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**TC04493**

**Appeal number: TC/2015/00360**

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*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**

**PROTEC IT SOLUTIONS LIMITED**

**Appellant**

**- and -**

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

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

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**The Tribunal determined the appeal on 12 June 2015 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 4 January 2015, and HMRC's Statement of Case dated 02  
April 2015 with attachments. The Tribunal wrote to the Appellant on 28 April  
2015 indicating that if they wished to reply to HMRC's Statement of Case they  
should do so within 30 days. No reply was received.**

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## DECISION

### 1. Introduction

This considers an appeal against a default surcharge of £1,465.84 levied by HMRC for the late payment by the due date of 7 December 2014 of the amount outstanding on its VAT Return for the period ended 31 October 2014.

### 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 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 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% 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 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

Garnmoss Ltd. t/a Parham Builders v HMRC [2012] UKFTT315 (TC)

### **4. The appellant's submissions.**

The Appellant attached to their Notice of Appeal dated 4 January a letter which states

“ Being a small business our book keeping is outsourced. Our book keeper emails through the notice to submit a return and make payment, this process is normally successful. For this return however the details were provided to us at 16.30 on the 5<sup>th</sup> December, although short notice this would normally be enough time for us to make the submission and payment (same day). However at 12.00 on 5<sup>th</sup> December we shut down all computer systems as we were being moved floor in the Regus building we occupy, hence unaware of the book keeper's inbound email. The move lasted through the weekend. The book keeper's email was read when we returned to work on 8<sup>th</sup> December where submission and payment was promptly actioned. On the 8<sup>th</sup> December £10,000 was transferred to HMRC bank account with the remaining £4,658.47 paid on the 9<sup>th</sup> December. Please note payment was split due to a £10,000 per 24 hours transfer limit imposed by our internet banking provider.

We have since removed the book keeper from our business and will be appointing our chartered accountant to perform future VAT return submissions. In addition we will be looking to implement direct debit payment for our account.

Please accept our sincere apologies and hope you will see this was merely a culmination of events causing a small delay and not an attempt to avoid submission or payment. Once brought to our attention we actioned the submission and payment as promptly as possible”.

### **5. HMRC's submissions**

In their statement of case HMRC point out it is the directors of the company that have ultimate responsibility for the submission of the VAT return.

They say that reliance on a third party for the completion, calculation and payment of VAT is not a reasonable excuse for the late payment of VAT; see The VAT Act 1994 Section 71 (1) (b).

It is the responsibility of the .....directors to be aware of the due dates, methods of payments and the time needed to complete electronic transfers and the ultimate responsibility remains with them.”

HMRC point to the VAT Guide Notice 700 which includes at paragraph 21.3.

*“If your due date falls on a bank holiday or weekend, your payment must clear HMRC’s bank account before then.....”*

6. HMRC say that they consider that genuine mistakes, honesty and acting in good faith are not acceptable as reasonable excuses and say that their view is supported by the First tier Tribunal Judgement in Garnmoss Ltd. t/a Parham Builders v HMRC [2012] UKFTT315 (TC)

The Tribunal stated at paragraph 12 of that decision

*“ What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus this default cannot be ignored under the provisions of subsection (7).”*

7. HMRC say that moving floors in the building should have been a foreseeable event and they contend that a reasonable and competent business person would have ensured measures were put in place prior to the event to ensure they met their legal obligation to submit their VAT return and payment on time. HMRC contend that the default did not occur as a result of something that was entirely out of the director’s control.

Therefore HMRC do not accept the appellant had reasonable excuse for the default and because they had not received payment by the due date a surcharge is due.

7. HMRC say that from period 04/12 the appellant’s preferred method of payment has consistently been the Faster Payment Service.

8. HMRC state that the VAT return and payment for the period to 31 October 2014 was due by 7 December 2014 assuming payment was made electronically. In fact the return was received electronically on 8 December 2014 so was one day late. In respect of payment HMRC say this was received in two amounts. £10,000 on 8 December 2014 that is one day late; and £4.658.47 on 9 December 2014 that is two days late.

9. The net amount of VAT due on the return for the period to 31 October 2014 is stated as £14.658.47. Therefore on 12 December 2014 HMRC assessed the surcharge as 10% of this sum being £1,465.84. HMRC consider this surcharge is in accordance with the VAT Act 1994 Section 59(4)

10. A schedule in the papers provided to the Tribunal shows that in three previous quarters the appellant made late payments and has been in the default surcharge regime since period 04/2012. These ultimately have had the effect of increasing the

surcharge liability rate to 10%. HMRC had issued three surcharge liability notices to the appellant although no financial penalty was levied.

11. 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](http://www.hmrc.gov.uk/paying_hmrc/vat.htm)

Problems paying your VAT?

If you can't pay the full amount on time, pay as much as you can and before the payment is due, contact the Business Payment Support Service.

12. HMRC consider that payment was made late and no reasonable excuse for the late payment has been established and request that the appeal be dismissed.

### **13. 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.

14. 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 15 above. The Tribunal does not consider that a penalty of 10% 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.

15. 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.

16. Parties agree that the VAT return was received one day late on 8 December 2014 and that full payment was received by HMRC two days late on 9 December 2014. The Act provides that a person is to be regarded as being in default if he fails to pay the amount of VAT shown on the return as payable by him. In this case the date shown on the return was 7 December 2014. The appellant therefore defaulted in respect of this

period. The question for the Tribunal is whether the appellant had a reasonable excuse for these failures.

17. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the director's control. In this case the moving to a different floor in a building would have been a planned event and the Tribunal agrees with HMRC that a reasonable and competent business person would have ensured measures were put in place prior to the event to ensure they met their legal obligation to submit their VAT return and payment on time. The Tribunal's notes that the appellant says that it was unaware of the book keeper's inbound e-mail. The Tribunal finds this surprising. A Vat return had been completed quarterly for the previous two years so the director's should have been expecting an e-mail from the book keeper and in its absence should have chased it before the move on 5<sup>th</sup> December. The directors should not rely on an email from a book keeper to prompt them into action.

The Tribunal agrees with the comments at paragraph 12 of the decision of the Tribunal in the case of Garnmoss Ltd. t/a Parham Builders v HMRC [2012] UKFTT315 (TC) which are appropriate for the present case. A genuine mistake or oversight cannot be regarded as providing a reasonable excuse.

18. The Tribunal also accepts that HMRC publish guidance literature advising taxpayers to ensure that payments get to HMRC's account on time. The guidance refers to what happens if the due date occurs at a weekend or on a bank holiday and refers to specific banking arrangements where there are limits to the amount that can be transferred in one day. In the Tribunal's view the directors of the appellant should have been aware of these matters. As they had received three surcharge liability notices for previous failures warning of potential surcharges for future failures the directors should have been even more alert to the need to submit the return and payment on time.

19. Thus the Tribunal considers that the appellant has not established any reasonable excuse for his failure to submit his VAT return for the period ended 31 October 2014 on time nor has the appellant established a reasonable excuse for the late payment of the amount due on the return.

20. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 13 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 has calculated the surcharge accurately as £1,465.84 being 10% of the outstanding tax of £14,658.47 at the due date in respect of the appellant's tax return for the period ended 31 October 2014. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

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 “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 JUDGE**

**RELEASE DATE: 22 June 2015**