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**TC04496**

**Appeal number: TC/2015/02126**

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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**

**FRESH CLEANING (SCOTLAND) LIMITED**

**Appellant**

**- and -**

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

**Respondents**

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

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**The Tribunal determined the appeal on 19 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 dated 9 March 2015, and HMRC's Statement of Case dated 25 March  
2015 with attachments. The Tribunal wrote to the Appellant on 15 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 £300 levied by HMRC for the late payment by the due date of 7 January 2015 of the amount outstanding on its VAT Return for the period ended 30 November 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.**

In a letter to HMRC dated 26 January 2015 the managing director of the appellant requests a review. The letter includes

“The total VAT due was £7,374.46 and on 7<sup>th</sup> January 2015 I made a payment of £5,374 .46 in error as I had been advised by my Personal Assistant the total was £5,374.46.

The very next morning she advised me this was incorrect and the figure was actually £7,374.46 and therefore I made a payment of £2,000 with immediate effect to make good the variance.

I then contacted HMRC to inform them of the error and what had happened, I was informed there would be no penalty for being 24 hours late as it was an obvious error.”

In the Notice of Appeal dated 9 March 2015 the appellant states

“I feel the penalty is harsh as the mistake was rectified within 24 hours and complete payment was made.”

### **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 timely submission of the VAT return and any tax due thereon.

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

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). ”*

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 11/12 the appellant’s preferred method of payment has consistently been via the Faster Payment Service.

8. HMRC state that the VAT return and payment for the period to 30 November 2014 was due by 7 January 2015 assuming payment was made electronically. In fact the return was received electronically on 5 January 2015 so was in time. In respect of payment HMRC say this was received in two amounts. £5,374.46 was received on time on 7 January 2015, and £2,000 one day late on 8 January 2015.

9. The net amount of VAT due on the return for the period to 30 November 2014 2014 is stated as £7,374.46. £2,000 of that was received one day late, therefore on 16 January 2015 HMRC assessed the surcharge as 15% of this sum being £300. 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 five previous quarters the appellant made late payments and has been in the default surcharge regime since period 11/2012. These ultimately have had the effect of increasing the surcharge liability rate to 15%. HMRC had issued five surcharge liability notices to the appellant although in four of them no financial penalty was levied. A financial penalty of £200 was levied in respect of a late payment for period 02/2014.

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.

HMRC point out that the appellant has not stated that he did not receive any of the notices which were addressed to the appellant’s principal place of business, and were not returned undelivered.

12. HMRC make no comment about the appellant’s assertion that he was advised there would be no penalty.

13. 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.

**14. 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.

15. 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 £300 which is 15% of the tax due which is the culmination of five 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.

16. Parties agree that a VAT Payment of £2,000 was received one day late on 8 January 2015. 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 January 2015. 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 as contemplated by Section 59 (7) VAT Act 1994.

17. A reasonable excuse is normally an unexpected event, something unforeseeable, something out of the director's control.

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. In the Tribunal's view the directors of the appellant should have been aware of these matters. As they had received five surcharge liability notices for previous failures warning of potential surcharges for future failures the directors should have been particularly alert to the need to ensure that the return and correct payment were submitted on time.

19. In respect of the submission that HMRC advised there would be no penalty. The Tribunal finds this surprising. The Tribunal regularly sees appeals where a surcharge is levied for a return and/or payment which through a simple error have been submitted one day late. There appears to be no reason why the appellant should be

treated exceptionally. It may be that in the telephone call the HMRC employee was not aware of the appellant's default history and assumed that this was a first default, in which case there would have been no financial penalty although a default would have been recorded.

20. Thus the Tribunal considers that the appellant has not established any reasonable excuse for his failure to submit his full VAT payment for the period ended 30 November 2014 on time nor has the appellant established a reasonable excuse for the late payment of the amount due on the return.

21. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 14 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 £300 being 15% of the outstanding tax of £2,000 at the due date in respect of the appellant's tax return for the period ended 30 November 2014. The appellant has established no reasonable excuse for the late payment of the VAT. Therefore the appeal is dismissed.

22. 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: 24 June 2015**