



TC03266

Appeal number: TC/2013/06012

Value Added Tax – Penalty for late payment of Tax; whether payment made by Billpay at 7 pm on day payment due but not received by HMRC until the following day constituted reasonable excuse – no. No reasonable excuse offered for failures in earlier quarters; appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TINSLEY ELECTRICAL 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 2 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 19 August 2013 with enclosures, and HMRC's paper Hearing Submission and enclosures received on 16 October 2013. 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

Introduction

1. This is an appeal against a penalty of £303.71 for the late submission of payment for the appellant's VAT return for the period ending 31 March 2013.
2. The appeal was made outside the time limit but as no objection was received from HMRC the Tribunal decided to allow the appeal to be made out of time and continued to consider the appeal.

Statutory Framework

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.
4. Regulation 25A(3) requires the provision of returns using an electronic system.
5. Regulation 40 requires a person making a return to pay any amount due by the required date.
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* UKFTT 20 (TC) TC 0335 which are set out below.

“20The 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”

5 *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.

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

Case law

15 *Energys Holdings UK Ltd* UKFTT 20 (TC) TC 0335
Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC).

Facts

20 10. In a letter dated 25 February 2013 the appellant requested a review of the default surcharge levied for late payment of its VAT return for the period ending 31 December 2012. HMRC reviewed the decision and in a letter dated 2 April 2013 they agreed to cancel the default for the period but warned that the surcharge liability period did not expire until 30 September 2013. They enclosed an information sheet intended to help the appellant to avoid future default surcharges.

25 11. In a letter dated 7 June 2013 the appellant requested a review of the default surcharge levied for late payment of its VAT return for the period ending 31 March 2013. HMRC reviewed the decision and in a letter dated 16 July 2013 they confirmed the surcharge and said they consider that no reasonable excuse had been given for the lateness of the VAT return payments.

Appellant's submissions

35 12. In their Notice of Appeal to the Tribunal the appellant states “On 7th May at around 7pm I submitted my payment of VAT as normal on 7th of each month due as is requested on line. I then received a letter saying I would have to pay a penalty of £303.17. I wrote back to you as I could not understand why I faced this penalty as I have been paying online on the 7th of the month on a regular basis. I then received a second letter stating that you received my electronic payment late on 8th May. I do not understand this as it was submitted on the 7th May. It was not a bank holiday or a weekend so this payment should have been received by you on the due date 7th May”.

40 13. It should be observed that the appellant has wrongly assumed that the Tribunal is part of HMRC whereas it is an entirely independent body, and does not receive taxes.

HMRC's submissions

14. HMRC state that the VAT return and payment for the period to 31 March 2013 was due by 7 May 2013. In fact the return was received electronically on 8 May 2013 and the tax was received via an electronic bill payment on the same day.

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15. A schedule in the papers provided to the Tribunal shows that the appellant has a history of late payments starting with the period ended 31 December 2011. There were four late payments in respect of six returns. 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%. HMRC calculate the penalty for the quarter ended 31 March 2013 HMRC as £303.17 being 10% of the tax unpaid at the due date of £3,031.78 as shown on the appellant's VAT return for the period.

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16. The appellant sent his VAT returns for periods on time for the periods 1 October 2011 to 31 December 2012. However payment was made late in each of the quarters ending 31 December 2011, 30 June 2012 and 30 September 2012.

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17. HMRC submit that the appellant was sent and should have received surcharge notices for these defaults and should be aware from the advice on them of the financial consequences of any further default.

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18. HMRC say that information is provided on their website including the specific due date for the period 03/13 , and advice when using Billpay.

19. HMRC request the appeal be dismissed.

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The Tribunal's observations

20. 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.

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21. 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 11 above. The Tribunal does not consider that a penalty of 10% of the tax due (£303.71) 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.

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22. 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.

5 23. Section 71(1)(a) of the VAT Act 1994 specifically excludes insufficiency of funds from being a reasonable excuse for the late payment of VAT.

24. The only excuse the appellant has offered for the lateness of the payment is that he is in the habit of making payment on the 7th of the month when the VAT payment is due. This has been successful in the past so he cannot understand why it failed this time. The Tribunal observes that the appellant's payment was one day late for both
10 the VAT return for the period ended 31 December 2011 and the VAT return for the period ended 30 September 2012. This should have indicated to the appellant that leaving payment by Billpay to the last possible moment was not reliable and that further failures could result in a penalty.

25. It is clear to the Tribunal that on a number of occasions the appellant has failed
15 to submit its VAT return payment within the time period laid down even if that failure was only by one or two days. The surcharge of £303.71 that has been levied by HMRC in respect of the period has been correctly calculated as 10% of the tax due of £3,031.78 as reported by the appellant on its VAT return for the period. For a taxpayer to leave payment until late on the day payment is due is brinksmanship and
20 courts disaster. On this occasion the appellant's payment did not reach HMRC until the next day and the Tribunal finds that as no reasonable excuse for the late returns and/or payments has been established it must dismiss the appeal. The surcharge of £303.71 has been calculated at a rate of 10% which rate is the result of an accumulation of previous failures and not just the failure in respect of the return for
25 the period ending 31 March 2012.

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
30 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**

RELEASE DATE: 24 January 2014

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