TC02873

Appeal number: TC/2012/09764

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT P SLIGHT & SONS LTD **Appellant**

- and -

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

TRIBUNAL: PRESIDING MEMBER: PETER R SHEPPARD FCIS, FCIB, CTA, ATII
MEMBER: DR HEIDI POON, CA, CTA, PhD

Sitting in public at George House, Edinburgh on 27 August 2013

The Appellant was unrepresented

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

Preliminary Matters

1. This appeal was originally set down by the Tribunal centre in Birmingham as a default paper case.

2. By a direction of the Tribunal dated 23 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 in fact released only six days later on 29 November 2012.

3. On 24 May 2013 HMRC wrote to the Tribunal centre in Birmingham applying to have the appeal re-categorised as a basic case under Regulation 23(3) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The grounds for the application were that "the appellant refers to proportionality within their grounds of appeal and consequently both parties may wish to give full presentation of the relevant arguments on that matter".

4. On 24 May 2013 HMRC advised the appellant of this application.

5. On 29 May 2013 the appellant wrote to HMRC saying "I don't really understand the letter and its consequences. I don't want to attend the hearing".

6. On 27 June 2013 the Tribunal sent a Notice of Hearing to the appellant advising that a hearing in absence had been arranged for 3.00 pm on 27 August 2013.

7. If a party fails to attend a hearing, Tribunal Rule 33 allows an appeal to proceed if the Tribunal-

> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
> (b) considers it is in the interests of justice to proceed with a hearing.

8. The Tribunal was satisfied that the appellant had been notified of the hearing and had decided not to attend, and it was in the interests of justice to proceed with the hearing to resolve the matter in early course following the release of the Upper Tribunal's decision in *Total Technology (Engineering) Ltd.*

9. The decision of HMRC, which is the subject of this appeal, was dated 21 September 2012. It contained the following sentence:

> "If you still dispute the decision you have 30 days from the date of this letter in which to lodge an appeal".

10. A Notice of Appeal dated 22 October 2012 was received by the Birmingham Tax Tribunal on 24 October 2012. The appeal was therefore made outwith the stipulated 30-day time limit.

11. In the absence of any objection by HMRC the Tribunal has allowed the appeal to proceed despite the late appeal.

Introduction

12. This concerns an appeal to the Tribunal dated 22 October 2012 made by the appellant against a surcharge of £1,946.35 for the late submission of payment for the appellant's VAT return for the quarter ended 31 May 2012. The appellant's business is that of a building contractor, specialising in joinery and maintenance work.

Statutory Framework

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

14. 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.

15. 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% 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."

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

17. The VAT Act 1994 Section 71(b) covers what is not to be considered a reasonable excuse.

Case law

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

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

Appellant's submissions

18. On 23 August 2012 the appellant wrote to HMRC appealing against the default surcharge. In the letter they say:

"R. P. Slight is a small contracting company with mainly Government maintenance contacts, we experience good demand in the early part of the year – April 2012 which resulted in a larger than usual VAT payment due on 7th July (38k approximately).

Due to a late payment from the NHS which was due June (paid in July) and a combination of the whole company shutting down for two weeks on annual holiday, 6th July to 23rd July the VAT payment was not paid on time.

The error was recognised on the Monday 23rd July our return to work date, and immediate efforts were made to comply with the VAT payment. The full amount of £38,927.09 was paid by CHAPS on 23rd July.

We acknowledge our mistake and have always endeavoured to comply with VAT/Tax payments over the 54 years we have been in business.

We would ask for the surcharge to be cancelled in this instance."

19. HMRC reviewed the decision and in a reply dated 21 September 2012 it was stated that they did not accept that the appellant had a reasonable excuse for the default. They gave the reason as follows: "as the company annual holiday is a foreseeable event, we would have expected measures to have been put in place prior to the holiday to ensure you met your legal obligation to submit the payment on time".

20. HMRC's reply on 21 September 2012 did not address the issue raised by the appellant regarding the late payment by the NHS, and there were no documents at the hearing to suggest HMRC had made any enquiries on these lines.

21. The Notice of Appeal dated 22 October 2012 refers to the above letters, in which the Appellant also states:

"A 5% surcharge on a few days late is not fair. Considering if I am 6 months late the fine is the same. You cannot charge the same for 5 days (max) as for 6 months. A merchant/supplier would be grateful for the terms we have with HMRC."

22. On 25 June 2013 the Manager of the Edinburgh Tribunal Centre sent an e-mail to the appellant in the following terms:

"Originally your appeal was due to be decided by the Tribunal on the basis of papers only and we note you still do not want to attend the hearing. HMRC had applied for an oral hearing so that you could explain your grounds of appeal (ie that the penalty is too large in the circumstances and that an NHS payment was late). It may be that the Tribunal would benefit from hearing your evidence however if you still do not wish to attend then you may wish to write a letter giving more details. Please explain the situation regarding the NHS payment and their status as your largest customer, the impact of their late payment and any other information that could assist the Tribunal."

23. The appellant did send an e-mail to the Tribunal on 25 June 2013 which included the following paragraphs:

"Our primary customers are public bodies mostly councils, the Scottish Office and NHS. We operate now under strict controls from our bank (RBS group) whom in the past have exercised a bit of leeway when it came to allowing us extended overdraft facilities with state payments eg Tax/VAT. We are very aware of the way the system now works with no allowances exceptions.

Over the last 18 months – 2 years we have experienced big flows in our cash flow both out and in. Primarily this is due to late payments from NHS – if one person is off in their finance department, then we just have to wait until the person returns or is replaced.

If we create too much fuss, we run the risk of being not used again. It is a very fine line between doing the work and asking for payment. During this period Nov 2012 we experienced exactly as above – negative cash flow – but we were assured that payments were 'in the pipeline' and would be paid within 4/5 days; as it was, it was considerably longer."

24. At the hearing the Tribunal expressed the view that it would have very much welcomed the opportunity to hear from a representative of the appellant. The comments made in the papers about large contracts with the NHS and cash flow difficulties suggested to the Tribunal that comments in the Court of Appeal decision in the case *C&E Commissioners v J B Steptoe* [1992] STC 757 might be applicable to the appellant's position. However, without the appellant's presence at the hearing this could not be pursued. For example, the Tribunal notes the appellant's statement that its primary customers are public bodies, mostly councils. In this respect, the Tribunal would have wished to know what proportion of the VAT due on May 2012 was due from the late NHS payment. The Tribunal would also have liked to enquire why the appellant referred to period Nov 2012 in its e-mail of 25 June 2013, or whether this was meant to read May 2012.

25. The Tribunal noted that Mrs McIntyre intimated that she had had similar questions, and that these questions could have been explored in the course of the

hearing had the appellant been present., The Tribunal considers that HMRC could have pursued this line of enquiry with the appellant prior to the hearing.

Respondent's submissions

26. Mrs McIntyre for HMRC referred to a schedule in the bundle, which detailed incidences of late payments by the appellant in the periods ended 31 August 2011, 30 November 2011, and 31 May 2012.

27. 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 May 2012 was due by 30 June 2012. A further seven days grace is given where payment is made electronically. The return was received by HMRC on 28 June 2012 (ie: in time) but the payment which was made by the Clearing House Automated Payment System (CHAPS) was not received by HMRC until 23 July 2012 (ie: sixteen days late). The two earlier defaults (ie: for payments for quarters to 31 August 2011 and 30 November 2011) meant that the late payment related to the 31 May 2012 was the third default, and the statutory default surcharge rate of 5% of the tax due automatically applied. An assessment of £1,946.35 was made by HMRC, being 5% of the tax of £38,927.09 shown as due on the appellant's VAT return for the quarter ended 31 May 2012. It should be emphasised that in accordance with the provisions of the legislation, the first two defaults (August and November 2011) had not attracted any surcharge. It was the *third* default (May 2012) within the 12-month period that incurred the 5% surcharge penalty.

28. Mrs McIntyre submitted that HMRC's review decision dated 21 September 2012 was correct in pointing out that the Company's annual holiday was a foreseeable event, and that one would have expected measures to have been put in place prior to the holiday to ensure the appellant met its legal obligation to submit the payment on time. She said that this did not constitute a reasonable excuse and no other reasonable excuse had been established and asked for the appeal to be dismissed

Decision

29. The surcharge of £1,946.35 for the quarter ending 31 May 2012 has been assessed by HMRC in accordance with the legislation. It has been correctly calculated as 5% of the tax due of £38,927.09 as reported by the appellant on its VAT return for that period.

30. The appellant has made comment that the level of the surcharge is unfair. The level of the penalties and whether or not they are unfair or 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 late submission of a return and payment of the related VAT by one day.

31. The level of the penalties has been laid down by Parliament and unless the default surcharge has not been issued in accordance with the relevant legislation or has been calculated inaccurately, the Tribunal has no powers to discharge or adjust it, other than for the reasons that might have been applicable, as outlined in paragraph 22 above and in the case of *Steptoe*. The Tribunal does not consider that a penalty of 5% of the tax due £1,946.35, which is the culmination of a short 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. 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.

32. Section 71(1)(a) of the VAT Act 1994 states that *"an insufficiency of funds to pay any VAT due is not a reasonable excuse"*. Whilst insufficiency of funds is not a reasonable excuse following the decision of the Court of Appeal in *J B Steptoe* [1992] STC 757, the *reason* that gives rise to the lack of funds might have been a reasonable excuse. In this case the appellant has made comment, which could have led to a reasonable excuse being established along the lines of the *Steptoe* decision. The appellant was encouraged to attend the hearing but decided not to. The appellant submitted further information but it was insufficient for the Tribunal to confirm whether or not the reason for the lack of funds gave the appellant a reasonable excuse for the default.

33. Based on the submissions of both parties and the papers before it, and in the absence of the appellant to present its case in the hearing, the Tribunal finds that the appellant has established no reasonable excuse for the late payment and therefore has no alternative but to dismiss the appeal.

34. In the light of the Tribunal's observations and Mrs McIntyre's comments HMRC may consider it appropriate to contact the appellant in order to ascertain whether or not the Court of Appeal's comments in their decision in the *Steptoe* case should have been applied in this case, but that is a matter for them.

35. 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 FCIS, FCIB, CTA, ATII
PRESIDING MEMBER

RELEASE DATE: 11 September 2013