



**TC02973**

**Appeal number: TC/2012/09372**

*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**

**GLAMORGAN WHITE LINING LIMITED**

**Appellant**

**- and -**

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

**Respondents**

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

**The Tribunal determined the appeal on 13 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 dated 10 October 2012 with enclosure, and HMRC's undated Statement of Case with enclosures received by the tribunal on 13 June 2013, and a bundle of documents subsequently received. The Tribunal wrote to the Appellant on 13 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.**

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## DECISION

### 1. Introduction

5 This considers an appeal against a default surcharge of £884.60 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 7 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

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 20 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.

- 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. Facts.**

- 10 HMRC issued a Default Surcharge Notice on 13 April 2012 in respect of a late payment for the VAT return for the period ended 29 February 2012 due by 7 April 2012.

HMRC issued a Default Surcharge Notice on 13 July 2012 in respect of a late payment for the VAT return for the period ended 31 May 2012 due by 7 July 2012

- 15 **5. The appellant’s submissions.**

In a letter dated 26 July 2012 the appellant states in respect of a Surcharge Liability Notice for the period ending 29 February 2012

- 20 The Surcharge Liability Notice was sent due to an alleged non-payment of VAT. This is not correct. The not inconsiderable sum of £70,967.99 as per our return was paid electronically on 6<sup>th</sup> April 2012. We did not appeal this notice as we incorrectly assumed that when your error was discovered the Notice would be rescinded, and in any case we have not missed a VAT payment and do not intend to do so in the future. A Mr.Maxwell of the HMRC Glasgow Debt Management Office confirmed that payment had been made properly. We appeal the Surcharge Liability Notice.

- 25 Later in the letter in respect of a Surcharge Liability Notice for the period ending 31 May 2012 the appellant states: “We then received on 23 July 2012 a Notice of assessment of surcharge .....We had made the payment electronically on 6<sup>th</sup> July 2012. We once again checked with Mr.Maxwell of the Glasgow HMRC Debt Management Office who confirmed that once again the not insignificant sum of  
30 £44,230.34 had been made properly. We appeal both the Notice od Assessment and the Surcharge Liability Extension.”

- 35 6. The letter of 26 July 2012 was taken by HMRC as a request for a review. In a letter dated 8 August 2012 HMRC advised that the result of their review was that “without supporting evidence such as an explanation from your bank as to why the payment wasn’t received until after the weekend” HMRC “are unable to establish if you have a reasonable excuse for the..... default.”

7. On 5 September 2012 the appellant sent a letter to the First-tier Tribunal (Tax) intended to be an appeal. On 10 October 2012 the appellant forwarded a completed Notice of appeal form.

5 This form was received by the Tribunal on 11 October 2012 and was therefore late being outside the 30 days limit for appealing decisions of HMRC. However in the absence of any objections from HMRC and in the interests of justice the Tribunal has proceeded to consider the appeal.

8. The Notice of appeal referred to the 5 September letter which makes the following submission

10 “The question at dispute is not whether the payment was made, the amount due, or the accuracy of the amount but when it was received. The amount received into your bank account was there not two months late, or two weeks late but two days and has been proved to have been made on time.”

15 The reference to “your bank account” in a letter addressed to the First-tier Tribunal shows that the appellant has addressed the First-tier Tribunal as if it was a part of HMRC and had been involved in making the earlier decisions received by the appellant. The Tribunal would point out that this is not the case. The Tribunal is a part of the Ministry of Justice and is independent of HMRC and does not collect tax.

9. The letter continues

20 “we accept that we have to ensure payments are in your bank on time but there is no consistency in your payments. We make payments to HMRC on a monthly basis, practically all of which are sent instantaneously in real time banking. How on earth are we expected to know that the next time we sent a payment to HMRC that it will take an extra day to go into your bank unless we actually send it in days early, thus  
25 depriving us of the use of the money, and if you hadn’t noticed there is a major recession going on for those of us exposed to working in the market place and every penny is hard fought for and vital.....”

The letter also includes

30 “This charge is not right as the ability to ensure that payment is received by yourselves on time is not possible due to the vagaries in your own collection methods”

In the notice of appeal the appellant requests the surcharge be rescinded.

#### **10. HMRC’s submissions.**

35 In a letter to the appellant dated 30 August 2012 HMRC point out that “The VAT liability for the period 02/12 was due by 7<sup>th</sup> April 2012. As this was a weekend and the previous day was a bank holiday, arrangements should have been made to ensure that the payment reached us by the previous working day but we did not receive the payment until 9<sup>th</sup> April 2012”

11. 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 time but payment was received two days late on 9 July 2012.

5 12. In their statement of case HMRC state “Whilst the due date was a Saturday the Faster Payment service does, subject to the relevant limits and cut off times of the initiating bank concerned, enable payment to be received to the payees account on weekends and Bank holidays.”

10 13. A schedule in the papers provided to the Tribunal shows the two late payments have had the effect of increasing the surcharge liability rate to 2%. The penalty for the quarter ended 31 May 2012 HMRC calculated as £884.60 being 2% of the tax unpaid at the due date.

14. HMRC contend that it is the director that has ultimate responsibility for the timely submission of the VAT return and any tax due thereon

15. HMRC say that an E-Vat return acknowledgement would have advised

15 “Any tax due must be paid electronically and received by HMRC by [the payment due date].” it goes on to say

“Please note: HMRC now accepts Faster Payments. Before making an electronic payment please contact your bank or building society to check the services available to you, any daily value limits and the latest cut off times for making payment.”

20 16. HMRC state that the appellant has not supplied any supporting evidence as to why the payment wasn’t received until after the weekend, as requested by HMRC’s letter dated 8 August 2012.

17. HMRC request that the appeal be dismissed.

### 18. The Tribunal’s observations

25 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  
30 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.

35 19. 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 18 above. The Tribunal does not consider that a penalty of 2% of the tax due which is the culmination of two 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.

20. The Tribunal has considered the difference of opinion over when HMRC received the money. The appellant says that he sent the money on time on 6 April 2012 but  
5 does not submit any other evidence to support when the money left his bank account neither does it submit any other documentary evidence to show what method of payment was used. Thus the appellant has not proved that the payment was made on time as he submits. On the other hand HMRC do not provide any bank statement to show that they received the money late. HMRC submit an internal document entitled  
10 "Accounting Information Sheet – Ledger Details which does record receipts by electronic payment of an amount of £70,967.99 on 11 April 2012 and an amount of £44,230.34 on 10 July 2012.

21. In respect of what method of payment was used HMRC state in their letter to the appellant dated 30 August 2012 that although the appellant "advised that payments  
15 were made using the faster payments method .....neither of the payments were actually made using this scheme" In the schedule attached to the statement of case the "date payment received and method" box for the period 02/12 is marked 10/04/12 FPS and similarly the equivalent box for the period 05/12 is marked 09/07/12 FPS. The use of the initial FPS would suggest that contrary to HMRC's letter of 30 August  
20 2012 the Faster Payments Service was used. HMRC's statement of case states "The Faster Payment was received on Monday 9 July 2012, being 2 days late."

22. This conflict in HMRC's documentation of how the payment was made does not instil any confidence in the Tribunal that HMRC's statement that the payment was made 2 days late is accurate.

25 23. However the Tribunal also notes that the appellant was asked to provide bank statements and details from its bank as to why the payments which left its bank accounts on 6 April 2012 did not arrive by the due date but has not responded to this request.

24. The Tribunal is aware that whether payments will be received on the same day or  
30 a later day can often depend on the time of the day the instruction is made, and on the method of payment used. There is a cut-off time for same day settlement which can vary from bank to bank. Banks do provide information to assist their customers on this. In addition, when making electronic payments, it is necessary to consider whether a bank holiday might delay the transfer of the money. April 6 to April 9  
35 was the Easter weekend in 2012. Some banks would have been closed on Good Friday 6 April, 2012 whilst others might have been closed on Easter Monday 9 April 2012.

25. In respect of 7 July 2012 this was a Saturday so a payment made late on 6 July may not have been received until after the weekend.

26. It is the appellant's responsibility to arrange for payment to be received by HMRC  
40 by the due date. If there is a bank holiday or a weekend then this has to be allowed for

when the payment is made. Bank holidays and weekends are not unforeseen events and therefore cannot form a reasonable excuse for a late payment.

27. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 18. 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 £884.60 being 2% of the tax of £44,230.34 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 returns for the quarters ended 29 February 2012 and 31 May 2012. Therefore the appeal is dismissed.

28. 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: 15 October 2013**