



TC02970

Appeal number: TC/2012/09822

*TYPE OF TAX – VAT – late submission of payment of VAT due on returns
–whether surcharge should be reduced - No. Whether reasonable excuse
for late submission of payment due on return - No.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HI TEC SIGNS LIMITED

Appellant

- and -

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

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

The Tribunal determined the appeal on 9 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 Notice of Appeal letter dated 16 October 2012, and HMRC's undated Statement of Case received by the tribunal on 18 June 2013, with enclosures. The Tribunal wrote to the Appellant on 18 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 £1746.51 levied by HMRC for the late payment by the appellant of the amount due on its Value Added Tax return for the period ended 31 May 2012. By a direction of the Tribunal dated 27 November 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 released on 29 November 2012.

10 2. Statutory Framework

15 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 7 days for those paying electronically.

Regulation 25A (3) requires the provision of returns using an electronic system.

20 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.* [2010] UKFTT 20 (TC) TC 0335 which are set out below.

25 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.*

35 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*
40 *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.

- 5 Section 71 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. [2010] UKFTT 20 (TC) TC 0335

4.The appellant’s submissions.

- 10 The appellant wrote to HMRC on 27 August 2012 requesting a review of the surcharge. They state

“The employee that normally prepared our vat return has left in april 2012 and has not been replaced, this has put me under a lot more pressure with twice the amount of paperwork to deal with.

- 15 We also wish you to review the situation because of the current economic Climate because we have reviewed all out current clients and limited account Customers to a minimum, we hold strict 30 day policy on these customers, But we cannot get aid within these terms, we cannot charge a fine or interest To late accounts as they wouldn’t pay it, or even worse they would go to some Other company.

- 20 The fact that for us to continue in business we need cash flow to keep us and All the other business’s we support going, and this fine penalises not Only us but other business’s that we give promises that we would pay them. We simply cannot afford to pay them because of the fine, as we are at our limits With our banks and our creditors.

- 25 For the reasons above we feel your surcharge of £1,746.51 is excessive and ask You to review it, given our current situation.”

5. In a letter dated 27 September 2012 to the appellant HMRC advised that the result of their review was that HMRC do not consider the appellant has a reasonable excuse for the default.

- 30 6. The appellant appealed that decision to the Tribunal. In the Notice of appeal dated 16 October 2012 the appellant makes similar points to those in the letter of 27 August 2012 set out above.

7. HMRC’s submissions

- 35 HMRC state that the VAT return and payment for the period to 31 May 2012 was due by 7 July 2012 assuming payment was made electronically. In fact the return was received on 11 July 2012, and payment was received two days later on 13 July 2012.

8. A schedule in the papers provided to the Tribunal shows that the appellant has been in the default surcharge regime from the period ended 30 November 2007. Since then it made fourteen defaults in the following nineteen quarters and has incurred thirteen surcharges. The tribunal has calculated that these total £18,811.20 This series of defaults has had the effect of increasing the surcharge liability rate to the maximum 15% by the August 2009 quarter and has remained at that level until ever since. The penalty for the quarter ended 31 May 2012 HMRC calculated as £1,746.51 being 15% of the tax unpaid at the due date of £11,643.41 as shown on the appellant's VAT return for the period. HMRC say that having received fourteen earlier surcharge notices the appellant should have been aware of the potential financial consequences of any further default.

9. In respect of the employee which left HMRC submit that the proprietor has ultimate responsibility for the timely submission of the VAT return and any tax due thereon.

10. HMRC submit that the excuses offered by the appellant are not reasonable excuses and refer to Section 71 (1) of the VAT Act 1994 to support that submission

11. HMRC request that the appeal be dismissed.

12. 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.

13. 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 12 above. The Tribunal does not consider that a penalty of 15% of the tax due which is the culmination of fourteen 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.

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 Tribunal notes that the employee responsible for preparing the Vat return left in April 2012. However the next VAT return and payment were not due to be sent until 7 July 2012. This left the appellant with a well over two months to either prepare the return themselves or get assistance in doing so.

16. The Tribunal notes the cash flow difficulties of the appellant but notes that over £18,000 of default surcharges have had to be paid over the previous 5 years and these cannot have helped cash flow. It was in the appellants own control to stop the defaults.

5 17. Section 71 (1) of the VAT Act 1994 states

(1) For the purpose of any provision of sections 59 to 70 which refers to reasonable excuse for any conduct-

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

10 (b) Where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

15 18. This legislation covers both of the problems experienced by the appellant namely insufficiency of funds and reliance on another. In the Tribunal's view in these circumstances there is no reasonable excuse for the late payment.

19. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 12. above this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated. HMRC has applied the legislation correctly and has calculated the surcharge accurately as £1,746.51 being 15% of the tax of £11,643.41 shown as due on the appellant's tax return for the period ended 31 May 2012. The appellant has established no reasonable excuse for the late payment of the VAT shown as due on the appellant's VAT return for the quarter ended 31 May 2012. Therefore the appeal is dismissed.

25 20. 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
30 "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

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RELEASE DATE: 15 October 2013