



TC05232

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Appeal number: TC/2016/01293

*VAT – late submission of VAT return and payment of VAT due on return -
whether reasonable excuse for late submission of return and payment due
on return - No.*

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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ALEXIA ZIMBLER

Appellant

- and -

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

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

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**The Tribunal determined the appeal on 1 July 2016 without a hearing under the
provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax
25 Chamber) Rules 2009 (default paper cases) having first read the undated Notice
of Appeal received 14 March 2016 with attachments, and HMRC's Statement of
Case dated 23 March 2016 with attachments. The Tribunal wrote to the
Appellant on 22 April 2016 indicating that if she wished to reply to HMRC's
Statement of Case she should do so within 30 days. A reply dated 20 May 2016
30 was received and was considered by the Tribunal.**

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DECISION

1. Introduction

This considers an appeal against a default surcharge originally in the amount of £547.65 but subsequently reduced to £446.86, levied by HMRC for the late submission and payment by the due date of 7 April 2015 of the appellant's VAT return for the period ended 28 February 2015.

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 seven days for those paying electronically, and a further three 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 *Enersys Holdings UK Ltd*. **Error! Hyperlink reference not valid.** 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.

3. Case law

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

Energys Holdings UK Ltd. **Error! Hyperlink reference not valid.**] UKFTT 20 (TC)
TC 0335

4. The appellant’s submissions.

On 29 April 2015 the appellant wrote to HMRC Default Surcharge Appeals team, she wrote

“I received a letter today (letter dated 17.4.2015) requiring me to pay my VAT & an additional 15% surcharge. I wish to raise the following matters:

1. The assessment of VAT was too high. As a criminal barrister my income fluctuates & this quarter my gross income was much less than you anticipated.
2. The letter states I have a ‘surcharge period’ which was previously notified. Could I please have a copy of the notification for my accountant?
3. The letter states the surcharge is discretionary “you may have to pay”. Although my VAT was late I have never failed to submit a return over the last 20 years so I ask if you would consider waiving the surcharge on this occasion?”

5. The appellant did not lodge the standard Notice of Appeal form but instead on 26 February 2016 wrote a lengthy letter addressed somewhat confusingly

“FAO: HM Revenue & Customs First-tier Tribunal (Tax)....”

The first page of the letter includes:

“I am writing to appeal against a decision of HMRC Appeals and Reviews dated 12.10.2015. I have been provided with a copy of this letter and was unaware of its existence until a conversation with Liz Sinclair on the 22.2.2016.

As of the 29th December 2014 (according to records provided to me by HMRC) I was up-to-date with my tax and VAT. I have been self-employed since 1994 and am generally very organised with my tax affairs. In March 2015 (I believe) I was asked by chambers to take over the VAT reclaiming – I recall speaking to someone at HMRC to check that this was OK and whether I needed to register anything or write to them to state this was happening. I was advised that this wasn’t necessary and that I

was entitled to become the nominated member of chambers and utilise one of the special accounting methods.

Because of taking over this role I was delayed in submitting my VAT return and it wasn't submitted until mid-April 2015. I subsequently received a letter stating that a surcharge had been imposed amounting to £574.65. Again I called HMRC to find out how I could appeal against this and was told I needed to write to a particular address (which I cannot now recall). This I did – in manuscript – explaining my situation and asking for the surcharge to be lifted. I received no response. I called HMRC again asking what I should do and was told that I should wait for a response before doing anything else (including paying my VAT). This I did but heard nothing.”

The next five paragraphs concern the submission of three VAT returns subsequent to the one which is the subject of this appeal. They include complaints about delays by HMRC in replying to letters, and to the appellant's account being frozen by HMRC. The details are given in over a page of text but the Tribunal has not set them out in this decision because they all relate to events which happened after the late submission and payment of the return for the period which is the subject of this appeal. Therefore they cannot be considered as providing a reasonable excuse for the late submission of a return for an earlier period.

The letter includes reference to an e-mail received by the appellant from HMRC on 8 October 2015 which mentions there had been undelivered mail.

The last paragraphs of the letter state

“I am therefore appealing the decision to lift the first surcharge and I am appealing out of time because I had no idea that the letter had ever been sent. I am also formally appealing the second surcharge imposed in July 2015. I only knew about this after seeing the outstanding amount on my online account when I submitted my September 2015 return. I had not received any further documents or letters and had no idea what was going on. It seems that no matter who I called or who I wrote to nothing happened except I was charged ever increasing fines. I did not submit a VAT return in June because I was told to do nothing when I spoke to someone in May 2015

Please could this letter be lodged as a formal appeal in relation to the first surcharge and a first dispute as to the second surcharge.”

6. The appellant sent an e-mail to the Tribunal on 20 May 2016 attaching a letter detailing “Further and final submissions”.

This contained 8 numbered paragraphs

In Paragraph 1 it is submitted that in this case HMRC did not give proper consideration to the appellant's request and this is borne out by their actions and the evidence.

In paragraph 2 it is submitted that HMRC were aware that the appellant took her tax responsibilities seriously.

In paragraph 3. The appellant points out that a failure in period 08/14 does not enable HMRC to disregard the reasons provided for the delay in 2015.

In paragraph 4 the appellant wholly disputes the contention by HMRC that she has a history of submitting late returns.

Paragraphs 5, 6 and 7 refer to matters which occurred after the late submission of the return. Paragraph 7 also refers to an appeal against a subsequent surcharge for a later period.

Paragraph 8 states

“I am disappointed that notwithstanding the delays and problems caused by HMRC in my case, their response to my appeal is over confident and dismissive. I do not accept that they have refuted my claims and I maintain that I have provided a reasonable excuse for the initial late payment and sufficient evidence thereafter to support my contention that my case was not given proper consideration. I submit that the appeal be granted and an indication be given that the second refusal also be overturned.”

7. HMRC's submissions

HMRC state that the VAT return for the period to 28 February 2015 was due by 7 April 2015. In fact the return was received electronically on 29 April 2015 so was twenty two days late. In respect of payment HMRC say that as a direct debit arrangement was in place an additional 3 working days is allowed so payment was due by 10 April 2015. In fact payment was collected 3 working days after receipt of the late return and that was by direct debit on 5 May 2015 so was late.

8. A schedule in the papers provided to the Tribunal shows that in four previous quarters the appellant submitted a late return/payment and has been in the default surcharge regime since period 05/2013.

8.1 The first default was in respect of the period ended 31 May 2013 when the return due by 7 July 2013 was received eighteen days late on 25 July 2013. This brought the appellant into the default surcharge regime. HMRC issued the appellant with a surcharge liability Notice V165 which warned that future failures may result in a default surcharge being levied. Being a first default no surcharge was levied.

8.2 The second default was in respect of the VAT return for the following period which was due by 7 October 2013 but was received 59 days late on 5 December 2013. HMRC issued a surcharge document V164 notifying a surcharge rate of 2%. Where a surcharge is calculated and would result in a surcharge of less than £400 HMRC normally waive the surcharge. In this case as 2% of the tax due of £2,480.09 is less than £400 HMRC waived the surcharge but notified the appellant that the surcharge rate would be 5% in the event of a further default.

8.3 The third default was in respect of the period ended 31 May 2014. The VAT return was due by 7 July 2014 but was received 15 days late on 22 July 2014. The surcharge again fell below £400 so HMRC again waived it and again issued a

surcharge document V164 advising that the surcharge rate had now increased to 10% of the tax due in the event of a further default within the default period.

8.4 The fourth default was in respect of the following period which ended on 31 August 2014. The VAT return was due to be submitted by 7 October 2014 but was received by HMRC 14 days late on 21 October 2014. On this occasion under the terms of the VAT Act 1994 Section 59 (4) HMRC decided to levy the minimum surcharge of £30 which the appellant paid. HMRC issued a surcharge document V166 which also notified that a future default within the default period would be levied at a rate of 15% of the tax due.

8.5 The fifth default, the subject of this appeal, was in respect of the period ended 28 February 2015. The return was due to be submitted by 7 April 2015 but was received by HMRC 22 days late on 29 April 2015. HMRC issued a surcharge notice V166 on 29 April 2015 using an estimated figure of £3,651 for the tax due and levying a surcharge of £547.65 (15% of £3,651 is £547.65). When HMRC processed the actual return this showed a lower figure of £2,979 for the tax due. 15% of £2,979 is £446.86. HMRC issued a surcharge for the reduced sum. On 12 October 2015 HMRC wrote to the Appellant confirming that the surcharge of £547.65 which had been calculated using the £3,651 estimated figure had been cancelled but the reduced surcharge of £446.86 remained.

9. HMRC point out that from the beginning of 2013 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

Problems paying your VAT?
If the person who normally does your VAT return will be absent, make alternative arrangements.

If you can't pay the full amount on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether.”

10. HMRC state that 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).

11. HMRC contend that the appellant, having received surcharge notices should have been aware of the financial consequences of any further default.

12. In respect of direct debits HMRC say these are normally taken three working days after the due date but where a return is submitted after the due date the direct debit is taken three working days after submission.

13. HMRC contend that the additional responsibilities which the appellant had undertaken to do on behalf of her chambers do not provide a reasonable excuse for the late submission of the 02/15 return. The appellant is obliged to ensure that her own affairs are kept up to date no matter the additional responsibilities which may be undertaken.

14. HMRC acknowledge that some correspondence was returned undelivered causing the appellant's account to be locked and which then prevented the appellant from submitting her 11/15 return. However they contend that this did not affect the earlier period which is the subject of this appeal and that the appellant did receive the surcharge notice for the period under review.

15. HMRC consider that the return and payment were made late and no reasonable excuse for the late payment has been established and request that the appeal be dismissed and the surcharge upheld.

16. HMRC refute some of the appellant's claims in respect of advice given in respect of returns subsequent to the return which is the subject of this appeal. The Tribunal has not set out the details because whether the advice was given or not, and whether it was good advice or bad advice, it cannot provide an excuse for the late submission of a return which was submitted before the advice was allegedly given.

17. 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.

18. 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 17 above. The Tribunal does not consider that a penalty of £446.86 which is 15% of the tax due which is the culmination of previous 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.

19. The VAT Payment of £2,979 was received late by direct debit on 5 May 2015. The Act provides that a person is to be regarded as being in default if he or she fails to pay by the due date the amount of VAT shown on the return as payable by him or her. The appellant defaulted in respect of this period. The question for the Tribunal is whether the appellant had a reasonable excuse for these failures as contemplated by Section 59 (7) VAT Act 1994.

20. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the appellant's control.
21. In her letter to HMRC dated 29 April 2015 the appellant accepts that her VAT return was late.
22. The complaints in her letters dated 26 February 2016 and 20 May 2016 about delays by HMRC refer to delays in responding to the appellant's enquiries about why a surcharge had been levied. These must have occurred after the tax return had been submitted late and so cannot constitute a reasonable excuse for the return being late.
23. The Tribunal acknowledges that HMRC publish guidance literature advising taxpayers to ensure that payments get to HMRC's account on time. In the Tribunal's view the appellant having completed returns for over 20 years should have been aware of these matters.
24. It seems to be agreed that some mail to the appellant was returned undelivered to HMRC. No precise details of what was returned undelivered have been provided to the Tribunal by either party. The appellant refers to not receiving any of the "relevant default notices". HMRC state that "some correspondence was returned undelivered" HMRC state that this ultimately caused the appellant's account to be "locked" which prevented the appellant from submitting the 11/15 return. However HMRC say "this did not affect the period under appeal."
25. The Tribunal observes that it is the taxpayers responsibility to submit returns on time (The VAT Regulations 1995 Regulation 25 (1)). If a taxpayer submits a return late and a default surcharge notice in respect of that late submission is not delivered it can hardly be claimed that that non-delivery provides the taxpayer with a reasonable excuse for submitting the next return late.
26. The Tribunal considers that the appellant's taking on additional responsibilities at her chambers does not provide a reasonable excuse for the late submission of her VAT return which had the effect of causing HMRC to activate the direct debit later than the due date for payment.
27. The fact that the appellant took her responsibilities seriously is what is expected of anyone completing a return to HMRC. It could be argued that if a taxpayer was taking their VAT return seriously they would submit it and payment in time.
28. The fact that a taxpayer has been submitting returns for over 20 years and has never asked for a payment to be delayed or deferred does not establish a reasonable excuse for a late return.
29. These cannot be considered to be unexpected, unforeseeable or something that is out of the appellant's control. Thus the appellant has not established any reasonable excuse for her failure to submit her VAT return and VAT payment for the period ended 28 February 2015 on time.

30. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 17 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 after the adjustment explained above at paragraph 8.5 has calculated the surcharge accurately as £446.86 being 15% of the outstanding tax of £2,979 at the due date in respect of the appellant's VAT return for the period ended 28 February 2015.

30. In the Tribunal's opinion the appellant has not put forward any circumstances that occurred that were unexpected, unforeseeable or out of her control. The appellant knew the dates her VAT return and payment were due and should have made provision accordingly. The appellant has established no reasonable excuse for either the late submission of her VAT return or for the late VAT payment for the period ending 28 February 2015. Therefore the appeal is dismissed and the surcharge upheld in the reduced amount of £446.86.

31. The appellant has included in her letter of 26 February 2016 what she terms a formal appeal against a further default surcharge for the late submission of her VAT return for the period ended 31 May 2015. In her letter of 20 May 2016, having by then received the result of HMRC's review dated 25 April 2016 the appellant confirms that she does wish to appeal the later default surcharge and makes some submissions in respect of why she considers she has reasonable excuse for the return being late. The Tribunal observes that HMRC have been given no opportunity to respond to the appellant's comments following the review. In addition it appears to the Tribunal that the appellant may have received surcharges for even later periods. In the circumstances if the appellant does wish to go ahead with an appeal against the second surcharge (and/or subsequent surcharges) it is suggested that she should lodge an appeal using a Notice of Appeal form which can be obtained from HM Courts & Tribunal Service. If that appeal does go ahead it would be helpful to the Tribunal if the appellant gives more precise details in respect of exactly which surcharges are being appealed and HMRC gives precise details of which correspondence was returned to them undelivered.

32. 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: 6 July 2016