[2018] UKFTT 267 (TC)

TC06497

Appeal number: TC/2017/04176

VAT – default surcharge – reasonable excuse – serious and life-threatening illnesses – reliance on manager – theft by manager – continued attempts to meet obligations – whether reasons for relying on a third party can provide a reasonable excuse – appeal allowed – approach of HMRC to dealing with people with disabilities

FIRST-TIER TRIBUNAL
TAX CHAMBER

SANDPIPER CAR HIRE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR IAN ABRAMS

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 25 April 2018

Mr Richard Pendrill, director of the Appellant, for the Appellant

Mr Colin Smithson, litigator in HM Revenue and Customs Solicitor's Office, for the Respondents

DECISION

1. This was the appeal of Sandpiper Car Hire Limited ("the Company"), which traded under the name "Regal Cars", against VAT default surcharge liability notices issued between 11 March 2011 and 11 December 2015 for periods 01/11 through to 10/15. The surcharges totalled £9,643.81.

2. The Tribunal decided that the Company had a reasonable excuse for its failures to pay VAT by the due dates. As a result, the Company's appeal is **ALLOWED** and the surcharges **CANCELLED**.

Why there is a full decision in this case

3. The Tribunal gave its decision orally at the end of the hearing, and suggested to the parties that a short decision might be appropriate. Short decisions are usually issued on the same day, or very soon after the hearing.

4. In making that suggestion the Tribunal had taken into account, *inter alia,* the worry and pressure this dispute has caused Mr Pendrill, the Company's only director and its owner, and his current very poor state of health. He was visibly distressed through much of the hearing. Mr Pendrill said he would be very happy with a short decision.

5. However, the Tribunal cannot issue a short decision without the agreement of both parties, see Rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). Furthermore, if the losing party wants to seek permission to appeal against a decision of the Tribunal, a full decision is required, see Rule 35(4).

6. Mr Smithson said HMRC did not agree to a short decision, but instead required a full decision, with a view to making an appeal. The Tribunal has given directions about the timing of any such permission to appeal application, and about a related matter, at the end of this decision.

7. At §XX the Tribunal also makes a number of observations about HMRC's approach when dealing with Mr Pendrill, who has severe hearing loss and other serious medical conditions. Our comments substantially echo those made in *E v HMRC* [2017] UKFTT 348 (TC) (Judge Thomas and Ms Dean).

Late appeal

8. HMRC issued their statutory review of the default surcharges on 8 March 2017; following a response from Mr Pendrill, they issued a supplementary letter on 6 April 2017. Mr Pendrill continued to correspond with HMRC in the hopes of resolving the dispute, but filed the Company's appeal to the Tribunal on 18 May 2017. The appeal was thus late.

9. HMRC did not object to the Tribunal admitting the appeal late. Having considered the relevant law, including *BPP Holdings Ltd v HMRC* [2017] UKSC 55 and *Denton v TH White Ltd* [2014] EWCA Civ 906, the Tribunal decided to admit

the late appeal. The breach was not serious or significant; it occurred because Mr Pendrill was trying to resolve the matter directly with HMRC and the circumstances of the case included Mr Pendrill's very poor state of health.

The arrangements for the hearing

10. Mr Pendrill suffers from Menière's disease (see §XX). Despite hearing aids in both ears he still finds it extremely difficult to hear. The hearing loop in the Tribunal room was not compatible with Mr Pendrill's hearing aids. He is able to lip read.

11. The hearing room was therefore reconfigured so that the parties and the Tribunal were sitting as close to each other as reasonably possible, around a small table. The Tribunal checked with Mr Pendrill from time to time that he was following the proceedings, and Mr Smithson repeated some of his submissions at a higher volume and more slowly as a result of requests from the Tribunal.

The evidence

12. The HMRC Bundle provided for the hearing included correspondence between the parties and between the parties and the Tribunal. It also contained:

(1) a schedule of the Company's defaults;

(2) a copy of the related VAT returns;

(3) extracts from HMRC's contact database recording communications between HMRC and the Company; and

(4) HMRC's ledger for the company for the relevant period.

13. Mr Pendrill gave oral evidence and answered questions put by Mr Smithson. The Tribunal found him to be an entirely honest and credible witness.

14. From that evidence summarised above we find the facts set out in the next part of this decision. None of the facts were challenged by HMRC.

Findings of fact

15. Mr Pendrill has had Menière's disease since around 1998. In one of his letters to HMRC, he described it as follows:

> "this is a disease which ultimately destroys your hearing. At its worst it puts the brain out of sync with your actions and this can cause you to pass out, become giddy and even collapse. These attacks can last several days and there is no cure. In fact 25% of people who suffer with Menière's commit suicide and this can be verified with the Menière's Society."

16. On 5 November 2007 Mr Pendrill set up the Company in the hope that he could continue to earn a living. He is the Company's only director and its owner. The Company acquired several cars on hire purchase and began operating. Mr Pendrill installed a manager to run the Company.

17. However, Mr Pendrill had had a routine blood test in October 2007; this was required as part of the monitoring of his Menière's disease. This blood sample was mistakenly tested not only for Menière's but also for carcinomas. It showed that Mr Pendrill had cancer. He was given an appointment at the Royal Marsden Hospital, where a further test showed that he required an urgent radical operation which he might not survive.

18. Prior to the operation, Mr Pendrill met with his manager and his solicitor. The manager was to run the business in Mr Pendrill's absence; the solicitor was instructed to sell the business to the manager if Mr Pendrill did not survive the operation.

19. Unfortunately during the operation to remove Mr Pendrill's tumour, the surgeon clipped a major nerve to Mr Pendrill's spine. This required several further operations over the following years and many subsequent visits to the pain clinic to try to manage the extreme pain which Mr Pendrill experiences; this is combined with significant mobility difficulties. For long periods, Mr Pendrill was unable to work, and he was frequently and unpredictably absent from the Company.

20. When Mr Pendrill returned to work, he found that the manager had set up his own business and persuaded Mr Pendrill's main client to migrate. This significantly reduced the Company's cash flow and its profits.

21. By July 2010 the Company had a new manager and its turnover had increased, requiring that it register for VAT. Profitability remained under pressure and the Company had significant debts, in particular relating to the lease/hire of vehicles.

22. Shortly afterwards Mr Pendrill had yet another operation to try and ameliorate the damage to his back, and restore some of his mobility. The plan was to insert a box into his spine which delivers electric shocks to the leg muscles so that they would move. However, during the operation the surgeons found that Mr Pendrill's spine was (as he described it) "crumbly". As a result the surgeons were unable to place the box securely between his vertebrae. They decided to refer him to another hospital and closed the incision in his back.

23. The box was finally installed following an operation at the second hospital. However, the night after he left hospital he suffered a significant post-operative discharge from the wound site. His son drove him to A&E as quickly as possible and he had an immediate operation. He was told that he would have died had he taken a further half hour to arrive.

24. When he was able to return to work, he discovered that the manager had sold four of the Company's hire purchase cars for £65,000 and pocketed the money. Mr Pendrill reported the theft to the Fraud Squad, but the Company had to find around £80,000 to repay the finance house which had lent the money as part of the lease/hire agreements for the vehicles.

25. The theft, together with Mr Pendrill's absence in hospital, caused significant financial strain on the Company, and it defaulted on its first VAT payment. Mr Pendrill arranged to pay the amount due under a time to pay ("TTP") agreement.

26. The Company then began to factor its debts, but received only 64% of the total due. As the drivers were entitled to retain 70% of each booking, the factoring did not assist with cashflow. Moreover, the factoring company charged a transaction fee of £48 (including VAT) twice a week, but Mr Pendrill subsequently established that this was unjustified as the transactions were carried out electronically and the transaction fee should not have been charged. This cost the Company £18,500 over a four year period. The Company has been unable to recover that money.

27. The Company sought to expand its business by investing in a website and recorded the domain name with a company called Sky Designs for £3,500. However, that company then demanded a further £1,850; when the Company refused to pay, Sky Designs sold the use of the website to a rival taxi company, with the result that when a customer contacted the website they were directed to that rival company. The Company successfully sued in the County court but Sky Designs was ordered to repay the original payment of £3,500 plus a further sum of £150 at only £50 per month. Mr Pendrill was given legal advice that he had a good case against Sky Designs to make a further claim for the theft of the Company's intellectual property, but that it would cost between £5,000 and £10,000 to take the case; the Company could not afford that outlay and no further claim was made.

28. During the winter of 2014-15 the Company's business suffered from the severe flooding which affected the geographical area where it operated. In addition, it lost several contracts with schools. Its accounts showed that it was making significant losses. When he was able to do so, Mr Pendrill tried to get new business and in March 2015 secured two new schools contracts.

29. During the period of the defaults, the Company generally filed its VAT returns on time, with the assistance of an accountant, but was continually behind with its VAT payments; the VAT was paid, but by instalments and in arrears, often using TTP agreements made after the due date with HMRC.

30. Mr Pendrill continued to be frequently absent from the business, because of his many hospital appointments including further operations on his back; the level of his pain, which was unpredictable but often severe; and the Menière's attacks, with their accompanying vertigo and sickness.

31. The HMRC contact records show numerous threats of distraint interspersed with Mr Pendrill's explanations of his health difficulties and the other problems facing the Company. The threats were not enforced because, as one HMRC officer noted following a visit to the premises, the cars were all on hire purchase and there were minimal office effects. Mr Pendrill continued to run the business throughout this period because he was trying to raise the money to meet the Company's debt obligations, both to HMRC and to the lease/hire companies.

32. In September 2015 Mr Pendrill sold part of the business to a competitor, which paid £45,000 over the next three months. Mr Pendrill used the proceeds to clear a substantial part of the Company's VAT debt. In December 2015, the Company's VAT registration was cancelled, because its taxable turnover had reduced.

33. Since then, the Company has continued to operate at a much reduced level, but with the aim of raising sufficient money to pay HMRC the amounts owed. Mr Pendrill has spent significant time trying to find out how much VAT is outstanding, but this has been far from straightforward. He identified three payments, one of £3,325, one of £2,990 and one of £1,000, which he considered had not been credited to the VAT account which HMRC hold for the Company. HMRC subsequently confirmed that the £3,325 and the £2,990 had been wrongly allocated to the Company's PAYE account.

34. When Mr Pendrill was informed that HMRC had located the £3,325, he wrote to HMRC's "VAT written enquiries team" saying (emphases added throughout the citations below):

> "thank you for your letter dated 19 December informing me that you have located our cheque for £3,325.71. Unfortunately I am deaf and unable to hear you, so can I please request that you transfer this money from the PAYE account to our VAT account."

35. On 13 January 2017 he received a letter from the VAT written enquiries team saying that they were unable to complete the transfer, but that the request had been forwarded to the PAYE office. It ended "should you need to speak to them regarding this matter, they can be contacted on telephone number 0200 300 3311."

36. Mr Pendrill wrote two further letters, on 30 January and 27 February 2017, and on 1 March 2017 received a reply, which said "as stated in my previous reply, you would need to speak to the PAYE team direct on telephone number 0200 300 3311".

37. As Mr Pendrill's hearing is seriously impaired, his wife called that number but it was unobtainable. She managed to obtain another telephone number but the PAYE team refused to speak to her as she was not an officer of the Company. Further correspondence ensued, with Mr Pendrill's letter of 20 April 2017 being treated as a complaint by HMRC. On 12 May 2017, HMRC's Complaints department wrote to Mr Pendrill. The letter denied that HMRC "had not considered your illness and constant hospital appointments", and went on to say that "any queries concerning your PAYE credit should be addressed to [the PAYE section] and you should contact them on 0300 200 3810". At the time of the hearing, Mr Pendrill was still unclear as to the position of the three amounts of £3,325, £2,990 and £1,000.

38. Mr Pendrill is 71 years of age. He told the Tribunal that his family were pressing him to stop work because of his serious ill-health, but he was worried about the surcharges and whether there were any other amounts owed to HMRC. He hoped this would be sorted out soon, because the leases on the Company's cars were due for renewal or cancellation in July 2018, and this would give him a good opportunity to close the business without beginning another debt cycle with the Company's vehicle providers.

The law

39. The relevant legislation is set out as an Appendix to this decision. A key provision is Value Added Taxes Act 1994 ("VATA"), s 59(7), which reads:

> "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)…, or
>
> (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)."

40. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 ("*Clean Car*") Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?...
>
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

41. In *Barrett v HMRC* [2015] UKFTT 329 ("*Barrett*") at [154], Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard".

42. VATA s 71(1) reads:

> "For the purposes 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 reasonable excuse; and

> (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse."

43. Although VATA s 71(1)(a) provides that an insufficiency of funds is not a reasonable excuse, in *C&E Commrs v Steptoe* [1992] STC 757 ("*Steptoe*") the Court of Appeal (Lord Donaldson MR, Nolan and Scott LJJ) found unanimously that the cause of the insufficiency of funds may provide such an excuse. At that time the relevant legislation was at Finance Act 1985 s 33(2); the wording was identical to what is now s 71, with the same two subparagraphs.

44. Scott LJ compared s 33(2)(a) to s 33(2)(b), saying at p 764:

> "An important part of the context is, to my mind, para (b). If para (b) had said no more than 'the fact of that reliance is not a reasonable excuse', the paragraph would have presented the same problem of construction as is presented by para (a). But the actual words used, 'neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse' resolve the problem. It is plain that a failure by the person relied on cannot, by itself, constitute a reasonable excuse, but it is also plain that, provided the failure is due to something other than dilatoriness or inaccuracy, the reason for the failure can be put forward as a reasonable excuse. If para (b) does not exclude consideration of the underlying reason for the failure of the person relied on to perform the task (save where the reason is dilatoriness or inaccuracy), it is difficult to see why para (a) should exclude consideration of the underlying reason for the insufficiency of funds. The two paragraphs must be construed consistently with one another."

45. Lord Donaldson's analysis was similar. He said (at pages 769-70) that the view of the Commissioners about the meaning of para (a) was not only improbable in itself but also could not survive in the context of para (b):

> "There the words 'neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse' show clearly that although reliance on another person is not of itself capable of constituting a reasonable excuse, the commissioners and the tribunal are expected to look behind that reliance and to ask themselves whether in such a case the underlying cause was dilatoriness or inaccuracy on the part of that person or whether, for example, he was run over by a bus. If the same approach is applied to s 33(2)(a) as clearly it should be, the legislative intention is that insufficiency of funds can never of itself constitute a reasonable excuse, but that the cause of that insufficiency, ie the underlying cause of the default, might do so.

46. Nolan LJ also agreed with this analysis, see page 768 of the judgment.

The parties' submissions

47. Both parties considered all the defaults together; neither sought to identify particular VAT periods when different factors might apply, or might apply to a greater or lesser extent.

48. Although this is the Company's appeal, the Company had only one shareholder and director, Mr Pendrill. When making submissions, both parties therefore considered whether the steps taken by Mr Pendrill met the tests of reasonable excuse.

49. Mr Pendrill said that he had always tried to act reasonably. However, his serious health conditions meant that he was frequently absent from work, and many of these absences were unpredictable. There had been other difficulties, which were exacerbated by his inability to devote enough time to the business on a reliable basis. He had obviously been aware when he set up the Company that he had Menière's disease, a long-standing and deteriorating health condition, but had not expected he would also be diagnosed with cancer and suffer significant spinal damage during the operation to remove the tumour. He had relied on managers, who had defrauded him and stolen part of his business. Nevertheless, he continually did his best to pay the VAT which he knew was owed, and almost all the VAT returns were filed on time by his accountant. He submitted that his situation was "exceptional", and that the Company had a reasonable excuse. He also described the surcharges as "outrageous" in amount.

50. Mr Smithson did not put forward a definition of "reasonable excuse" but accepted the correct formulation was that stated in *Clean Car*. However, he submitted that there was no reasonable excuse in this case, because Mr Pendrill "has not provided anything to the Commissioners to the effect that the health of the director prevented the Company from making payment of VAT by the due date". He said that Mr Pendrill's health problems "were ongoing prior to the Company registering for VAT in 2010" and that:

> "a taxable person wishing to be compliant in his tax affairs would have put arrangements in place for both the VAT return and the required payment to be submitted on time."

51. The Tribunal reminded Mr Smithson that Mr Pendrill had delegated responsibility for managing the Company, but while he was in hospital, one manager had set up a rival business, and another had fraudulently taken assets worth around £80,000 from the Company, which had significantly worsened its financial position. Mr Smithson's response was that VATA s 71(1)(b) said that "where reliance is place on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse", and that as a result the Company did not have a reasonable excuse as the result of Mr Pendrill's relying on the managers.

52. The Tribunal asked how he reconciled those two submissions. Mr Smithson reiterated that Mr Pendrill should have "made alternative arrangements" for when he was ill, but was unable to explain how he could have done this, other than by relying

on a third party, which was in his submission prevented by statute from being a reasonable excuse.

53. Mr Smithson also said that the Company continued to trade during the period, and if it was possible to trade, it must also have been possible for the Company to organise and pay its VAT. However, he accepted that Mr Pendrill had continued to run the business because he was trying to raise the money to meet the Company's debt obligations, most of which were to HMRC.

54. In answer to a question from the Tribunal, Mr Smithson said that the Company could have avoided most of the defaults, and the related surcharges, had Mr Pendrill:

(1) asked for and obtained TTP agreements in relation to the next period's VAT bill, instead of continually trying to clear the historic liabilities; and/or

(2) required HMRC to allocate the Company's payments to the next liability, rather than to the historic liabilities, in reliance on the principle in *The Mecca* [1897] AC 286.

55. Finally, Mr Smithson submitted that the Company could not rely on the shortage of funds, because it was prevented from doing so by VATA s 71(1)(a).

Discussion

56. Like the parties, the Tribunal considered the reasonableness of the steps taken by Mr Pendrill on behalf of the Company. We started from the test set out in *Clean Car,* which is very similar to that put forward by Judge Berner in *Barrett.* The reasonable person with Menière's disease, who was then diagnosed with life-threatening cancer and who suffered significant spinal damage when undergoing an operation to remove the tumour, would have put arrangements into place, so far as he was able to do so, to ensure that the Company's obligations were met when he was hospitalised.

57. That is exactly what Mr Pendrill did. However, the trust he reposed in his managers was misplaced; when he came out of hospital the Company had lost all its vehicles in a £80,000 fraud and as a result the Company defaulted on its VAT payment.

58. Although Mr Smithson submitted that the reasonable taxpayer in Mr Pendrill's position would have delegated responsibilities when he was sick, he also said that delegation was precluded by statute from being a reasonable excuse. He was unable to explain how the reasonable taxpayer would have resolved this Catch 22 position. The solution is, however, to be found in *Steptoe.* The Court of Appeal there held that although an insufficiency of funds could not provide a taxpayer with a reasonable excuse because of VATA s 71(1)(a), the cause of that insufficiency could provide such an excuse. They came to that conclusion by analogy with the statutory phrasing of para (b), with Scott LJ saying:

> "It is plain that a failure by the person relied on cannot, by itself, constitute a reasonable excuse, but it is also plain that, provided the

> failure is due to something other than dilatoriness or inaccuracy, the reason for the failure can be put forward as a reasonable excuse."

59. It is absolutely clear that the reason why a person relies on a third party can provide a reasonable excuse. Moreover, as Lord Donaldson said, it is the duty of HMRC and the Tribunal to look behind that reliance to establish whether failure was caused by "dilatoriness or inaccuracy", or had some other cause.

60. In other words, the statute prevents mere reliance from being a reasonable excuse, so it is not possible to avoid a surcharge simply by delegating responsibility for making the VAT payment. But where a person has an extremely serious health condition which requires reliance on a third party to run the business, that condition is the cause of the reliance, and so may provide a reasonable excuse, just as the cause of the insufficiency of funds provided a reasonable excuse in *Steptoe.*

61. In this case, Mr Pendrill relied on his managers because he was seriously ill. The reasonable business owner in Mr Pendrill's position who entrusted his business to a manager when he was hospitalised would not have expected that manager to commit serious fraud. As the result of that fraud and Mr Pendrill's illness, the Company was continually playing "catch-up" with the VAT liabilities. To use an analogy, the Company had been "holed below the waterline" from shortly after the time it had registered for VAT, but Mr Pendrill "had continued to bail out". He made numerous successive TTP arrangements with HMRC as he attempted to get the business back on an even keel.

62. He acted responsibly and reasonably, too, when he factored the debts to try to improve the cash flow, and when he looked for new business to try to replace that which the Company had lost in the severe flooding and to competitors. In September 2015, with no realisable assets (§XX) Mr Pendrill took the only remaining course of action reasonably open to him, and sold part of the business to raise funds to pay his VAT.

63. Judge Medd said that "the incidence of some particular difficulty or misfortune" may also have a bearing on the reasonable excuse position. Here, the Company had a further unexpected difficulty to contend with in addition to those set out above: its treatment by Sky Designs. The Company acted entirely reasonably in seeking to pursue Sky Designs in the courts, but the outcome was a derisory monthly payment of £50. It was also entirely reasonable for the Company not to embark upon a costly legal action in relation to the intellectual property issue, given the parlous state of its finances and the anticipated costs of the legal proceedings.

64. We have no hesitation in finding that the Company has a reasonable excuse for its VAT defaults. The reasonable taxpayer in the position of Mr Pendrill, acting on behalf of the Company, with his serious and life-threatening health conditions, and in continual pain, would have delegated to a manager; faced with the financial consequences which followed that breach of trust, he would have reported the manager's fraud to the police, factored the debts, sought new business, and pursued in the courts a business which had sold him a website but subsequently operated it on

behalf of a competitor. The reasonable person would also have tried his best at all times to pay HMRC. Mr Pendrill did all these things. He finally sold part of the business in order to try and settle the Company's VAT debt.

65. We also note, but do not rely on when coming to our conclusion, that (as Mr Smithson acknowledged) the size and frequency of the Company's defaults would have been much less had Mr Pendrill either obtained TTP agreements for future liabilities, and/or required HMRC to allocate the payments to current liabilities, in reliance on *The Mecca*. Instead, Mr Pendrill always tried his best to pay off the old debts. That behaviour is itself an indicator that he was acting in a conscientious and responsible way, endeavouring at all times to pay the VAT which was already due.

66. Because of our finding on reasonable excuse, we do not need to consider the law on proportionality or the parties' submissions on that issue.

Appeal rights and related directions

67. This document contains full findings of fact and reasons for the decision. If HMRC are dissatisfied with it, they have a right to apply for permission to appeal pursuant to Rule 39 of the Tribunal Rules. The same Rule provides that the application for permission to appeal must be received by the Tribunal no later than 56 days after the date this decision is issued.

68. That time limit means that an appellant who has won his appeal does not know for up to 56 days whether or not the decision is being appealed, or whether it is final. Sometimes the period of uncertainty is even longer, because of administrative delays in communications between parties and the Tribunal.

69. Rule 2(1) provides that the overriding objective of the Tribunal Rules is to deal with cases fairly and justly, and Rule 2(3) provides: that the Tribunal must:

> "seek to give effect to the overriding objective when it–
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

70. Rule 5(3)(a) gives the Tribunal power to issue a direction to "extend or shorten the time for complying with any rule".

71. The Tribunal therefore makes the following directions:

(1) If HMRC decide not to seek permission to appeal this decision, so that it is final and conclusive, **they shall inform the Company in writing within 5 days of coming to that conclusion, and notify the Tribunal that they have done so. The letter shall be delivered to Mr Pendrill by first class post and state in clear terms that the decision is final**; and

(2) **the time limit for appealing this decision is shortened, so that any application for permission to appeal must be received within 28 days from the date of issue of this decision**.

72. The First Direction is made for the following reasons:

(1) if HMRC decide not to appeal this decision, it is fair and just for Mr Pendrill to be provided with that information as soon as possible because:

(a) his state of health is extremely fragile;

(b) he is already 71 years of age.;

(c) the dispute with HMRC is causing him significant stress; and

(d) he wants to close down his business, and can do so relatively easily if he knows by the end of June 2018 that this dispute has come to an end, see §XX.

73. The Second Direction is made for the reasons given at (a) to (d) in the previous paragraph, and for the following additional reasons:

(1) the 56 day time limit applies to all cases, irrespective of their level of complexity. This is a straightforward VAT default surcharge appeal and the time required for HMRC to assess whether or not to ask for permission to appeal, and to formulate the relevant grounds, is therefore significantly less than in complicated case; and

(2) no factual issues were in dispute, so this is not a case where detailed drafting is required in order to seek to show that the threshold set in *Edwards v Bairstow* (1955) 36 TC 207, and related case law, has been met.

74. 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.

Other matters

75. The Tribunal set out at §XX extracts from the letters passing between Mr Pendrill and HMRC, in which he was repeatedly told to call HMRC's PAYE section despite HMRC having being explicitly informed on many occasions that Mr Pendrill suffers from Menière's disease.

76. In *E v HMRC*, where the appellant had mental health difficulties, the Tribunal began its judgment by saying:

> "[1] HMRC has published many statements in compliance with its obligations under the Equality Act 2010. See for example HMRC's report 'How HMRC has complied with its Public Sector Equality Duties 2015-16' published 20 January 2017. That report refers to the continuing operation in 2016-17 of HMRC's dedicated group called 'Needs Extra Support'…
>
> [3] HMRC's Debt Management & Banking Guidance (among no doubt others) at paragraphs 585180 and 585185 gives clear and full guidance to staff in relation to vulnerable groups.

> [4] But these publications are of little use if HMRC staff ignore them or do not recognise when they should be applied. This case is a very unfortunate example of that."

77. We echo and endorse those sentiments. Mr Pendrill clearly has several "long term impairments" as defined by the Equality Act, as HMRC recognise at DMBM585185, which says that

> "The act defines the long-term effect of an impairment as either one
>
> - which has lasted for 12 month
> - where the total period for which it lasts is likely to be 12 months
> - which is likely to last for the rest of the life of the person affected."

78. DMBM585185 also requires HMRC staff to consider "in all cases" the "possible detrimental effect on the debtor" of taking recovery action, and "the possibility of unreasonable distress". HMRC officers are also told to be aware of "the likelihood of adverse publicity" if they take inappropriate action.

79. There is no indication that any of this guidance has been considered by the many HMRC employees who have had dealings with Mr Pendrill over the years. Instead, the Company has been repeatedly threatened with enforcement proceedings, by letter, on the phone, by text and by visits.

80. Mr Pendrill also appears to this Tribunal to meet the criteria for a reference to the "Needs Extra Support" ("NES") team; he is profoundly deaf, he is over 70 years old, and he is in significant and constant pain from the damage to his spine.

81. An appropriately trained HMRC NES officer might also have been quickly able to resolve Mr Pendrill's continuing problem with the payments which were wrongly allocated to PAYE and the other £1,000 amount. But instead, he was repeatedly told to make phone contact (initially using an incorrect number) and he has now spent two years trying to resolve these issues. His letter of 8 June 2017, having set out the background to the difficulties once again, concludes "firstly, you discriminate against me because of my disability and secondly you hound me with daily texts/letters from Debt Management and I am the person who has had to fight to sort out your errors going back 2 years".

82. The Tribunal has no jurisdiction over how HMRC treats its disabled customers, and no jurisdiction over the collection of VAT debts or the allocation of tax payments. Nevertheless, we hope that HMRC will take into account our comments together with those of the tribunal in *E v HMRC*.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 14 May 2018

THE LEGISLATION

VATA s 59 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 subsections (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) to (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) 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—

(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;

(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.

(6) For the purposes of subsections (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.

(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

(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).

(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

(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—

(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,

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.

(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.

VATA s 71 Construction of sections 59 to 70

(1) For the purposes 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 reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

(2) …..