TC03144

Appeal number: TC/2013/06204

VAT – late submission of payment of VAT due on returns – Cancellation of Direct Debit Instruction by bank -Whether reasonable excuse for late payment - Yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAPITAL COIN MACHINE CO. LTD **Appellant**

- and -

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

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

The Tribunal determined the appeal on 4 December 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 26 July 2013, and HMRC's undated Statement of Case received by the tribunal on 16 October 2013, with enclosures. The Tribunal wrote to the Appellant on 16 October 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.

DECISION

1. Introduction

This considers an appeal against a default surcharge of £980.21 levied by HMRC for the late filing by the appellant of its Value Added Tax return for the period ended 31 March 2013. The appeal was made late because it seems to have been misdirected in the post. However in the absence of any objections from HMRC the Tribunal has allowed the appeal to continue.

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. **Error! Hyperlink reference not valid.**~~[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)

Enersys Holdings UK Ltd. **Error! Hyperlink reference not valid.**~~[2010~~] UKFTT 20 (TC) TC 0335

4. **The appellant's submissions**.

In a letter to HMRC Default Surcharge Appeals Team dated 28 May 2013 Tina Slade a director of the appellant writes from its Wellington Road, Portslade address

"I have been submitting our VAT returns on line for more than 2 years with the payment being taken by yourselves by Direct Debit 7-10 days afterwards and as far as I am aware there has been no change to this procedure.

I was expecting the payment for period 03 13 to be taken from our account at any time in the usual way and so was extremely surprised to receive your letter. A cheque was sent on the same day to cover the amount of the VAT return…….

Finally, could you please amend your records to show our correct address, as above.

The appellant asks for the penalty to be cancelled.

5. This letter was taken by HMRC to be a request for a review. The result of the review was that in a letter dated 8 July 2013 HMRC confirmed the penalty and did not accept that the appellant had a reasonable excuse for the failure. The letter also included

"My colleague's letter of 15 February 2013 advised that your Direct debit mandate had been cancelled and that alternative methods of payment should be used if a new mandate was not set up (copy enclosed). As this was not returned by the Royal Mail to us so there was no reason for us to suppose it did not reach you."

6. In their Notice of appeal dated 26 July 2013 the appellant states

"We reiterate that the letter of 15 February 2013 was not received. Had it been received we would not have been waiting for the Direct Debit to be taken.

Correspondence is still being sent to our old premises (which are unoccupied for most of the time) despite requests to address everything to our Wellington Road office. HMRC response to our letter of 28 May 2013 was again sent to the wrong address."

7. **HMRC's submissions**

"Section 59 of the VAT Act 1994 requires the appellant to furnish VAT returns and pay the outstanding VAT within one month of the relevant accounting period. The due date for the 03/13 period was 7 May 2013 as payment was made electronically. The return was received on 3 May 2013 and payment made by cheque on 28/05/2013"

8. "If payment is by Direct Debit HMRC will automatically collect payment from the business bank account three bank working days after the extra seven calendar days following the standard due date."

9. "The Direct Debit instruction was set up in May 2010 and since this date payments have been taken in this way."

10. On 15 February 2013 HMRC wrote to the appellant, at an address in Boundary Road Hove, saying

"**Advice of Cancelled Direct Debit Instruction**

Our records for your Direct Debit Instruction (DDI) are as follows:
Account Name (details supplied)
Bank Account Number: (details supplied) Sort Code (details supplied)
This is to advise you that the above Direct Debit Instruction has been cancelled.
If you wish to pay your VAT by Direct Debit in the future you will have to complete another Direct Debit Instruction, either on-line or by sending us a paper instruction."

HMRC say that the letter of 15 February 2013 was not returned by the Royal Mail to them so there was no reason for them to suppose that it had not reached the appellant.

11. HMRC say that when an electronic return is submitted if a Direct Debit is in place the following message is given on the acknowledgement

"The tax due as declared on this return £xx.xx will be debited from your bank account on xx/xx/xx"

As there was not a direct debit in place for the 03/13 return the acknowledgement message would have been

"any tax due must be paid electronically and received by HM Revenue & customs by xx/xx/xx. Payment must be made electronically, by Bankers Automated Clearing Services (BACS), Bank Giro Credit Transfer or by Clearing House automated Payment System (CHAPS)."

12. A schedule in the papers provided to the Tribunal shows that the appellant has previously made three late payments starting with the period ended 30 June 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 10%. The penalty for the

quarter ended 31 March 2013 HMRC calculate as £980.21 being 10% of the tax unpaid at the due date of £9,802.19 as shown on the appellant's VAT return for the period .HMRC submit that the appellant has received surcharge notices for previous defaults and would be aware from the advice on them of the financial consequences of any further default.

13. In their statement of case HMRC state that "to date there has not been any official notification of the change of address and the address on file remains as Boundary Road.

In the light of the last sentence of the letter to HMRC dated 28 May 2013 from the appellant's director Tina Slade which is set out at paragraph 4 above The Tribunal finds this a surprising submission.

14. HMRC request 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 (£980.21) 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.

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 appellants say that the letter dated 15 February 2013 was not received by them as it went to an address that they no longer use. The Tribunal notes that the letter merely says "This is to advise you that the …..Direct Debit Instruction has been cancelled." It does not say who by and for what reason.

19. In their statement of case HMRC say "HMRC records show that the Direct Debit Instruction was cancelled by the payer so they would have been aware that the payment for 03/13 period would not be taken by Direct Debit and an alternative payment should have been used. The question has to be asked as to why if HMRC

consider the appellant had cancelled the Direct Debit instruction did they write to the appellant to advise him that the instruction had been cancelled. It is interesting to note that HMRC did not say "We notice that you have cancelled the Direct Debit instruction"

20. In the papers at folio 7 and 8 is an internal e-mail dated 3 October 2013 from Fiona Loveitt (LocalCOMP Planning, Governance and Capability) to EASy Team (DDI) {DMB,Banking Ops, Southend} This reads as follows:

(I) spoke to one of the team last week…….I am dealing with a Tribunal appeal for this trader. They are appealing on the grounds that they were unaware that the Direct Debit Instruction had been cancelled. The person I spoke to advised that the DDI had actually been cancelled by the bank ??? (illegible short word) by HMRC. She faxed me over a copy of the ADDACS report. I have spoken to the appeals countersigning officer and he has suggested I obtain an email for Tribunal purposes containing the factual details confirming that the cancellation was made by the bank and the date HMRC were notified. Is this something you can provide to me please.

21. The reply from EASy Team (DDI) {DMB,Banking Ops, Southend} says

22. "As further to our conversation the phone we can confirm that the information was received via the ADDACS System. This is an electronic file which we receive each day from the banks requesting that the trader's Direct Debit is either amended to new Bank account details or amended or cancelled. This is the report you received from my colleague

On this occasion the report received was coded reason 1 – this means that the DDI was cancelled by the payer, Paying Bank cancelled DDI
This information is recorded on the Trader's file.
This information is then updated on the DDI System which a letter is automatically sent to the Trader (as shown on ef)
This tells the trader that the DDI has been cancelled and that they would need to complete a new mandate DDI or on line.

23. The problem with this evidence is that in two vital areas it is deficient. Firstly the illegible short word could be "or" or "not". Which would mean that the instruction was cancelled by the bank or HMRC or by the Bank not HMRC. However it is not intended to read that it was cancelled by the trader. Secondly the reply says

"the DDI was cancelled by the payer, Paying bank cancelled DDI" which is difficult to understand. The Tribunal wonders if it is meant to say "the payer's paying bank cancelled the DDI.

These e-mails do not seem to the Tribunal to be clear enough to support the contention that the appellant cancelled the direct debit instruction. The grammatical errors and illegible word do not convince the Tribunal that it should come to that conclusion.

It follows that the direct debit must have been cancelled by the bank . The two e-mails seem to indicate this.

The Tribunal notes that the paying bank could cancel the instruction for three reasons, there may be others:

i) It was instructed to do so by the appellant
ii) It had its own reasons to stop the direct debit for example because it had some issue with the appellant's banking arrangements
iii) By misunderstanding or mistake

Unfortunately there is no evidence to support any of these alternatives.

24. The appellant says that they never received the letter of 15 February 2013 and was therefore expecting the amount due to be debited to their account as previously. They had submitted their VAT return on time to facilitate this. This statement and their actions indicate that the first of the above alternatives is unlikely. In the Tribunal's view it is easy to understand how the appellant could read the computer acknowledgement of their VAT return and think as I am paying electronically by the direct debit arrangement I need take no further action.

25. The Tribunal therefore accepts the Appellant's argument that the unexpected unforeseen and unadvised cancellation of the Direct Debit Instruction is a reasonable excuse for their late payment.

24. 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 and has calculated the surcharge accurately as £980.21 as detailed in paragraph 12 above. However the appellant has established a reasonable excuse for the late submission of the VAT return for the quarter ended 31 March 2013. Therefore the appeal is allowed

25. 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: 4 December 2013