



**TC02938**

**Appeal number: TC/2012/05674**

*TYPE OF TAX – VAT – late submission of VAT Returns and payment of VAT due on returns – whether scale of penalty is disproportionate to the gravity of the offence , or plainly unfair, and whether penalty should be reduced - Decision of Upper Tribunal in Total Technology (Engineering) Ltd applies. Whether reasonable excuse for late submission of return - No.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**HONITON CARPETS LIMITED**

**Appellant**

**- and -**

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

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

**The Tribunal determined the appeal on 3 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 18 May 2012 with enclosures, and HMRC's Statement of Case submitted on or about 13 Jun 2013 with enclosures. 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 £1,169.84 levied by HMRC for the late filing by the appellant of its Value Added Tax return for the period ended 31 December 2011. By a direction of the Tribunal dated 31 May 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  
10 decision was released on 29 November 2012.

### 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  
15 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  
20 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.

25 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  
30 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.*

35 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  
40 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.”*

5 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

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

### 4. The appellant’s submissions.

In a letter dated 12 Mar 2012 to HMRC the appellant writes

“I am writing to appeal against the fine for late payment for period 09/11/2011-31/12/2011.

15 Late payment was due to a very poor trading period which I am now past and trying to catch up with my arrears as quickly as I can. I am not trying to avoid paying my VAT and feel fining me is unfair and will not help the situation.”

20 On 18 May 2012 the appellant submitted to the Tribunal a Notice of appeal. Box 7. headed ‘Grounds for appeal’ is marked ‘Please see attached letter’. The attached letter is a copy of the 12 March 2012 letter. The Notice of appeal is against a decision of HMRC dated 3 April 2012 and should have been submitted within 30 days of that date. It is therefore 15 days late. As HMRC have raised no objection to the late appeal the Tribunal has allowed the late appeal.

5. In a letter date 20 April 2012 the appellant states:-

25 “It must be obvious that cash flow is an issue by my late payments and I cannot understand how you feel that fining me extra amounts is going to help an already difficult situation

I feel a little leniency in tough times is not much to ask and after all the VAT been fully paid.”

30 The appellant asks for the penalty to be waived.

### 6. HMRC’s submissions

HMRC state that the VAT return and payment for the period to 31 December 2011 was due by 7 February 2012 assuming payment was made electronically. In fact the

return was made late on 16 February 2012 and payment was made in four amounts on four days between 16 February and 26 March 2012.

5 A schedule in the papers provided to the Tribunal shows that the appellant has a history of late payments starting with the period ended 31 March 2009. The continued late payments have had the cumulative effect of increasing the surcharge liability rate to the maximum of 15%. The penalty for the quarter ended 31 December 2011 is £1,169.84 being 15% of the tax due for the quarter of £7,798.97 as shown on the appellant's VAT return for the period.

10 7. HMRC submit that in the appellant's letter of 12 March 2012 it is acknowledged that payment of the tax due as shown on the appellant's VAT return was submitted late because of a very poor trading period. HMRC submit that Section 71(1) (a) of the VAT Act 1994 states insufficiency of funds is not a reasonable excuse.

8. HMRC submit that the appellant has received surcharge notices and should be aware from the advice on them of the financial consequences of any further default.

15 9. HMRC submit that following an earlier default HMRC made the appellant aware that they could contact their Business payment support service if they were experiencing difficulty with paying on time.

10. HMRC request the appeal be dismissed.

#### **11. The Tribunal's observations**

20 The level of the penalties and whether or not they are disproportionate is discussed at length in the Upper Tribunal's decision. 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  
25 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.

30 12. 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 11 above. The Tribunal does not consider that a penalty of 15% of the tax due £1,169.84, which is the culmination of a 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  
35 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. It is clear from statements by the appellant that the reason for the late payment was lack of funds. 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.*"

13. The Tribunal is aware of the Court of Appeal decision in the case of J B Steptoe CA July 1992, [1992] STC 757. from which it is apparent that the reason for an insufficiency of funds may constitute a reasonable excuse. No information was provided in the papers which would give the Tribunal any guidance on the reason for the appellant's insufficiency of funds other than the general downturn in the economy.

14. In the light of the Upper Tribunal decision in Total Technology (Engineering) Ltd. as explained in paragraph 11. above this Tribunal has no statutory power to adjust the level of a penalty paid. HMRC has applied the legislation correctly and calculated the amount of the default surcharge of £1,169.94 accurately for the quarter ended 31 December 2011 being 15% of the VAT due for the period of £7,798.97. The appellant has established no reasonable excuse for the late submission of the VAT return for the quarter ended 31 December 2011. Therefore the appeal is dismissed.

15. 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.

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**PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

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**RELEASE DATE: 3 October 2013**