



**TC04561**

**Appeal number: TC/2014/06638**

*VAT – default surcharge – ss59 and 71, Value Added Tax Act 1994 –  
reasonable excuse – incorrect advice by a taxpayer’s accountant – incorrect  
information provided to the taxpayer’s accountant by HMRC over two years  
earlier - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WHISTON MOTOR FACTORS LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE RICHARD CHAPMAN  
MR PHILIP JOLLY**

**Sitting in public at Liverpool Civil and Family Court, 3<sup>rd</sup> Floor, 35 Vernon  
Street, Liverpool, L2 2BX on 29 May 2015.**

**Mr Graham Swann, Accountant, for the Appellant.**

**Mrs Lisa Fletcher, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents.**

## DECISION

### Introduction

5 1. This appeal is brought by Whiston Motor Factors Ltd (“Whiston”) against the imposition of two default surcharges for the late payment of VAT for the periods 05/13 and 08/13.

2. The dispute is as to whether or not Whiston has a reasonable excuse for the late payment of the VAT due for each of these periods. Whiston’s argument is based upon  
10 information allegedly provided by HMRC to its accountant, Mr Graham Swann of Swann Accountants Ltd, with regard to the dates for payment.

### The Factual Background

3. The broad factual background was not in dispute and can be summarised as follows.

15 4. Whiston carries on business in the sale of parts and accessories for motor vehicles. At all material times, Whiston retained Mr Swann to deal with (amongst other things) its VAT affairs.

5. The 05/13 period had a due date of 7 July 2013 for electronic submission of the return and for electronic payment other than by direct debit. HMRC received the  
20 return electronically on 1 July 2013 and received a CHAPS payment on 10 July 2013. The payment was therefore three days late. This gave rise to a notice assessment dated 12 July 2013, whereby HMRC imposed a default surcharge in the sum of £3,414.77. This represented 15% of the £22,765.18 VAT outstanding as at the due date for the return for the 05/13 period.

25 6. The 08/13 period had a due date of 7 October 2013 for electronic submission of the return and for electronic payment other than by direct debit. HMRC received the return electronically on 29 September 2013 and received a CHAPS payment on 9 October 2013. The payment was therefore two days late. Again, this gave rise to a notice of assessment, this time dated 11 October 2013 and with a default surcharge in  
30 the sum of £3,637.56. This represented 15% of the £24,250.42 VAT outstanding as at the due date for the return for the 08/13 period.

7. Both of these default surcharges were calculated at a rate of 15% because of Whiston’s default history. Section 59(5)(a) to (d) of the Value Added Tax Act 1994 (“VATA 1994”) provides for a rate of 2% for a first default during a surcharge period,  
35 5% for a second default, 10% for a third default and 15% for each subsequent default. Whiston had been in the default surcharge regime since the 02/09 period and there had been further defaults for the periods 11/09, 05/10, 05/11 and 05/12. Although default surcharges were initially imposed for the 08/10 and 08/12 periods, these were subsequently removed. As such, without taking into account the 08/10 and 08/12

periods, the 05/13 and 08/13 periods were Whiston's fifth and sixth defaults respectively.

8. By letters from Whiston and Mr Swann dated 29 October 2013, 11 November 2013, 10 January 2014 and 16 October 2014, Whiston requested reviews of the default surcharges for the 05/13 and 08/13 periods. Although these (and other) letters included requests for reviews of other periods, Whiston only appeals the 05/13 and 08/13 periods.

9. The essence of Whiston's argument was an allegation that a VAT inspector had previously told Mr Swann that taxpayers who filed their VAT returns online would benefit from a further three days for payment (and so to the tenth day of the relevant month), without explaining that this would only be if payment was by direct debit. In particular, Mr Swann stated as follows in his letter dated 11 November 2013:

Since the introduction of online filing my client's VAT returns have always been filed on time. All VAT liabilities were paid by the due date of the 7<sup>th</sup> until a conversation I had with Mrs Barratt (VAT Inspector) which took place in January 2011 at my client's premises following which I instructed my client to start paying their VAT liability by the 10<sup>th</sup> of the month after the VAT Return due date.

My instruction to my client to pay their VAT liability by the 10<sup>th</sup> of the month after the VAT Return due date was based on a conversation with Mrs Barrett (VAT Inspector) during a VAT inspection of my above named client's records. During a completely innocent conversation about various VAT matters not specifically related to my client, Mrs Barrett encouraged me to file VAT returns on line for my clients with a turnover of less than £100,000. During the conversation Mrs Barrett explained the benefits of filing on line, one of which was that my clients had an extra three days to pay their VAT liability (i.e. pay by the 10<sup>th</sup> of the month after the VAT Return due date). I recall the conversation well as I in a jocular manner said to Mrs Barrett "What's the catch, HMRC waiting for their money, I don't believe that, they must be awash with money?" to which Mrs Barrett did not reply other than to give me a somewhat dismissive smile.

Naturally, being a VAT inspector I never queried (other than my quip above) Mrs Barrett on what appeared to be an innocuous statement of fact. At no time did Mrs Barrett say that the 10<sup>th</sup> only applied to those clients that paid by direct debit.

10. By review decisions dated 20 December 2013 and 11 November 2014, HMRC upheld the default surcharges for (amongst others) the 05/13 and 08/13 periods.

### **Grounds for Appeal**

11. Whiston's Grounds for Appeal are as follows:

Default Surcharge Notices – 05/11 05/12 05/13 08/13

5 The basis for the appeal is that for periods up to and including 11/10 my understanding was that the VAT liability payment due date was the 7<sup>th</sup> of the relevant month. However, my understanding from the period 02/11 onwards was that the due date was the 10<sup>th</sup> of the relevant month.

With the exception of the periods ending 05/11 and 05/12 payments have always been made by the 10<sup>th</sup> of the relevant month.

Therefore, periods ended 05/11 and 05/12 are not being appealed. The periods being appealed are 05/13 and 08/13.

10 During late 2010/early 2011 a VAT inspection was carried out by Mrs Barrett (HMRC VAT Inspector) at my business premises. In January 2011 Mrs Barrett held a conversation with my accountant Graham Swann (Swann Accountants Ltd).

15 The conversation I understand was a general one about various VAT matters not specifically related to my company. During the conversation Mrs Barrett explained the benefits of filing online, one of which was that an extra three days were allowed to pay the VAT liability (i.e. pay by the 10<sup>th</sup> of the month after the VAT Return due date, no mention was made that the payment due date of the 10<sup>th</sup> only applied to those paying by direct debit).

20 Reliance was therefore placed on the advice received from Mrs Barrett. I believe that it is reasonable having received this advice from Mrs Barrett that reliance could be placed on it.

25 Mrs Bennett in her letters of 20 December 2013 and 11 November 2014 makes reference to a letter dated 18 December 2012 from a “colleague” in which was enclosed a “Top Tips Sheet” which gave full and comprehensive guidance with regards to making electronic payments by the due date. Being motor factors we receive/send and in consequence store over 10,000 invoices, statements and various matters of correspondence each year. We therefore have comprehensive filing systems one of which is in relation to VAT matters. We cannot find any correspondence from Mrs Bennett’s “colleague” dated 18 December 2012.

35 I therefore believe Mrs Bennett’s decision in refusing the appeal is wrong.

12. For completeness, we note that the Notice of Appeal is dated 9 December 2014 and so, insofar as it relates to the review decision on 20 December 2013, is out of time. However, Mrs Fletcher informed the Tribunal that HMRC took no issue with this in the circumstances of this case and so agreed to the appeal being made late.

13. We also note that neither the Grounds for Appeal nor Mr Swann’s submissions questioned the proportionality of the default surcharges.

### **The Evidence**

5 14. Mr Swann gave evidence on behalf of Whiston. His evidence was essentially the same as set out in his letter dated 11 November 2013. He explained that Mrs Barrett attended at Whiston’s premises in about January 2011 in order to conduct a VAT inspection of Whiston’s affairs. During the inspection, Mr Swann had a general discussion with Mrs Barrett about matters including the regime for online returns. Mr Swann told us that Mrs Barrett was encouraging him to file returns online for all his clients, even if under the threshold for being required to do so. His evidence was that Mrs Barrett had said that one of the advantages was that taxpayers got “an extra three days”. Although Mr Swann fell short of saying that Mrs Barrett told him that this would give his clients until the tenth day of the relevant month to make payment, he said that he understood this to mean an extra three days on top of the seven days already allowed. Mr Swann described this as a “general chat” and made the point that this was not particularly directed towards Whiston but to Mr Swann and his clients as a whole.

15 15. Mr Swann explained that he subsequently advised Whiston and his other clients that they could wait until the tenth day of the month to make payment. Whiston continued to make payment by the seventh day of the month. However, on 29 March 2013, Mr Andrew Gamble (one of Whiston’s directors) emailed Mr Swann and asked him when his VAT had to be paid by. This was because Whiston was experiencing cashflow problems. Mr Swann replied that payment was not due until the tenth day of the month. Mr Swann told us that he gave this advice to Whiston because of what Mrs Barrett had told him in January 2011.

16. Mrs Fletcher did not cross-examine Mr Swann.

17. Mr Swann was asked by the Tribunal whether or not he was familiar with Public Notice 700. He said that he had seen it many years ago.

30 18. We also heard from Mr Andrew Gamble. He said that Whiston had moved to direct debit and had not defaulted since. He also told us that the changeover period from paper to electronics had been a difficult process. In addition, he was keen to make the point that Whiston had tried to “play by the rules” and was not trying to gain an advantage.

19. There was no witness evidence on behalf of HMRC.

### **35 The Statutory Framework**

20. Section 59 of VATA 1994 sets out the default surcharge regime in the following terms.

59. The default surcharge

- (1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period –
- (a) the Commissioners have not received that return, or
  - (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,
- then that person shall be regarded for the purposes of this section as being in default in respect of that period.
- (1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.
- (2) Subject to subsection (9) and (10) below, subsection (4) below applies in any case where –
- (a) a taxable person is in default in respect of a prescribed accounting period; and
  - (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.
- (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.
- (4) Subject to subsections (7) and (10) below, if a taxable person on whom a surcharge liability notice has been served –
- (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
  - (b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

5 (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that –

10 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

15 (c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

20 (6) For the purposes of subsection (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

30 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge –

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

35 (b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting

period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

5 (8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

10 (b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where –

15 (a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

20 the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

25 (11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

21. Section 71(1) of VATA 1994 is also of relevance.

71. Construction of sections 59 to 70

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

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

35 (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance or any dilatoriness

or inaccuracy on the part of the person relied upon is a reasonable excuse.

### **Whiston's Case**

22. In short, Mr Swann's submission was that he had acted upon the advice of Mrs Barrett in advising Whiston. He maintained that this was a reasonable thing to do given that she was a VAT inspector. His, and Whiston's, reliance upon that advice was therefore a reasonable excuse.

23. We were taken to the First-Tier Tribunal decision of Judge Blewitt in *Dental IT Ltd v HMRC* [2011] UKFTT 128 (TC). In that case, the appellant had delegated the tasks of VAT and PAYE to an employee named Ms Beesley and then another employee named Ms Callan. Ms Beesley had sought advice from HMRC as to when payments were due. HMRC had said that payments made by or on the seventh day of the relevant month would be accepted. Judge Blewitt allowed the appeal and stated as follows at paragraphs 13 to 19:

15                                    “*Decision*

[13] If the Appellant had sought to rely on his reliance on either Ms Beesley or Ms Callan as the sole ground of appeal then I would have no hesitation in dismissing this appeal; the case authorities and legislation make clear this would not amount to a reasonable excuse.

20                                    [14] I did not accept the Appellant's submission that HMRC ought to have made the company aware of the fact that payments made by BACS can take 2 or 3 days to clear. Ignorance of the law or banking procedures involved in making payments cannot amount to a reasonable excuse and the onus must rest with the taxpayer to ensure he is aware of, and meets, his obligations under the VAT regime.

25                                    [15] I now turn to the telephone call made by Ms Beesley to the HMRC VAT call centre on 23 June 2009. In reviewing the transcript I find as a fact that Ms Beesley was clearly seeking assistance and clarification as to why the Surcharge Liability Notice had been issued and how the company could ensure compliance in the future. Ms Beesley was advised by HMRC that the company had 'at the latest until the 7<sup>th</sup>' to make payment.

30                                    [16] It is clear from the records produced by HMRC that following this advice, all VAT returns submitted by Ms Beesley were received by HMRC on the 7<sup>th</sup> of the relevant month. I infer from the very short default periods of payment that the tax due was paid on the same date, although not cleared until after the deadline. This is corroborated by the evidence of Ms Callan, which I accept, that she was told by Ms Beesley that she must submit both the return and the payment on the 7<sup>th</sup>.

5 [17] I find as a fact that Ms Beesley had acted as any reasonable business person in seeking advice from the HMRC VAT call centre and that she had acted upon that advice to ensure compliance with the Appellant's VAT obligations. I bear in mind HMRC's submissions that information is widely available on the HMRC website, which warns of delays in electronic payments; however, I find as a fact that the specific advice given by the HMRC representative by telephone clearly indicated that payment by or on the 7<sup>th</sup> of the relevant month would ensure that the deadline was met. Ms Beesley acted upon that advice.

10 [18] It is unfortunate that matters were no doubt confused by the fact that no penalties were imposed for the two subsequent defaults due to the fact that they fell below the £400 threshold, in all likelihood confirming to Ms Beesley that the company was fulfilling its obligations. I accept the evidence of Ms Callan and Mr McNaughton  
15 that the company did not receive any Surcharge Liability Notice Extension forms in respect of these defaults and as a result the Appellant (through Ms Beesley and Ms Callan) continued to follow the advice given by HMRC.

20 [19] In the particular circumstances of this case I find that the Appellant had, through the periods of default, acted on the misleading advice given by HMRC and that there was a reasonable excuse."

24. Mr Swann submitted that Whiston was in exactly the same position as the appellant in *Dental IT Ltd v HMRC*.

25 25. Mr Swann said that Public Notice 700 would not have taken the matter any further as he did not believe that it referred to direct debits in the form that it was in at the time of Mrs Barrett's comments.

### **HMRC's Case**

30 26. Mrs Fletcher did not accept that Mr Swann had been advised by HMRC in the manner in which he alleged. There was no record of an inspection in December 2010 or January 2011, although she did not go so far as to suggest that no meeting took place. There was a record of an inspection in October 2009. There was no report of any advice or information as to payment dates being given by Mrs Barrett.

35 27. Even if incorrect information had been given by Mrs Barrett, her comments could not gainsay the law. If Whiston felt that Mr Swann had been wrongly informed, the remedy was through HMRC's complaints procedure rather than constituting a reasonable excuse for the purposes of section 59(1)(a) of VATA 1994.

28. Mrs Fletcher sought to distinguish *Dental IT Ltd* upon the basis that in that case an actual transcript of the telephone conversation was provided and specific advice was sought and given.

29. Mrs Fletcher also addressed us on Public Notice 700. She said that it ought to have been clear from this notice that the due date for electronic payments was on the seventh day of the month. The version of the notice which was current at the time of the defaults in the 05/13 and 08/13 periods was published in May 2012 and, she said, makes this clear. In particular, she relied upon paragraph 21.3.1 of this version of the notice, which states as follows:

“21.3 Methods of payment

21.1.3.1 Online VAT returns

If you submit your VAT online, you must pay by one of the approved electronic methods, listed below. You cannot pay by cheque in the post.

You can pay by Direct Debit, Debit or Credit card over the internet using the BillPay service, Bacs Direct Credit, Faster Payments, Internet or Phone Banking, CHAPS, Bank Giro Credit. You can pay by standing order if you have been accepted for the Annual Accounting Scheme or you make Payments on Account.

You can find more information about electronic payment, including how to set up and use each approved payment method, on our website at [hmrc.gov.uk/payingvat](http://hmrc.gov.uk/payingvat). There is also a VAT payment deadline calculator at [www.hmrc.gov.uk/tools/vatpaymentsdeadline](http://www.hmrc.gov.uk/tools/vatpaymentsdeadline). The tool will help you work out when to set up or make a VAT payment to make sure it reaches us on time.

Paying by an approved electronic method will give you up to seven extra calendar days to submit your return and pay your VAT, unless you make annual returns or Payments on Account (and submit quarterly returns). The extended due date will be shown on your online VAT return and you must ensure that cleared funds reach HMRC’s bank account by this date. (The exception to this is online Direct Debit (DD) – if you pay by DD, then HMRC will automatically collect your payment on the third bank working day after the date shown on your return.) If your due date falls on a bank holiday or weekend, your payment must clear HMRC’s bank account before then (unless you use the Faster Payments service – Faster Payments can be received on bank holidays and weekends).

If your payment arrives late you may be liable to a surcharge for late payment. To make sure that your payment clears our account in time, you should check with your bank or building society to find out:

- If there are any single or daily limits to how much you can transfer from your account.

- Is there a cut-off time for processing payments on the same day?
- How long your payment will take to clear into HMRC's bank account?

5                   Checking these details will help to ensure that you do not incur and unnecessary late payment surcharges.”

30. We asked Mrs Fletcher to provide us with the version of the notice which was current at the time Mr Swann alleges that he was advised by Mrs Barrett. After the hearing, Mrs Fletcher provided us with a version dated April 2002. Mr Swann was  
10 correct in his understanding that this made no reference to direct debits.

## **Discussion**

### *Findings of fact*

31. Mr Gamble's comments were very brief and were not contentious and HMRC did not present any witness evidence at all. The main witness evidence therefore came  
15 from Mr Swann. Mr Swann is a professional and gave his evidence in a fair, honest and credible manner. We have no reason to doubt what he said. Indeed, Mrs Fletcher did not cross-examine him and did not seriously challenge his evidence in submissions, albeit that she of course took issue with the conclusions to be taken from his evidence.

20 32. As such, we make the following findings of fact:

- (1) An investigation of Whiston's affairs did take place in January 2011, during which Mr Swann had a general conversation with Mrs Barrett about online filing.
- (2) Mrs Barrett informed Mr Swann that a benefit of online filing was that it  
25 gave, “an extra three days”.
- (3) Mrs Barrett made no mention of this being restricted to direct debits.
- (4) Mr Swann reasonably took this to mean that taxpayers who filed returns online had until the tenth day of the relevant month to make payment.
- (5) Mr Swann advised his clients of this, including Whiston, soon afterwards.
- (6) Whiston did not act upon this and continued to aim to make payment by  
30 the seventh day of the relevant month.
- (7) On 29 March 2013, Mr Gamble asked Mr Swann for advice as to when payment was due. Mr Swann said that payment was due by the tenth day of the relevant month. In providing this advice, Mr Swann had in mind what he had  
35 been told by Mrs Barrett in January 2011.
- (8) The Grounds for Appeal state that Whiston did not receive a “Top Tips Sheet” allegedly sent with a covering letter dated 18 December 2012. Neither

Mr Swann nor Mr Gamble gave any oral evidence on this and Mrs Fletcher did not cross-examine them. As such, we are not in a position to make any findings on this point.

5 *Reasonable excuse*

33. The parties agreed that whether or not an excuse is a reasonable one is an objective test, which should be applied to Whiston's circumstances. Although not cited to us, the First-Tier Tribunal decision of *Coales v HMRC* [2012] SFTD 1371, [2012] UKFTT 477(TC) highlights that this is correct. Judge Brannan stated as follows at paragraph [31], disagreeing with another First-Tier Tribunal decision, *Chichester v Revenue and Customs Comrs* [2012] UKFTT 397 (TC):

15                    “[31] With respect, I disagree. The starting point for any analysis of the concept of “reasonable excuse” must always be the statute. In this case s59(C)(9)(a) TMA provides that I may set aside the surcharge if the taxpayer has a reasonable excuse for not paying the tax. Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must be a reasonable one. The word “reasonable” imports the concept of objectivity, whilst the words “the taxpayer” recognise that the objective test should be applied to the circumstances of the actual (rather than some hypothetical) taxpayer.”

34. In applying this test to the present case, we find that Whiston does not have a reasonable excuse for the defaults in the 05/13 and 08/13 periods. We have reached this decision for the following reasons.

25 35. First, it is clear from section 71(1)(b) of VATA 1994 that the fact that Whiston was relying upon Mr Swann's advice is not itself capable of constituting a reasonable excuse. In the language of section 71(1)(b), Whiston placed reliance upon Mr Swann to perform the task of telling him when payment was due and so any inaccuracy in that advice is not a reasonable excuse. It follows that the question is not whether or not it was reasonable for Whiston to rely upon Mr Swann's advice, but instead whether or not Mr Swann acted reasonably in giving this advice in the light of what he had been told by Mrs Barrett.

35 36. Secondly, two and a quarter years had passed between Mrs Barrett's comments to Mr Swann and Mr Gamble's request for advice from Mr Swann. We do not find it reasonable for Mr Swann to continue to rely upon the information given by Mrs Barrett without checking the position first, either by contacting HMRC or through his own research. Consulting Public Notice 700 would have confirmed that the payment due date was the seventh of the relevant month, with the extension of three days being for direct debits only.

40 37. Thirdly, this is particularly stark given that Mr Swann is a professional accountant. We find it surprising that, by the time of the relevant defaults, Mr Swann

did not know from his own experience and expertise that the information given by Mrs Barrett had been wrong. As set out in *Coales v HMRC*, above, we must apply the objective test to Whiston's circumstances. Those circumstances include the fact that Whiston was being advised by a professional accountant.

5 38. Fourthly, the conversation was a general one rather than being a response to a specific request about any particular electronic payment method or about Whiston.

39. Fifthly, the imposition of the default surcharge in respect of the 05/13 period (which had been paid on 10 July 2013) ought to have made it clear that payment was due earlier than the tenth day of the relevant month. Even if we had found that there had been a reasonable excuse for the 05/13 period, this would have prevented us from finding that there had been a reasonable excuse for the 08/13 period.

40. We are of the view that *Dental IT Limited v HMRC*, above, (which is in any event not binding upon us) was a very different case to the present case. Crucially, there was a much closer nexus between the advice from HMRC and the reliance by the taxpayer than in the present case; in *Dental IT Limited v HMRC* the advice was given to the appellant's employee, was directed at the taxpayer's particular circumstances in the light of specific questions posed and the taxpayer acted upon the advice immediately.

41. We wish to place on record that we are most unimpressed that Mrs Barrett gave Mr Swann misleading information. However, in the specific circumstances of the present case, this is outweighed by the features set out in paragraphs 35 to 40 above.

### **Decision**

42. For the reasons set out above, we find that Whiston did not have a reasonable excuse for the defaults in the 05/13 or 08/13 periods. We must therefore dismiss the appeal.

43. 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.

35 **RICHARD CHAPMAN**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 06 AUGUST 2015**

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