



**TC03178**

**Appeal number: TC/2013/06599**

*Value Added Tax – Penalty for late payment of Tax; whether failed direct debit on day payment due rectified the following morning constituted reasonable excuse – no. No reasonable excuse offered for failures in earlier quarters; appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WILMSLOW AUDIO LIMITED**

**Appellant**

**- and -**

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

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

The Tribunal determined the appeal on 23 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 20 September 2013, and HMRC's undated Statement of Case received by the tribunal on 30 October 2013, with enclosures. The Tribunal wrote to the Appellant on 30 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

### Introduction

5 1. This is an appeal against a penalty of £586.20 for the late submission of payment for the Appellants VAT return for the period ending 30 April 2013.

### 2. Statutory Framework

10 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. Where payment is made by direct debit then HMRC automatically collect the payment on the third bank working day after the due date and the 7 days mentioned above.

15 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.

20 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.

25 *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.*

30 *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*

40 *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.

- 5 Section 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

#### **4 Case law**

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

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

#### **5 Calculation of the Surcharge**

- 10 5.1 Before considering the submissions by the parties it will be helpful to set out how the surcharge was calculated.

5.2 For the purposes of this appeal the first return for which a default occurred was for the quarter ended 31 January 2011. The return was due by 7 March 2011 assuming payment was made electronically. Payment was made in four instalments all of which  
15 were late, the last being received by HMRC on 14 December 2011. As this was the first failure no surcharge was levied but HMRC issued a Surcharge Liability Notice to the appellant warning that surcharges may be levied in the event of further defaults within the surcharge liability period advised in the notice – usually a period of 12 months from the due date of the late payment.

20 5.3 The return for the period to 30 April 2011 was also submitted electronically and was therefore due on 7 June 2011. The return was in fact received by HMRC on time but the tax payment of £3,943.05 was not received until 20 June 2011 ie 13 days late. A surcharge liability at a rate of 2% was due. The surcharge due was 2% of £3,943.05 which is £78.86. HMRC do not always levy surcharges of under £400 and did not do  
25 so on this occasion. However the surcharge liability period was extended.

5.4 The return for the period to 31 July 2011 was also submitted electronically and was therefore due on 7 September 2011. The return was received by HMRC on time but the tax payment of £3,698.51 was received in six instalments, the last of which  
30 was not received until 14 March 2012. A surcharge liability at a rate of 5% was due. The surcharge due was 5% of £3,698.51 which is £184.92. HMRC did not levy the surcharge. However the surcharge liability period was extended. An officer of HMRC visited the trader.

5.5 The return for the period to 31 October 2011 was also submitted electronically and was therefore due on 7 December 2011. The return was received by HMRC on  
35 time but the tax payment of £3,520.56 was received in seven instalments, the last of which was not received until 27 April 2012. A surcharge liability at a rate of 10% was due. The surcharge due was 10% of £3,520.56 which was rounded down to £352. By

HMRC who sent the trader a Surcharge Liability Notice for this sum and extended the surcharge liability period.

5.6 The return for the period to 31 January 2012 was also submitted electronically and was therefore due on 7 March 2012. The return was received by HMRC on time but the tax payment of £4,755.83 was received in eleven instalments, the last of which was not received until 6 July 2012. A surcharge liability at a rate of 15% was due. The surcharge due was 15% of £4,755.83 which is £713.37. HMRC sent the trader a Surcharge Liability Notice for this sum and extended the surcharge liability period.

5.7 The return for the period to 31 January 2012 was also submitted electronically and was therefore due on 7 March 2012. The return was received by HMRC on time but the tax payment of £4,755.83 was received in eleven instalments, the last of which was not received until 6 July 2012. A surcharge liability at a rate of 15% was due. The surcharge due was 15% of £4,755.83 which is £713.37. HMRC sent the trader a Surcharge Liability Notice for this sum and extended the surcharge liability period.

5.8 The returns and payments for the periods to 30 April 2012 and 31 July 2012 were all submitted on time.

5.9 The return for the period to 31 October 2012 was also submitted electronically and was therefore due on 7 December 2012. The return was received by HMRC on time but the tax payment of £4,022.81 was received in two late instalments, the last of which was not received until 7 January 2012. A surcharge liability at a rate of 15% was due. The surcharge due was 15% of £4,022.81 which is £603.42. HMRC sent the trader a Surcharge Liability Notice for this sum and extended the surcharge liability period.

5.10 No default is recorded for the period ending 31 January 2013.

5.11 The return for the period to 30 April 2013 was also submitted electronically and was therefore due on 7 June 2012. The return was received by HMRC on time but the tax payment of £3,908 was received on 13 June 2013. A surcharge liability at a rate of 15% was due. The surcharge due was 15% of £3,908 which is £586.20. HMRC sent the trader a Surcharge Liability Notice for this sum and extended the surcharge liability period. The appellant has appealed against this surcharge.

5.12 In the circumstances HMRC levied no surcharges for the periods ending 30 April 2011 and 31 July 2011 although they could have done so. Thus the Appellants benefitted financially to that extent.

5.13 It has been necessary for the Tribunal to consider this history because if there is any error in levying any of the surcharges or if the appellant has a reasonable excuse for the late payments in the earlier periods this could have the effect of reducing the surcharge percentage used to calculate the surcharge that is being appealed.

5.14 HMRC offer a Time To Pay system for taxpayers who anticipate having difficulty making payment by the due date. If the taxpayer contacts HMRC before the due date for payment then no surcharge will be levied. The appellant did avail himself

of this facility but on each occasion contacted HMRC after the due date for payment so a surcharge was levied.

## **6. Appellant's submissions**

5 In a letter to HMRC dated 9 January 2013 the appellant writes about the surcharge of £603.42 levied in respect of the late return for the period ended 31 October 2012 (see paragraph 5.9 above). The letter includes the following:

“As you will see from our records we did submit the return on time; it was just that when the payment was due we did not have enough funds to make our payment in full.”

10 7. In a letter to HMRC dated 24 June 2013 the Appellant writes “We would be grateful if you could please consider our appeal against this surcharge, as we did not know until start of business on the 13<sup>th</sup> June, that our payment had not been taken, we manually transferred the due amount £3,908.00 at 8.49 a.m. that morning plus £203.42 in respect of a previous surcharge.”

15 HMRC regarded this letter as a request for review. They wrote to the appellant on 28 August 2013 saying that they could not accept that the appellant had a reasonable excuse for the late payment.

8. In the notice of Appeal dated 20 September 2013 the appellant makes similar remarks.

## **20 9. HMRC submissions**

The appellant has been in the default surcharge regime from period 01/11 onwards. Prior to the period subject to this appeal six earlier Surcharge Liability Notices had been issued. The potential financial consequences resulting from further defaults which are advised in the Notices were therefore known to the appellant.

25 HMRC's records show that the period 04/13 Direct Debit payment failed.. The Direct Debit was returned unpaid by the bank marked “refer to payer”.

On submitting the period 04/13 VAT return the appellant would have received an acknowledgement which stated:

30 “The tax due as declared on this return £3,908 will be debited from your bank account on 12/06/13. If you have submitted this VAT Return on behalf of the VAT registered entity you must print this acknowledgement and present to the account holder/ authorised signatory of the account prior to the stated Direct Debit collection date.”

The directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon HMRC contend that the appellant did not take appropriate or  
35 sufficient steps to ensure that it met its VAT payment obligations

Insufficiency of funds is excluded from providing reasonable excuse for a default by Section 71 (1) (a) of the VAT Act 1994.

## **10. Decision**

5 It is clear to the Tribunal that the Appellant has on a number of occasions failed to submit its VAT returns and /or accompanying payments within the time periods laid down. The surcharge of £586.20 that has been levied by HMRC in respect of the period ended 30 April 2013 has been correctly calculated as 15% of the tax due of £3,908 as reported by the Appellant on its VAT return for the period. The appellant was aware of the amount due and the date the direct debit would be collected. It was  
10 his responsibility to ensure that sufficient funds were in his account to meet the payment on that date. The legislation is clear that lack of funds does not constitute a reasonable excuse for the late payment. The surcharge at a rate of 15% is the result of an accumulation of previous failures and not just the failure in respect of the return for the period ending 30 April 2011. The appellant has made no submissions in respect of  
15 any reasonable excuse for the late payments for the earlier quarters. The Tribunal finds that as no reasonable excuse for the late payments in any of the periods has been established it must dismiss the appeal.

6. 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  
20 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.

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**PETER R. SHEPPARD  
PRESIDING MEMBER**

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**RELEASE DATE: 23 December 2013**