



TC02846

Appeal number: TC/2013/02059

Value Added Tax – Surcharge for late submission of VAT return; whether reasonable excuse – no; appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BINAP LIMITED

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R SHEPPARD FCIS,
FCIB, CTA, ATII
SCOTT A RAE LLB,WS**

Sitting in public at George House, Edinburgh on 23 August 2013

John Linklater and Derek Copeland, CA for the Appellant

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

Introduction

1. As a preliminary matter, Mrs McIntyre for HMRC confirmed that the respondents withdrew their objections to the appeal proceeding on grounds of it having been out of time. The Tribunal confirmed acceptance of that position and proceeded to hear the substantive appeal.

2. This concerns an appeal to the Tribunal dated 12 March 2013 made by the appellant against a surcharge initially of £1,749.75 but later reduced to £1,722.90 assessed by HMRC. The appellant believed that the surcharge was for the late submission of payment for the appellant's VAT return for the quarter ended 31 October 2010 but as became apparent during the hearing it was for the late submission of the return.

Statutory Framework

3. The VAT Regulations 1995 Regulation 25(1) contains provisions for the making of returns.

4. 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.

5. When the first default occurs a surcharge liability notice is issued which specifies a surcharge period of 12 months beginning on the date of the notice and ending 12 months later assuming no further defaults occur. If a further default does occur then a surcharge of 2% of the tax due for the period may be levied and the period of the notice is extended to one year from that default. Further defaults within the surcharge period can give rise to increasing surcharges of 5%, 10% and a maximum of 15% of the tax due, and the period of the surcharge notice is extended to one year from each default. If a taxpayer makes all returns and payments on time for one year within the period of the surcharge liability notice he will not receive a surcharge during that period and will be removed from the surcharge system. If he subsequently defaults the whole process starts again.

6. Section 59(7) covers the concept of a person having reasonable excuse for failing to submit a VAT return or payment therefor on time.

Facts

7. The appellant supplies electrical testing for compliance and safety purposes and is based in Edinburgh.

Appellant's submissions

8. Mr Linklater was originally the sales director of the company. The financial side was looked after by another director, Scott Mitchell, who had become ill and was hospitalised for a considerable time. In effect Mr Linklater was now acting as
5 managing director. The company had made a series of defaults which explains why the surcharge rate was at the maximum of 15%. It had also got into financial difficulties. Mr Linklater submitted that some of this was down to the fact that Mr Mitchell's health problems had not allowed him to give sufficient attention to the company's affairs. When asked whether the company had thought of submitting this
10 as a reasonable excuse for the earlier failures Mr Linklater candidly, and the Tribunal thinks accurately, said that they had thought of it but had considered it would not be acceptable as a reasonable excuse because the company had other directors who, it would be argued, could have stepped in.

9. Mr Linklater had had to take over managing the company which he immediately
15 discovered was perilously close to failure. There was a debt of £53,000.55 to HMRC recorded in a letter from HMRC to the appellant dated 15 December 2010. It was explained that a payment of £3,000 had not been included in this figure. Mr Linklater considered this sum formed part of a time to pay arrangement which he had agreed over the telephone with HMRC at round about that date in December 2010. He
20 considered that the arrangements covered payments by instalment of what he called the historic debt. He considered it also included three payments of £4,000 for his estimate (of £12,000) of what would be due in the VAT return for the then still current period ended 31 December 2010. Mr Linklater gave full details of what he had understood had been agreed and the instalments he thought he had agreed to pay and
25 the dates the appellant actually paid them. In view of what transpired during the hearing it is not necessary to set these out in detail in this decision except perhaps to say that the appellant was able to make all the payments by the date they say they agreed and cleared the whole debt earlier than they say they agreed to. The only criticism of the appellant in this is that they did not make a written record of what had
30 been agreed with HMRC at the time it was agreed nor did they write to HMRC to confirm what had been agreed.

Respondent's submissions

10. Mrs McIntyre for HMRC referred to a schedule in the bundle which detailed incidences of late payments and/or late returns by the appellant in the one year period
35 ended 31 December 2009 and the three months periods ended 31 March 2010; 30 June 2010, 30 September 2010 and 31 December 2010.

11. It is the surcharge that was levied for the last of these failures that is the subject of this appeal. The appellant's VAT return for the quarter ended 31 December 2010 was due to be submitted by 31 January 2011. A further seven days grace is given
40 where payment is made electronically. The return was received by HMRC on 21 February 2011 that is 14 days late. The four earlier failures had resulted in a surcharge rate of 15% of the tax due applying so an assessment of £1,722.90 was

made by HMRC, being 15% of the tax of £11,486 shown as due on the appellant's VAT return for the quarter ended 31 December 2010.

12. The original surcharge of £1,749.75 had been calculated by HMRC as 15% of their estimate of the tax due for the period and was made before the actual return was received. The adjustment to £1,722.90 was made following receipt of the actual figure.

13. Mrs McIntyre advised that HMRC had logged the call requesting time to pay but the details recorded were slightly different from what Mr Linklater had indicated. It varied as to what tax periods the instalments were for and the amounts. However she considered that there was no need to have a dispute about whether or not payment of instalments under the time to pay arrangements had been made on time because any time to pay arrangements are always made by HMRC with certain conditions and one of these is that irrespective of payments VAT returns must be submitted on time. The appellant had not adhered to this condition and so the penalty was levied for the late submission of the return. When asked whether HMRC had written to the appellant setting out the time to pay arrangements and the conditions she had referred to Mrs McIntyre said that she was unable to confirm that this had been done and had not been able to trace any such letter.

14. It was clear that this argument took Mr Linklater completely by surprise. He said he had had a number of telephone conversations with HMRC since receiving the default surcharge notice and all had led him to believe that the penalty was for late payment of the return and because he considered the appellant had adhered to the time to pay arrangements that he considered he had made with HMRC he had appealed against the penalty.

15. Mr Linklater pointed to a letter dated 12 February 2013 from HMRC to the appellant's agents. The agents, on behalf of the appellant, had requested a review of the default surcharge and explained that they considered the time to pay arrangements agreed for the period ended 31 December 2010 had been adhered to. The letter from HMRC set out the result of their review. It makes no reference at all to the return being late but does say "Whilst your comments are noted, we must advise that insufficiency of funds at the due date is not usually regarded as a reasonable excuse for default surcharge purposes".

Decision

16. The appellant was clearly and understandably under the impression that the surcharge was for the late payment of the return. Correspondence from HMRC and telephone conversations Mr Linklater had had quite clearly suggested to him that was the reason. Mr Linklater said had it been explained to him what the penalty was actually for he would not have appealed. He quite correctly pointed out that by their misleading letter and statements HMRC had wasted everybody's time. The Tribunal agrees with the appellant. However as the appellant immediately appreciated at the hearing that does not give reasonable excuse for the failure to submit the return on time. In the absence of any written evidence of the terms of the time to pay

arrangement the provisions of Section 25(1) of the VAT Regulations 1995 must apply. A return for the period ended 31 December 2010 should have been submitted by the appellant to HMRC on line at the latest by 7 February 2011. Mr Linklater did not give any reason why the return was submitted 14 days later than that, and accepted that the penalty was due.

17. The surcharge of £1,722.90 for the quarter ending 31 December 2010 that has been assessed by HMRC has been correctly calculated as 15% of the tax due of £11,486 as reported by the appellant on its VAT return for that period. The appellant accepted that it had no reasonable excuse for the late submission of the return. Whilst in the unfortunate circumstances of this case the Tribunal has some sympathy for the appellant the legislation makes it clear that the Tribunal has to dismiss this appeal.

18. 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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**PETER R SHEPPARD
PRESIDING MEMBER**

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RELEASE DATE: 27 August 2013