



TC05854

Appeal number: TC/2015/07013

VAT – penalties – assessments – failure to notify underassessment – whether payment into HMRC bank account constitutes notification - no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SILVERGATE SUPPORT SERVICES LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE FAIRPO
 MS REBECCA NEWNS**

Sitting in public at Fox Court on 9 June 2016

Mr Zigah, director of the Appellant

Ms Brown, presenting officer for HM Revenue and Customs, for the Respondents

DECISION

Introduction

5 1. This is an appeal against penalties raised under paragraph 2 of Schedule 24, Finance Act 2007, in respect of an underassessment in the appellant's VAT returns for the periods 06/13, 09/13, 12/13, 03/14, 06/14, 09/14 and 12/14. The penalties raised are as follows:

- (1) 06/13 - £577
- 10 (2) 09/13 - £742
- (3) 12/13 - £125
- (4) 03/14 - £787
- (5) 06/14 - £401
- (6) 09/14 - £856
- 15 (7) 12/14 - £981

Background

2. The appellant provides cleaning facility management and registered for VAT with effect from 8 March 2013.

20 3. No VAT returns were filed by the appellant for the periods in question and so the respondents ('HMRC') raised assessments for each period as follows:

- (1) 06/13 - assessment for £434 issued on 16 August 2013
- (2) 09/13 - assessment for £341 issued on 15 November 2013
- (3) 12/13 - assessment for £346 issued on 12 February 2014
- (4) 03/14 - assessment for £396 issued on 16 May 2014
- 25 (5) 06/14 - assessment for £486 issued on 15 August 2014
- (6) 09/14 - assessment for £554 issued on 14 November 2014
- (7) 12/14 - assessment for £630 issued on 13 February 2015

30 4. Payments of VAT had been made in respect of each period; these payments were in excess of the assessments but less than the amount eventually found to be due (see summary below).

5. HMRC arranged to visit the appellant on 8 April 2015. During that visit, Mr Zigah confirmed to HMRC that no returns had been submitted as he had been unable to get online to do so and had not received an activation code despite attempts to do so.

6. Following the visit, on 10 April 2015, HMRC wrote to the appellant to confirm the VAT due for the periods 06/13 to 03/15 inclusive, and advising that the appellant should contact the HMRC Online Services Helpdesk for assistance with filing online returns.

5 7. With assistance from HMRC by telephone, the appellant's VAT returns were eventually filed online on 15 May 2015 (for the 06/13, 12/13, 06/14, 09/14 and 12/14 periods) and 18 May 2015 (for the 09/13 and 03/14 periods).

8. On 25 June 2015 HMRC advised the appellant that penalties would be issued as an underassessment of VAT had occurred and the appellant had not advised HMRC
10 of the underassessments within 30 days of the assessments being issued. The penalties were issued on 14 August 2015.

9. The penalties were calculated on the basis that there had been a prompted disclosure, allowing the maximum reduction for a prompted disclosure to 15% of the under-assessed tax.

15 10. HMRC considered special reduction but concluded that no special circumstances existed as it was considered that the appellant had had sufficient time before the VAT visit in April 2015 to resolve problems and file returns.

Appellant's evidence and submissions

11. Mr Zigah explained that there had been considerable difficulties in filing VAT
20 returns online; initially, he had thought it was because they had not received the activation code. Subsequently, the problem was that the business was on the flat rate scheme and he could not access the flat rate scheme return when attempting to file online.

12. Mr Zigah explained that he had called HMRC for assistance on a number of
25 occasions, because the business was a new registrant and they had little experience of dealing with VAT matters. He had dealt with VAT returns for another company previously but, unlike the appellant, that company was not on the flat rate scheme and returns were filed on paper. He had also written to the eCustomer Support Team asking for assistance. No response had been received from HMRC. Mr Zigah had
30 checked the HMRC website for assistance, as the telephone answering message had suggested that he should do so, but found it very confusing at the time.

13. When the first filing date, 7 August 2013, arrived, the appellant had still had no response from HMRC despite sending letters asking for activation instructions.

14. The appellant received an assessment for £434.00 of VAT dated 16 August
35 2013 in respect of the 06/13 period as no return had been filed. The assessment noted that if the appellant did not draw any underassessment to HMRC's attention within 30 days, they may be liable to a penalty and interest. The appellant noted that there was no address for correspondence on the assessment.

15. The assessment was followed by a letter dated 4 September 2013 from HMRC's Debt Technical Office confirming that the assessment had been issued and asking the appellant to make payment immediately.
16. The appellant responded to the letter from HMRC Debt Technical Office on 13 September 2013, explaining that they had been unable to file the VAT return as a result of technical difficulties, and that they had written to the technical team with no response. That letter also confirmed that the VAT due had been calculated as £2,900.09. This amount was paid to HMRC on 17 September 2013.
17. On the next filing date, 7 November 2013, the appellant was still unable to file returns online. A second assessment was received from HMRC, for £341.00, dated 15 November 2013.
18. Another letter was received from the Debt Technical Office, demanding payment of the £341 assessed.
19. On 20 November 2013 the appellant wrote again to HMRC Debt Technical Office, as this was the only address that they had for HMRC and the assessment had no address or telephone number to contact HMRC. The letter explained that they had received another assessment, they were still having problems with online filing, and confirmed that the appellant had paid VAT of £3,832.46 to HMRC on 6 November 2013.
20. Following this, and having had no response to either letter to HMRC, nor to repeated telephone calls to HMRC to try to resolve the issue with online filing, Mr Zigah explained that they had concluded that the reasonable thing to do was to make calculate the VAT due and make payment of that VAT to HMRC to ensure that there was no potential loss of revenue.
21. As returns had still not been filed, further assessments were received, still with no address or telephone number to contact VAT, and so Mr Zigah submitted that it was virtually impossible to comply with the request in those assessments to notify any underassessment.
22. Mr Zigah noted that HMRC have described the payments made as being 'payments on account'; he disputed this, as he considered that both the letters made it clear that the payments were payments of VAT which had been calculated as due and not payments on account. Further, if HMRC had considered the first payment to be a payment on account, the second letter requesting payment of £341 would have been unnecessary as the amount paid in September would have covered the amounts in both assessments. He considered that it was reasonable for him to have assumed that the first payment had been accepted accordingly.
23. In January 2015 a letter had been received from HMRC advising of a large credit on the account; Mr Zigah explained that this letter appeared to be irrelevant as he knew that payments had been made.

24. Mr Zigah submitted that, at the date of the VAT visit, the appellant was up to date with all VAT payments. All that was missing were the returns, as a result of the difficulties filing online. The VAT visit had identified only two errors: the wrong flat rate had been used because the appellant had failed to remove the first year discount when it ended, and an invoice had been incorrectly dealt with at the beginning.

25. Mr Zigah submitted that, if HMRC had not waited over a year and a half to explain what was happening and that notify him that an unallocated credit was building up on the account, the problems would have been resolved much earlier.

26. Following the VAT visit, once telephone assistance was finally obtained, Mr Zigah noted that it took two days for HMRC to resolve the issues so that he could file the returns. Accordingly, he submitted that the technical problems he had encountered were clear problems given that it took HMRC themselves some time to find the answer.

27. As soon as the difficulties with online filing were resolved, when he finally managed to get assistance from HMRC, all returns were filed and the position brought up to date.

28. Accordingly, Mr Zigah submitted that all reasonable attempts had been made to try and deal with VAT: over £28,000 had been paid to HMRC even though the appellant could not file VAT returns online. Attempts had been made to contact HMRC by letter and telephone, with no response. Accordingly, in frustration, he had done what a reasonable person would do: that is, calculate the tax due and pay what was owed until the problem was resolved.

29. In the circumstances, he submitted that he had taken reasonable steps to notify HMRC that the assessments were too low by firstly writing to Debt Technical Office on two occasions and subsequently by continuing to make payments of the VAT due for each period. As such, there was no potential loss of revenue and the penalties should be cancelled.

HMRC evidence and submissions

30. For HMRC, Ms Brown agreed that payments had been made but it was submitted that, without the associated return or any other notification from the taxpayer, these were simply payments on account and could not be regarded as constituting notification from the taxpayer to HMRC that the central assessment was too low in each period.

31. Although the penalties had been reduced for cooperation and assistance, it was submitted that the penalties should not be cancelled completely as the appellant had had plenty of time between registration in 2013 and the VAT visit in 2015 to resolve the problems with online filing. Mr Zigah had failed to address the problems and had not, for example, responded the letter sent to him in January 2015 advising him that the business was accumulating surplus credit.

32. Ms Brown noted that the HMRC website contains substantial information on how to register for online submission of returns, and information on how to submit those returns. It was submitted that there are a number of frequently asked questions on the website which cover the issues raised by the appellant with regard to online filing when on the flat rate scheme. There is also an online services helpdesk which provides assistance if problems are encountered.

33. It was submitted that it is not HMRC's responsibility to notify taxpayers of their liability; statute places the obligation on taxpayers to comply with the requirements of tax law as to notification and filing.

10 **Relevant law**

34. Paragraph 2 of Schedule 24, Finance Act 2007 provides (as relevant):

2—

(1) A penalty is payable by a person (P) where—

15 (a) an assessment issued to P by HMRC understates P's liability to a relevant tax, and

(b) P has failed to take reasonable steps to notify HMRC, within the period of 30 days beginning with the date of the assessment, that it is an under-assessment.

20 (2) In deciding what steps (if any) were reasonable HMRC must consider—

(a) whether P knew, or should have known, about the under-assessment, and

(b) what steps would have been reasonable to take to notify HMRC.

25 (3) In sub-paragraph (1) "relevant tax" means any tax mentioned in the Table in paragraph 1.

A "relevant tax" includes VAT.

Findings of fact

35. We find as a fact that the appellant's VAT returns for the periods in question were filed late.

36. We find as a fact that the appellant wrote to HMRC on 13 September 2013, within 30 days of the assessment issued on 16 August 2013, for the period 06/13 and that the letter advised HMRC of the amount that had been calculated as due for the period 06/13. That amount was greater than the amount stated in the assessment.

35 37. We find as a fact that the appellant wrote to HMRC on 20 November 2013, within 30 days of the assessment issued on 15 November 2013, for the period 09/13

and that the letter advised HMRC of the amount that had been calculated as due for the period 09/13. That amount was greater than the amount stated in the assessment.

38. We find as a fact that the appellant did not write to HMRC within 30 days of receipt of the subsequent assessments.

5 **Decision**

39. For each of the VAT periods under appeal, the taxpayer received a notice of assessment from HMRC as a result of a failure to file a VAT return online. It is common ground that these notices of assessment were each underassessments of the VAT liability for the relevant periods.

10 40. Under paragraph 2(1), Schedule 24, Finance Act 2007, a taxpayer is liable to a penalty if it fails to take reasonable steps to notify HMRC within 30 days of the date of an assessment to VAT by HMRC that such assessment is an underassessment.

15 41. For the first two periods, 06/13 and 09/13, Mr Zigah wrote to HMRC and informed them in each case that the amount of VAT due for the relevant period was a specific amount; in each case, the amount stated was more than the amount of the assessment. We take the view that this constitutes notification to HMRC that each of these assessments was an underassessment.

20 42. Accordingly, we find that Mr Zigah did take reasonable steps to notify HMRC of the underassessment within the time allowed by statute and so the taxpayer is not liable to a penalty for those two VAT periods.

43. For the remaining VAT periods in question, there was no correspondence between the taxpayer and HMRC as to the underassessments. Instead, Mr Zigah arranged for amounts to be paid in respect of VAT.

25 44. We appreciate Mr Zigah's frustration at the perceived lack of response from HMRC but we consider that "reasonable steps to notify HMRC" of an underassessment requires that the taxpayer make it clear to HMRC that there has been an underassessment.

30 45. We do not consider that payment of an amount to an HMRC bank account alone can constitute notification of an underassessment. We consider that notification requires a positive action to bring to HMRC's attention that the amount of VAT due for a particular period is more than the amount assessed. A payment into a bank account does not bring attention to an underassessment and could, for example, have been made in error.

35 46. The appeal is therefore upheld in respect of the penalties for the first two VAT periods (06/13 and 09/13) but dismissed in respect of the remaining periods.

47. 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

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RELEASE DATE: 4 MAY 2017