFTT315 (TC)

4. The appellant's submissions.

In a letter dated 14 August 2014 to HMRC Default Surcharge Appeals Team the appellant wrote

“We write to you in good faith to have this surcharge lifted. I am a sole trader and have been away during this period. Noting the imminent due date I submitted the payment of £138.84 on line and when I returned home to submit the paperwork I found that 1 month had been added twice resulting in an underpayment (enclosed) I immediately paid this. I am told that I should have left it and made the adjustment next quarter, but being honest I corrected it this time, only to be penalised for my honesty.

I am voluntarily registered, and don't need to be but mainly for 2 clients, which prices me out of other markets, a consideration for not remaining VAT registered. You will see by the VAT submitted through the year we don't make anywhere near the threshold.”

5. In the Notice of Appeal the Appellant states:

“Despite being self-employed (sole trader) who doesn't need to pay VAT in the first place. Earnings less than £16k a year. Having a surcharge on top is unjust.

However this appeal is now based on hardship. On the 14/10/2014 we had our van and contentsstolen ... whilst onsite. , with an estimated £8,000 worth of tools, we have also had to borrow funds to purchase a new van to continue. In order to continue my business we have had to buy tools and equipment and have and have been unable to work for 7 days following this.”

The police crime numbers are given.

The appellant also makes points similar to and refers to those in his letter of 14 August 2014.

The appellant continues “Before the paperless submissions were introduced we were never late. We ticked that we be informed when it was due – no such notifications ever came.

Whist we appreciate it is our responsibility to provide payment on time. However we corrected the payment instead of leaving it to the next quarter where this surcharge would not have been raised. It is clear honesty is punished by HMRC? Now we have been the subject of theft.

6. In the e-mail to the Tribunal dated 22 March 2014 the appellant states “Thank you for the reply and my apologies for its late reply having just spent the last two weeks in hospital. I am aware of the document sent “ – HMRC’s statement of case – “...its cost in preparation far outweighs the £50 dispute? Not really a cost effective practice”.

7. HMRC’s submissions

HMRC took the appellant’s letter of 14 August 2014 as a request for a review. They replied on 1 October 2014. They stated that they did not accept the appellant had reasonable excuse for the default because they had not received a return and full payment by the due date.

8. HMRC state that the VAT return and payment for the period to 30 June 2014 was due by 7 August 2014 assuming payment was made electronically. In fact the return was received electronically on 13 August 2014 so was late. In respect of payment HMRC accept that a payment of £130.84 was made on 8 August 2014 one day late, and that a further payment of £425.45 was made on 13 August 2014 which was 6 days late.

9. The net amount of VAT due on the return for the period to 30 June 2014 is stated as £556.29. Therefore on 12 September 2014 HMRC assessed the surcharge as 10% of this sum being £55.62. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

10. A schedule in the papers provided to the Tribunal shows that the appellant has made previous late payments 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 10%.

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.

12. HMRC say that non receipt of an e-mail reminder does not itself amount to a reasonable excuse for the late submission of VAT. A registered trader is expected to be aware of their quarter ends.

13. HMRC say that whilst they are sympathetic to the appellant’s current circumstances events subsequent to the issue of a surcharge cannot be considered a reasonable excuse for the late return or payment.

14. HMRC consider that no reasonable excuse for the late payment has been established and request that the appeal be dismissed.

15. 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.

16. 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 10% of the tax due which is the culmination of previous 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.

17. 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.

18. The return was received by HMRC on 13 August 2014. A partial payment in the amount of £130.84 was paid one day late on 8 August 2014, with the balance of £425.45 paid on 13 August 2014.

19. The Tribunal observes that the return and both payments were received late by HMRC. Therefore the appellant's submission that he is being penalised for his honesty in correcting the error he discovered is incorrect because the first (and incorrect) payment he made was late. In respect of the theft of the appellant's van and tools and his two week period in hospital these occurred after August 2014 so whilst the Tribunal has sympathy with the appellant over what must be a severe blow to his business they cannot establish a reasonable excuse for the late return and late payment.

20. 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 £55.62 being 10% of the outstanding tax of £556.29 at the due date in respect of the appellant's tax return for the period ended 30 June 2014. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

21. The Tribunal does accept the Appellant's comments that the cost of preparation of HMRC's statement of case and photocopying of enclosures (49 pages in total) must far outweigh the £55.62 penalty they will now levy. It has not been a cost effective exercise.

20. 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: 16 April 2015