



TC02969

Appeal number: TC/2012/05594

***TYPE OF TAX – VAT– late payment of part of amount due on VAT Return -
whether there was reasonable excuse - No.***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FASTAWAY SERVICES UK LIMITED

Appellant

- and -

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

Respondents

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

The Tribunal determined the appeal on 3 September 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 Letter of Appeal dated 3 May 2012, and HMRC's Statement of Case submitted on 6 June 2013 with enclosures. The Tribunal wrote to the Appellant on 19 June 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

1. Introduction

5 This considers an appeal against a default surcharge of £1,504.30 levied by HMRC for the late payment by the appellant of part of the amount due on its VAT return for the quarter ended 31 December 2011 . By a direction of the Tribunal dated 22 May 2012 the appeal was stood over until 60 days after the issue of its decision by the Upper Tribunal (Tax & Chancery Chamber) in the matter of Total Technology (Engineering) Ltd. That decision was
10 released on 29 November 2012.

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
15 certain circumstances eg by allowing a further 7 days for those paying electronically.

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
20 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. [\[2010\]](#) 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%
30 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
35 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.”*
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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 71 VAT Act 1994 covers what is not to be considered a reasonable excuse.

3. Case law

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

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

J B Steptoe CA July 1992, [1992] STC 757

4. Facts

5. Appellant's submissions

10 An undated letter from the Appellant was received by HMRC on 22 March 2012. The letter included the following:

“Back in January we had a major computer collapse here in our office and the main frame computer lost all of its data.

15 I called your office on 11 January (please see enclosed phone bill usage) and spoke to a lady, I explained that we may be late with the payment as we were awaiting a new computer to be installed and this then had to be completely reloaded with all the previous six months invoices and supplier invoices. My accountant did try to do some back up works and we tried as hard as we could to get the VAT returns on time but we were slightly late. The lady from the VAT office told me to pay £20,000 and then pay the remainder as soon as we could. I was
20 told that I would get a standard letter to say we owe a penalty payment but we had to write to you to explain that we did inform you of this major problem we had.

As a small company we always strive to pay our bill on time and this was an exception to the rule.

25 I write to ask you to reconsider this penalty bill as the VAT Office was duly informed and we tried everything we could to get the new computer system up and running and the previous six months of work loaded.”

6. A BT telephone recent usage itemised account shows that at 10.46 am on 11 January 2012 the appellant telephoned HMRC

7. HMRC's Action History confirms the telephone call and their log reads as follows:-

30 “tele call from tp other (obliterated short text) 11/01/12 10.57 Other-FAST AWAY SERVICES (UK) Limited (Dir) rtn may be late but will make pymnt this is due to computer problem being worked on approx 20k due aware ds will apply auto but will appeal. WLAS.”

35 8. On 23 March 2012 HMRC wrote to the appellant saying that they did not accept that the appellant had reasonable excuse. They said “.it would appear the facts indicate an insufficiency of funds prevented you from meeting your statutory obligations to submit your return and full payment by the due date. 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.” The letter also included a reduction in the penalty as is detailed below in paragraph 12.

5 9. On 3 May 2012 the appellant wrote to the Tribunal wrongly assuming the Tribunal was part of HMRC asking for the case to be reviewed again. The letter included the following:

10 10. “in the letter you sent to me it say that insufficiency of funds prevented me from making payment, this was never the case as I explain in the last letter I sent yourself the late payment was due to major computer collapse here In our office and the main frame computer lost all of it data therefore could not get the VAT calculation, although we tried our best to rectify the problem we was worried that the payment was going to be late so I contacted your office and was advised by a lady to pay £20,000 and make up the rest when the computer was fixed. I took the advice of the lady I spoken to and paid the £20,000 and as soon as the computer was up and running and had verification from my accountant regarding the actual amount of VAT I owed I paid the remainder.”

15 11. HMRC’s submissions

HMRC drew attention to a schedule they had provided in the bundle of papers which showed the default history of the appellant. Defaults had occurred in the periods ending 30 June 2010, 30 September 2010, 30 June 2011 and 31 December 2011. It is the last of these defaults which triggered the penalty which is the subject of this appeal.

20 HMRC submit that the appellant’s VAT return due on 7 February 2012 was submitted on 2 February 2012 but full payment was not received by HMRC until 16 February 2012. They say that a payment of £20,000 was received by the due date but the balance of £15,043.03 was not received until 16 February 2012. They have therefore on 17 February 2012 levied a default surcharge of 15% of this sum ie £2,331.45. In the letter dated 23 April 2012 in which
25 HMRC advised the appellant of the conclusion of their review. They also stated that during their review of the case they noticed the return and payment for the period ended 30 September 2011 were submitted on time so the surcharge for that period should be removed. This had the effect that the surcharge rate applying at 31 December 2011 reduced from 15% to 10% so reducing the penalty to £1,504.30.

30 12. HMRC observe that on 2 February 2012 the appellant submitted its VAT return 5 days before the due date so at that time they knew the amount that was due to be paid by 7 February 2012. Therefore no reasonable excuse for the late payment is established and the appeal should be dismissed.

13. Tribunal’s observations

35 The level of the penalties has been laid down by parliament. HMRC has applied the legislation correctly and calculated the amount of the default surcharge of £1,504.30 accurately being 10% of the amount of £15,043.03 outstanding on the due date.

40 14. 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.

15. The appellant suffered a major computer collapse which was totally unforeseen, it telephoned HMRC to advise them well ahead of the deadline for submission of the return. However by 2 February 2012 the appellant had recovered sufficiently to be able to submit its VAT return five days before the due date. Therefore on that date it knew the amount due to be paid by the deadline date of 7 February 2012. The Appellant gives no explanation as to why it did not make payment by the due date or as to why it made two payments the first of £20,000 which HMRC say was received by the due date and the second of £15,043.03 received by HMRC on 16 February 2012. The appellant is to be congratulated for overcoming its computer difficulties in order to submit its VAT return for the period ended 31 December 2011 five days before the due date. Unfortunately because of the unexplained delay of 14 days in completing payment it has not established a reasonable excuse for its late payment of the amount due on the return. The appeal is therefore dismissed.

16. 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: 2 October 2013