



TC05262

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Appeal number: TC/2016/01604

VAT – late payment of VAT due on return - whether reasonable excuse for late payment - No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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PRO-SCAFFOLDING (SOUTH WEST) LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE
PETER R SHEPPARD FCIS FCIB CTA AIIT**

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The Tribunal determined the appeal on 1 July 2016 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 16 March 2016 with attachments, and HMRC’s Statement of Case dated 15 April 2016 with attachments. The Tribunal wrote to the Appellant on 22 April 2016 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

Introduction

1. This considers an appeal against a default surcharge of £570.98 levied by HMRC for the late payment by the due date of 7 January 2016 of the amount due on the appellant's VAT return for the period ended 30 November 2015.

Statutory Framework

2. The VAT Act Section 25(1) states that VAT payments are to be made in such time and manner as determined by or under regulations.

3. 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 seven days for those paying electronically, and a further three working days for those paying by means of a direct debit arrangement.

4. Regulation 25A(3) requires the provision of returns using an electronic system.

5. Regulation 40(2) stipulates that VAT must be paid no later than the due date of the return

6. 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.

7. 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.”

8. 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.

9. Section 70 VAT Act 1994 covers what is not to be considered a reasonable excuse.

10. Finance Act 2008 Section 108.

11. **Case law**

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

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

Garnmoss Limited T/A Parham Builders v HMRC [2012] UKFTT 315 (TC)

The appellant’s submissions.

12. In the Notice of Appeal dated 16 March 2016 the appellant states:

“HMRC have a duty to act fairly and they have not exercised this responsibility.

The facts of the case are that prior to the VAT return period 11/15 returns had been submitted late and significant penalties had been incurred.

The Company changed agents in October 2015 in an effort to bring its tax and VAT affairs up to date. The new agent (Nick James Ltd, Chartered Accountants) duly submitted the 11/15 VAT return on the due date of 7 January 2016.

Where a VAT return is submitted by the due date and a direct debit is in place to enable HMRC to collect the VAT due, the statutory obligations are complied with and there is no default. It was believed that a direct debit was in place, as the company had previously instructed its bank, as acknowledged by HMRC in its letter of 25 February 2016, which refers to letters sent to the company advising that the bank had for unknown reasons refused to accept the direct debit. During the takeover of Nick James Ltd from the previous agents, it was not realised that the direct debit was not effective.

Had a direct debit been in place, the payment would have been taken by HMRC 3 working days after the due date for submission of the return of 7 January 2016 – therefore the payment would have been taken on 12 January 2016.

The new company agent Nick James Ltd , becoming aware that the direct debit was not in place, advised the company to make payment by bank transfer, which the company did, on 11 January – ie BEFORE the date which HMRC would have collected the payment had a direct debit been in place.

It is considered that, given the company's obvious attempts to bring its tax affairs into order, and make payments on time, and the fact that HMRC have not suffered any loss as the payment was made by the date that would have been expected, albeit by bank transfer rather than direct debit, the imposition of a further penalty by HMRC is unreasonable and unfair.

Penalties imposed by HMRC should be a tool to encourage taxpayers to comply with their statutory duties, not penalise those taxpayers who have clearly attempted to comply but have failed to do so on a technical ground but where no loss to HMRC has resulted.

Previous Tribunal decisions have recognized the duty of HMRC to act in accordance with the common law duty of fairness, therefore it is considered that this penalty should be cancelled on the above grounds.”

13. On 2 February 2016 Dan Sullivan proprietor for the appellant wrote to HMRC saying in response to the surcharge notice stating that he could not see where the appellant had not complied with the rules.

14. On 23 February 2016 the appellant's agent sent an e-mail to HMRC requesting a further review. The points made in that e-mail are very similar to those on the Notice of appeal. It also states that a direct debit arrangement has now been put in place for future returns.

HMRC's submissions

15. HMRC state that the VAT return for the period to 30 November 2015 was due by 7 January 2016. In fact the return was received electronically on 7 January 2016 so was on time. In respect of payment HMRC say that as a direct debit arrangement was not in place an additional three days could not be allowed so payment was due by 7 January 2016. In fact payment was received by the faster payment service on 11 January 2016 so was four days late.

16. A schedule in the papers provided to the Tribunal shows that in seven previous periods the appellant submitted a late return/payment and has been in the default surcharge regime since period 02/2013.

17. After a series of default notices and appeals by the period 11/2014 the appellant remained in the surcharge regime but the percentage of the surcharge applicable to him in that period was 2%. A further default occurred in respect of the period ended 31 August 2015 when the return was received on time on 7 October 2015 but payment was received six days late on 13 October 2015. This default had the effect of increasing the default surcharge percentage to 5% but as the surcharge was less than £400 it was not levied by HMRC. HMRC issued the appellant with a surcharge

liability Notice V161 which warned that future failures may result in a default surcharge being levied. The final default was in respect of the VAT return for the following period which was due by 7 January 2016 but although the return was submitted on time payment which in the absence of a direct debit arrangement was also due by 7 January 2016 was received four days late on 11 January 2016.

18. The net amount of VAT due on the return for the period to 30 November 2015 is stated on the return as £5,709.88. Therefore on 15 January 2016 HMRC assessed the surcharge as 10% of this sum being £570.98. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4).

19. HMRC point out that from the beginning of 2013 until 31 March 2015 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.

Later default surcharges have similar but not identical wording on the reverse.

20. HMRC state that the reverse of the surcharge notices details how surcharges are calculated and the percentage used in determining surcharges in accordance with the VAT Act 1995 s 59(5).

21. HMRC say that the appellant made one payment by direct debit in respect of period 11/2012. All other payments have been by Faster Payment Service, BACS, and the Telephone Payment Service. When Time to pay arrangements are in place the National Direct Debit System is used which is different from the normal Direct Debit Payments. This was used in respect of the appellant in periods 11/2013 and 11/ 2014.

22. Whilst HMRC accept that the appellants tried to set up a direct debit system twice on 21 September 2015 and 13 October 2015 the Bank would not accept direct debits on the account number quoted. HMRC advised the appellant on each occasion. They consider the appellant had sufficient notice to make alternative arrangements.

23. They consider a prudent trader having employed a new agent would have made them aware of the letters from HMRC.

24. HMRC point to the decision in the case of *Garmoss Ltd T/A Parham Builders*. In that decision Judge Hellier writes:

“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. Thus this default cannot be ignored under the provisions of subsection [s59 VATA] (7)".

25. HMRC say that their willingness to review defaults on previous occasions and to withdraw surcharges made in error show they have treated the appellant fairly.

26. 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 and the surcharge upheld.

The Tribunal's observations

27. 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.

28. 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 27 above. The Tribunal does not consider that a penalty of £570.98 which is 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.

29. The VAT Payment of £570.98 was received late by faster payment on 11 January 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 the notice of appeal the appellant accepts that he attempted to comply but failed to do so on a technical ground. That being that his agent was unaware that the appellant had received letters from HMRC advising that appellant's bank had refused to accept direct debits on the account number quoted. The question for the Tribunal is whether the appellant had a reasonable excuse for this failure as contemplated by Section 59(7) VAT Act 1994.

30. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the appellant's control.

31. 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 previously 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 subsequent returns and payments were submitted on time.

32. The Tribunal considers that the paragraph from the decision in *Garmoss* quoted above is applicable in this case. After a series of defaults the appellant appointed a new agent and was clearly trying to put its house in order and avoid future surcharges. It is therefore most unfortunate that the appellant made a mistake and overlooked the need to advise their new agents of the two letters from HMRC dated 29 September 2015 and 21 October 2015 advising that the appellant's bank had notified them that direct debits could not be accepted on the account number quoted. The implications of those letters was that in the absence of direct debit arrangements the due date for payment was no longer three working days after 7 January 2016 but was now 7 January 2016 at the latest. The action by the agents on 11 January 2016 to make payment by faster payment in order to beat the payment due date for situations where a direct debit was in place (12 January), whilst commendable, could not rectify the mistake that had already been made. Payment was made four days late and the mistake described above cannot be regarded as something unexpected or unforeseeable or out of the appellant's control. It was clearly within the appellant's control to act on the letters received from HMRC before the deadline date.

33. In the light of the Upper Tribunal decision in *Total Technology (Engineering) Ltd* as explained in paragraph 27 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 £570.98 being 10% of the outstanding tax of £5,709.88 at the due date in respect of the appellant's tax return for the period ended 30 November 2015.

34. It is clearly evident that the appellant is trying to put its house in order, however, it has made a mistake in not advising its agent of the letters from HMRC. Legislation provides that reliance on another cannot be regarded as a reasonable excuse. Having appointed a new agent the appellant should have updated the agent on the position in respect of payments of VAT returns by direct debit. The appellant's failure to do so in the Tribunal's opinion cannot be considered as circumstances that occurred that were unexpected, unforeseeable or out of the appellant's control. The appellant knew the dates his VAT return and payment were due and should have made provision accordingly. The appellant had been notified twice by HMRC that the appellant's bank would not allow direct debit arrangements in respect of the account number quoted. The appellant should have acted upon those letters and either made new arrangements with their bank or notified their new agents of the contents of the letters. Thus the appellant has established no reasonable excuse for the late VAT payment for the period ending 30 November 2015. The Tribunal could see no evidence that HMRC had acted unfairly towards the appellant. Therefore the appeal is dismissed and the surcharge upheld.

35. 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 JUDGE**

RELEASE DATE: 21 JULY 2016