



TC06353

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Appeal number: TC/2017/02991

*VAT – late submission of 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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STEPHEN RICHARD HALL T/AS DELI-LICIOUS Appellant

- and -

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

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

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**MEMBER:
JULIAN STAFFORD**

**Sitting in public at City Exchange, 11 Albion Street, Leeds at 2 p.m. on 4
September 2017**

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The Appellant was unrepresented

Thomas Nicholson, HMRC Officer, for the Respondents.

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DECISION

1. Introduction

This considers an appeal against a default surcharge of £1,726.60 levied by HMRC for the late submission and payment by the due date of 7 January 2017 of the appellant's VAT return for the period ended 30 November 2016.

2. On the morning of the hearing the Tribunal received an e-mail from the appellant which stated as follows:

“Unfortunately I will not be able to attend today's hearing due to circumstances beyond my control. I understand that the case will be ruled in my absence and would like to send my apologies to all involved for the waste of their time.”

The Tribunal therefore considered Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which states:

“Hearings in a party's absence
33.

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.”

It was clear from the e-mail that the appellant had received notification of the hearing and was expecting it to be heard in his absence. He gave no indication of the reason his inability to attend or why he had left it until the morning of the hearing to notify his non-attendance.

The Presiding member, the member and the HMRC officer had travelled some distance to attend the hearing and had prepared for it.

The Tribunal decided that it was in the interests of justice to proceed in the appellant's absence.

3. 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 e.g. by allowing a further 7 days for those paying electronically, and a further 3 days for those paying by means of a direct debit arrangement.

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 therefor on time.

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

Section 71 VAT Act 1994 excludes insufficiency of funds as a reasonable excuse.

The VAT Regulations 1995, Regulation 40 provide for payment of amounts due on VAT returns by the due date.

Finance Act 2009 Section 108

4. 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 [2012] UKFTT 315(TC)

5. Facts

5.1 Deli-licious run a delicatessen, sandwich and cake shop in both Cleethorpes and Grimsby.

5.2 HMRC state that the appellant has consistently submitted their VAT returns by the due date. However the appellant entered the default surcharge regime in the period 02/15 because payment was made late.

5.3 Payment of £11,170.27 being the net tax shown on the appellant's VAT return for the period to 28 February 2015 was due by 7 April 2015. It was paid by eleven separate instalments. The first five, totalling £5,170, were paid by the due date. The remaining £6,000 was paid by six separate instalments each of £1,000 all made after the due date the last being received by HMRC on 19 May 2015. HMRC wrote off the outstanding £0.27. A surcharge was not levied at this stage because it was the appellant's first default. However a surcharge liability notice was issued to the appellant warning of the potential consequences of a further default.

5.4 Payment of £9,839.02 being the net tax shown on the appellant's VAT return for the period to 31 May 2015 was due by 7 July 2015. It was paid by ten separate instalments. The first six, each of £1,000, were paid by the due date. The remaining £3,839.02 was paid by four separate instalments all made after the due date, three of £1,000 each and the then the balance of £839.02 which was received by HMRC on 3 August 2015. A surcharge of 2% was therefore due on the amount outstanding on the due date. However HMRC operate a policy whereby they do not levy surcharges of less than £400 and so this surcharge was not levied.

5.5 Payment of £10,582.55 being the net tax shown on the appellant's VAT return for the period to 30 November 2015 was due by 7 January 2016. It was paid by twelve separate instalments. The first seven totalling £5,028.51 were paid by the due date. The remaining £5,554.04 was paid by five separate instalments all made after the due date, the last of which was received by HMRC on 8 March 2016. A surcharge of 5% was therefore due on the amount outstanding on the due date. However as this was also less than £400 HMRC did not levy it.

5.6 Payment of £11,285.55 being the net tax shown on the appellant's VAT return for the period to 31 May 2016 was due by 7 July 2016. It was paid by twelve separate instalments. The first two each of £1,000 were paid by the due date. The remaining £9,285.55 was paid by ten separate instalments all made after the due date, the last of which was received by HMRC on 25 September 2016. A surcharge of 10% was therefore due on the amount outstanding on the due date. HMRC therefore levied a surcharge of £928.55 being 10% of £9,285.55.

5.7 Payment of £11,508.01 being the net tax shown on the appellant's VAT return for the period to 30 November 2016 was due by 7 January 2017. It was paid by a single payment received two days late by HMRC on 9 January 2017. A surcharge of 15% was therefore due on the amount outstanding on the due date. HMRC therefore levied a

surcharge of £1,726.20 being 15% of £11,508.01. It is this surcharge which is the subject of this appeal.

6. The appellant's submissions.

In the absence of the appellant The Tribunal considered his comments in the Notice of Appeal to the Tribunal dated 6 April 2017 and in his correspondence with HMRC. He makes the following points:

- I didn't pay until Monday 9th I didn't think this would be an issue as the 7th fell on a weekend.
- The charge of 15% (£1,726.20) is extremely excessive and unjust.
- The charge will impact heavily on my business.

7. HMRC Submissions

HMRC point out that for periods 01/13 onwards 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

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 of VAT due on time, pay as much as you can, By Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge altogether.

8. HMRC state that with effect from period 04/15 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).

9. HMRC point out that the appellant had successfully used the Time to pay arrangements on previous occasions, so was aware of the facility.

10. HMRC point out that the VAT Regulations 1995 Regulation 40 states “any person required to make a return “shall pay” to HMRC “such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return,”

11. In response to the appellant's contention that payment was made on 9th January 2017 because it was believed that as 7th January fell on a weekend this would not be an issue HMRC say that in a letter to the appellant dated 28 September 2014 they enclosed an information sheet which may help to avoid future default surcharges. They say that included "If your due date falls on a bank holiday or weekend your payment must clear HMRC's bank account before then (unless you use the Faster Payments service –Faster payments can be received on bank holidays and weekends)."

12. Similar information is to be found in Notice 700 The VAT Guide. HMRC also point out that there is a VAT payment deadline calculator which is available online.

13. HMRC point out that the business of a delicatessen, café and sandwich shop is largely cash based. Thus the VAT is largely collected at the point of sale. Thus the cash was available to meet the appellant's VAT obligations. They say that if the appellant chooses to regard this as an interest free loan until the VAT becomes due that is a risk the business takes upon itself and should not be used as a reasonable excuse.

14. 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.

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 decisions in the cases of Total Technology Engineering Ltd, and Trinity Mirror PLC. The decisions also discuss 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 £1,726.60 which is 15% of the tax due and which follows from four previous failures to submit payments of VAT due on time, is wholly disproportionate to the gravity of the offence nor plainly unfair.

17. The question for the Tribunal is whether the appellant had a reasonable excuse for this default as contemplated by Section 59 (7) VAT Act 1994.

18. The Tribunal accepts that HMRC publish guidance literature advising taxpayers to ensure that payments get to HMRC's account on time. These include information about paying when the due date falls on a bank holiday or weekend. In the Tribunal's view the appellant should have been aware of these matters. As he had previously received surcharge liability notices for previous failures which warned of potential surcharges for future failures he should have been particularly alert to the need to ensure that

subsequent returns and payments were submitted on time. The Tribunal notes that HMRC accepts payment by the Faster Payment Service at weekend. The appellant paid by using the Faster Payment service two days late on Monday 9 January 2017. He could have used it two days earlier.

19. The Tribunal also accepts HMRC's contention that appellant operates a largely cash based business and therefore had collected VAT from his customers during the 3 months ended 30 November 2016. He became a temporary custodian of that money which had to be paid to HMRC by the due date in accordance with VAT Regulations 1995 Regulation 40. Whilst the appellant, if he chooses, has temporary use of the money he must nevertheless make sure that the money is paid over to HMRC by the due date.

20. The last day for payment of the amount due was 7 January 2017 but the appellant had submitted his VAT return on 31 December 2016. He therefore knew the amount he was due to pay but delayed making payment until what he thought was the last possible moment. Brinksmanship of this nature leaves no opportunity to deal with unforeseen difficulties.

21. It may be argued that the appellant made a mistake by misunderstanding the Faster Payment system. In *Garnmoss Ltd. T/A Parham Builders* at paragraph 12 Judge Hellier states "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 (7)."

22. The appellant had successfully used the Time To Pay arrangements in previous periods so was aware that those arrangements were available if he had difficulty paying.

23. The tribunal therefore concludes that the appellant made the simple mistake of assuming that payment two days late was acceptable where the due date was on a weekend. The appellant had received information that explained this was not so but he must have overlooked it. A simple check would have revealed his assumption was incorrect.

24. 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 £1,726.60 being 15% of the outstanding tax of £11,508.01 at the due date in respect of the appellant's tax return for the period ended 30 November 2016.

25. In the Tribunal's opinion the appellant has established no reasonable excuse for the late VAT payment for the period ending 30 November 2016. The appellant has not made any submissions in respect of the late payments in respect of returns for earlier periods. The surcharge rate of 15% is therefore uncontested. Therefore the appeal is dismissed and the surcharge upheld.

26. 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: 23 FEBRUARY 2018