Neutral Citation: [2023] UKFTT 283 (TC)

Case Number:TC08757

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/03070

Default surcharge – whether surcharge notice served on Appellant – yes – whether Appellant had a reasonable excuse for non-payment of VAT – no – whether surcharge disproportionate – no – Appeal dismissed

Heard on: 4th October 2022
Judgment date: 11 January 2023

Before

TRIBUNAL JUDGE MARK BALDWIN
MR IAN SHEARER

Between

MAREEL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Miss Amy Owens, Financial Controller of the Appellant

For the Respondents: Mr Asgar Thaver, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by Mareel Limited ("Mareel") against an assessment dated 18 August 2021 to a default surcharge in the sum of £64,119.53 raised by His Majesty's Revenue and Customs ("HMRC") in respect of the period 1 April 2021 to 30 June 2021 ("period 06/21"). Mareel raises three points, firstly whether a default surcharge notice in respect of an earlier period had been properly served on Mareel as required by section 59, Value Added Tax Act 1994 ("VATA") (we refer to this as the "Surcharge Liability Notice Issue"), secondly, whether Mareel has a reasonable excuse for not having paid VAT due for the period 06/21 on time (we refer to this as the "Reasonable Excuse Issue") and finally Mareel complains about the size of the surcharge in relation to its default (we refer to this as the "Proportionality Issue").

2. We heard Miss Amy Owens, the Financial Controller of Mareel, for the Appellant. In addition to articulating Mareel's case, she provided evidence, particularly in the form of statements about the company's financial position at particular times and of her dealings with HMRC. She had not previously supplied a witness statement. Mr Thaver (for HMRC) made no objection to this approach. We also had a hearing bundle, which included transcripts of three conversations between Miss Owens and HMRC staff, the relevance of which will become apparent.

THE DEFAULT SURCHARGE

3. The framework of the default surcharge regime was not disputed before us. Section 59, VATA provides that, if by the last day on which a taxable person is required in accordance with regulations under VATA to furnish a return for a prescribed accounting period (a) HMRC have not received that return, or (b) HMRC have received that return but have not received the amount of VAT shown on the return as payable by the taxpayer in respect of that period, then the taxpayer is regarded for the purposes of Section 59 as being in default in respect of that period.

4. Where a taxable person is in default in respect of a prescribed accounting period HMRC may serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of section 59 a period ending on the first anniversary of the last day of the period for which that person was in default.

5. If a surcharge liability notice is served by reason of a default in a prescribed accounting period which ends at or before the expiry of an existing surcharge period already notified to the taxable person, then 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; sub-section 59 (3).

6. Sub-section (4) provides that, if a taxable person on whom a surcharge liability notice has been served is in default in respect of a prescribed accounting period ending within the surcharge period and has outstanding VAT for that prescribed accounting period, that person is liable to a surcharge equal to the greater of £30 and the specified percentage of their outstanding VAT for that prescribed accounting period. The specified percentage depends on the number of prescribed accounting periods in respect of which the taxable person is in default during the surcharge period and for which they have outstanding VAT. In relation to the first such prescribed accounting period, the specified percentage is 2 per cent. In relation to the second such period, the specified percentage is 5 per cent. In relation to the third such

period, the specified percentage is 10 per cent. and in relation to each subsequent period after the third, the specified percentage is 15 per cent.

7. For these purposes, a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which they are liable in respect of that period has not been paid by the last day on which they are required (pursuant to regulations made under VATA) to make a return for that period; sub-section 59 (6).

8. If a person who would otherwise be liable to a surcharge satisfies HMRC, or on appeal the tribunal, that there is a reasonable excuse for the return or VAT which is material to the surcharge not having been dispatched at such a time and in such a manner that it was reasonable to expect that it would be received by HMRC within the appropriate time limit, then that person is not liable to the surcharge and is not treated as having been in default in respect of the prescribed accounting period in question (so that any surcharge liability notice which depended on that default is deemed not to have been served); sub-section 59 (7).

9. Section 25 VATA requires a taxable person to account for and pay VAT by reference to such periods ("prescribed accounting periods") at such time and in such manner as is determined by or under regulations. Regulation 25 of the Value Added Tax Regulations 1995 (the "VAT Regulations") requires a person who is registered for VAT to make a VAT return not later than the last day of the month next following the end of a prescribed accounting period and regulation 40 of the VAT Regulations requires a person required to make a return to pay the VAT due for a period not later than the last day on which they are required to make that return. Where returns are filed online or payments made electronically, the due dates are extended by 7 days.

THE IMPACT OF "TIME TO PAY" (OR "TTP") ARRANGEMENTS

10. Section 108 of the Finance Act 2009 applies if a person ("P") fails to pay an amount of tax when it becomes due and payable, makes a request to HMRC for the payment of the amount to be deferred and HMRC agrees with that request. In those circumstances, P is not liable to a penalty for failing to pay the amount mentioned if the penalty is prescribed in Section 108 and P would otherwise become liable to the penalty between the date on which P makes the request and the end of a deferral period. If P breaks the agreement and HMRC serve a notice on P, they become liable at the date of the notice to that penalty.

11. Although Mareel had entered into "time to pay" arrangements with HMRC, there was no suggestion before us that these arrangements resulted in Mareel not being "in default" for any of the prescribed accounting periods relevant for this appeal. As we will see, Mareel was seeking to enter into a further TTP arrangement for the 06/21 period when the VAT return and payment for that period fell due.

MAREEL'S DEFAULTS

12. Mareel's first default was in the period 09/20 (the period from 1 July 2020 to 30 September 2020). Its VAT return for that period was submitted before the due date (7 November 2020), but the VAT due (£259,444.48) was paid in two instalments, the first on 10 November 2020 (£159,444.88) and the balance (£99,999.60) on 26 January 2021.

13. Mareel's second default was in respect of period 12/20 (from 1 October 2020 to 31 December 2020). Again, the VAT return was submitted before the due date (7 February 2021), but the VAT due (£240,586.25) was paid in three instalments in February, July and August 2021.

14. Mareel's third default was in respect of the period 03/21 (from 1 January 2021 to 31 March 2021). Here the VAT return was submitted on time on 5 May (due date 7 May 2021) but the VAT due was not paid until 30 August 2021. The VAT due was £16,899.49.

15. Finally, in respect of the prescribed accounting period 06/21, the subject of this appeal, the VAT return was due on 7 August 2021 and submitted on 6 August 2021. The VAT due (£641,195.33) was paid two months late on 30 September 2021.

THE SURCHARGE LIABILITY NOTICE ISSUE

16. As mentioned above, the default surcharge regime in Section 59 is triggered where HMRC "serve notice on the taxable person (a "surcharge liability notice")" specifying a surcharge period which ends a year after the end of the period in which a default took place. It is only a default during a surcharge period which can give rise to a surcharge. Mareel's case, as initially expressed, was that they had not received one (but they did not specify which) of the surcharge liability notices. By the time of the hearing before us that assertion had been refined and it was said that the first liability notice (for the period 09/20) had not been received.

17. Section 98 VATA provides that any notice, notification, requirement or demand to be served on or given to or made of any person for the purposes of the Act "may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative". So, a default surcharge notice can be served by sending it by post to a taxpayer or their representative. Mareel's VAT correspondence was directed to its accountant.

18. Section 7 of the Interpretation Act 1978 provides that, where an Act authorises or requires a document to be served by post, then, unless the contrary intention appears, service is deemed to be effected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

19. In *Customs & Excise Commissioners v Medway Draughting & Technical Services Limited*, [1989] STC 346, it was held in that case that, as Parliament's clear intention was that a surcharge liability notice should act as a warning to a taxpayer before the surcharge could be levied, receipt of the notice was crucial to put the taxpayer on notice that they were in danger of incurring a surcharge. Accordingly, Section 7 could not operate to deem that service had been effected at a particular time if, in fact, the notice had not been received. In that case it had been proved before the tribunal that the surcharge liability notice had not in fact been received by the taxpayer. The important point to take from this case is that Section 7 does not deem service to have been effected, even where a notice is correctly posted, if it is proved that the notice had not been received. What Section 7 does, in a case where it is proved (or accepted) that a notice has been correctly posted, is shift the burden to the taxpayer to show that the notice was not received.

20. This may seem a very high burden, but it is one which can be discharged. In *Dow Engineering* (MAN/90/557) the taxpayer accepted that notices were correctly posted but nevertheless, looking at the whole of the evidence, which included evidence of persistent failures to deliver mail by the Post Office and the taxpayer's procedures for dealing with mail when he was away, the tribunal concluded on the balance of probabilities that none of the notices was received by the taxpayer. The tribunal also held that, if an original surcharge notice had not been correctly served, any subsequent notice which purports to extend the surcharge period intended to have been notified by the original notice falls with it.

21. A similar conclusion was reached in *Eidographics Ltd* (LON/91/1049Z), where the tribunal accepted on the balance of probabilities that a surcharge liability notice had been posted but also (against the background of significant evidence of a shocking level of postal (non-)service) held that it had not been received. The tribunal held that subsequent notices

seeking to extend that period on account of later defaults could not extend the original period as the taxpayer was not a "person on whom a surcharge liability notice has been served" and this despite the taxpayer having received some of these notices and knowing that, at least in HMRC's mind, a surcharge period was running.

22. In *England and Wales Cricket Board Limited v HMRC*, [2016] UKFTT 348 (TC), this tribunal held, following *Medway*, that if a surcharge liability notice had not been served, then HMRC have no power to levy a surcharge. In that case the tribunal was satisfied that the notice had been produced by HMRC, but there was no evidence that it had been posted pre-paid to the taxpayer; HMRC's computer records indicated the production, but not the posting, of the notice. In the tribunal's view "HMRC therefore fail at the first hurdle as they have no evidence of the posting of the SLN. On the basis of the evidence before us, we find that the SLN had not been posted to the Appellant." The tribunal went on to observe that,

> "[E]ven if our finding that the SLN had not been posted is incorrect, there is the unchallenged evidence of Mr Mannie that the SLN had not been received. Although Section 7 of the Interpretation Act 1978 makes provision for service to be deemed to occur when the SLN would have been received in the ordinary course of post, this is subject to the proviso "unless the contrary is proved". The Appellants' unchallenged evidence was that the SLN had not been received by them, and this evidence is corroborated by examples of other correspondence from HMRC not being received (and again this evidence was unchallenged by HMRC). We therefore find that the Appellants have proved "the contrary", and that the presumption as to service in Section 7 does not apply. Even if we are wrong in our finding that the SLN had not been posted, we find that it had not been received by the Appellants, and had therefore not been served on them."

23. In *Garnmoss Limited (T/A Parham Builders) v HMRC*, [2012] UKFTT 315 (TC), the taxpayer asserted that no surcharge extension notices had been received. Miss Pothecary (who lived with Mr Parham) dealt with the business's accounting. She gave evidence to the effect that she (or Mr Parham's sister) opened all the post and anything to do with HMRC was given to her. She said that she did not have any of the surcharge extension period notices. HMRC had printouts showing that notices had been produced, but the record did not mean that a letter had been sent, rather than that instructions had been given to send a letter. The tribunal summarised the position (at [41] and [42]) as follows:

> "We have to decide on the evidence before us whether, on the balance of probabilities, the notices were sent. The evidence that they were not was that of Miss Pothecary, but we thought it was possible that the letters were received but misfiled or lost. On the other hand we had a computer printout which one might expect to be accurately kept, but in relation to which we had no evidence linking the entry to the posting of a letter.
>
> On balance, on that evidence, we are not satisfied that the letters were posted and therefore we are not satisfied that the notices were served on the taxpayer."

24. In a very brief decision, *Once Upon a Time Marketing Ltd v HMRC*, [2019] UKFTT 98 (TC), this tribunal observed (at [5]-[8]):

> "HMRC do not keep copies of all correspondence with taxpayers, particularly where the correspondence is in a standard form. This is entirely understandable, as the amount of storage required to do so (even in electronic form) is impractical. However, HMRC keep an electronic log of such correspondence. This is the case for SLNs.

> The bundle of documents placed before us in evidence did not include any extracts from HMRC's electronic log. Nor is there any correspondence included in the bundle which otherwise evidences the receipt by the Appellant of any SLNs.
>
> It falls on HMRC to prove that an SLN has been served.
>
> As there was no evidence before us of any kind showing that an SLN had been printed by HMRC and posted to the Appellant, it follows that HMRC have not satisfied us that an SLN was served on the Appellant, and we so find."

25. Mr Thaver explained that default surcharge notices are produced automatically by HMRC's computer and dispatched to taxpayers without HMRC retaining a copy or record of dispatch.

26. Miss Owens expressly conceded that Mareel did not dispute that the relevant surcharge liability notice had been dispatched, but asserted that it had simply not been received. Given Miss Owens' concession, Mr Thaver pressed us to conclude, on the authority of Section 7, that the default surcharge notice had indeed been given. As the discussion above indicates, Miss Owens' concession helps Mr Thaver considerably, but Section 7 does not conclusively determine the issue in his favour.

27. Miss Owens said that the default surcharge notice for the period 09/20 would have been received at a time when Mareel's accountants were not working in their offices because of Covid restrictions. Mareel's accountants simply had no record of receiving that notice. They did receive the notices for 12/20 and 03/21. We asked why no one had queried the surcharges shown on the notices for those periods. In fact, those surcharges had been paid, along with other VAT and PAYE amounts due to HMRC. Miss Owens' explanation was that at the relevant times the business was struggling coming out of the Covid period, there was a lot to do and no one picked this up.

28. For his part, Mr Thaver points out that Mareel has not proffered any evidence of previous problems with post delivered by Royal Mail or couriers, nor indeed any evidence from those who receive and open mail which might indicate how easy it might be for post to be received unnoticed. As already noted, Mareel's VAT correspondence is delivered to their accountants and no representative of the accountants was produced to explain their procedures for dealing with clients' correspondence. In his submission Mareel has not done enough to "*displace the statutory presumption*" (by which we take him to mean the Section 7 presumption, once it is proved or (here) accepted that the notice was dispatched) that all the surcharge notices were properly served.

29. Although Section 7 of the Interpretation Act 1978 makes provision for service to be deemed to occur when the liability notice would have been received in the ordinary course of post, this is subject to the proviso "unless the contrary is proved". This is not the case here; the contrary has not been proved and we are not satisfied that the notice was not delivered.

30. We have reached this conclusion because there is no evidence of delivery problems at Mareel's accountants and no record of Royal Mail returning the default surcharge notice undelivered. The fact that Mareel's accountants were not in the office at the relevant time might be thought to increase the likelihood that a notice (particularly one which did not actually impose a liability) might arrive and not be picked up on. We received no evidence of their ordinary post management processes nor of any measures put in place during the periods of dislocation caused by Covid-related restrictions on business activity. Finally, in the context of a penalty regime which depends on the cumulative effect of a number of defaults over a period, we find it surprising that subsequent penalties had been accepted and paid

(particularly given Mareel's financial position) without anyone noticing that the first default surcharge notice had not been received. This is particularly the case where, as here, relevant VAT correspondence passes through the hands of professional advisers.

31. Although we cannot be sure (and we consider there is significant merit in Macpherson J's suggestion that default surcharge notices should be sent by recorded delivery so as to put points like these beyond doubt), we are satisfied that it is more likely than not, and so we find as a fact, that the 09/20 default surcharge notice was received by Mareel's accountants and so it was properly served.

THE REASONABLE EXCUSE ISSUE

32. Turning now to the question of reasonable excuse, Section 59(7)(b) VATA 1994 provides that a surcharge does not arise in relation to a failure to submit a return and/or payment by the due date if the person satisfies HMRC or on appeal a tribunal that they have a reasonable excuse for the failure.

33. The Upper Tribunal set out how the FTT should approach "reasonable excuse" questions in a direct tax case, *Christine Perrin v HMRC*, [2018] UKUT 0156 (TCC), at paragraph 81:

> "When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

34. In *The Clean Car Company v C&E Commissioners*, [1991] VATTR 234, Judge Medd QC put the test like this:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible taxpayer 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?"

In terms of *Perrin*, he was articulating what is now the third step in the *Perrin* approach and suggesting that relevant attributes of the taxpayer include being knowledgeable and inclined to be compliant where tax is concerned.

35. Section 71 VATA 1994 provides that an insufficiency of funds to pay any VAT due is not a reasonable excuse for these purposes. However, although inability to pay is not a reasonable excuse, the underlying reason for that inability to pay can constitute a reasonable excuse; *Steptoe v Revenue & Customs Commissioners*, [1992] STC 527.

36. Mareel put forward two arguments as to why it had a reasonable excuse for this default. The first was the continuing economic effects of the Covid-19 pandemic and the second was their belief that they would be able to enter into a TTP in relation to the VAT due for period 06/21.

37. When asked by HMRC on 28 January 2022, in correspondence prompted by the Notice of Appeal, to comment in writing on their default, Miss Owens replied for Mareel on 7 february 2022 as follows:

> "Although this might not be viewed as of high significance, the COVID-19 pandemic hit Mareel hard. Whilst we struggled with the day to day running of the business there was a heavy impact to sales. As you can appreciate interest in sales dropped considerably with the unknown of the pandemic. This, in turn, meant a lot of interested parties withdrew contract options all together; potential sales we were relying on as a business, and had employed people ready to start. That considered, you will see that it wasn't just our VAT repayments that were impacted at that time, it was also our PAYE. You will also note that whilst we have struggled, we have always repaid the debt owing and maintained permanent contact honouring any arrangements you agreed.
>
> This instance is of annoyance, I called and spoke to an agent prior to the return being submitted to explain our situation. Wages was and remains our highest priority, we don't want to cause undue stress to our employees, so we have prioritised that and made it our main commitment. I was told by the agent to call back once the return was submitted to discuss it further. I asked at this point what the chances of delaying the payment would be and I was told it was 'discretional'. Again, we are aware of the importance of repayment VAT, we take all reasonable steps to ensure we can afford to meet this commitment. Aware at the time of the return we would struggle, I called again to ask for 4-week extension. Rightly or wrongly, we made the decision to meet the wage commitments of 100+ employees, at that time over the VAT. We did this, firstly, to not put these 100+ people into hardship and ultimately unemployed but secondly, to ensure we could meet our work commitments and maintain an income."

38. HMRC were not satisfied on the basis of evidence supplied by Mareel that it had a reasonable excuse for its default, in particular that the insufficiency of funds had arisen despite their best efforts. Mareel had supplied HMRC with very little in the way of evidence, for example of allegedly lost contracts, and no bank statements or similar accounting records. HMRC were unable, on the basis of what Mareel supplied, to conclude that the Covid pandemic had resulted in reduced sales and withdrawn contracts that resulted in the company's inability to pay the VAT due for the period 06/21 when it fell due.

39. Miss Owens did not produce any documentary evidence (or any evidence at all beyond her statements to us) to the tribunal. Before us Miss Owens explained that Mareel's business is a seasonal one, involving taking crew, engineers and freight out to offshore wind turbines. Their troubles started in 2020, when projects were pulled. There was one particularly

significant contract that was pulled in May/June 2020 (having had its original March 2020 start date put back) and only reinstated in 2021. In the period in question (April to June 2021) the company saw contracts and work come back to the extent they had to recruit and train more staff. The fluctuating levels of turnover can be seen in the output figures in Mareel's VAT returns:

VAT period	Outputs
09/20	1,915,194
12/20	1,745,282
03/21	811,923
06/21	4,425,666

40. Miss Owens said that clients were given 60-day payment terms and in the period 06/21 the company had started to fall behind in paying its suppliers. As is clear from the note Miss Owens sent to HMRC and her comments to us, Mareel was balancing its financial commitments. The company was clearly aware of the importance of paying VAT, and in fairness to it we should note that its statement that "we have always repaid the debt owing" is borne out by its payment record, but balanced that against its commitment to its staff; as Miss Owens put it in her note to HMRC, "we made the decision to meet the wage commitments of 100+ employees, at that time over the VAT". It is clear from the telephone transcripts discussed below and Miss Owens' note to HMRC that VAT was not the only tax Mareel was managing.

41. On 6 August 2021 (the day before the return and payment for 06/21 were due) Miss Owens had a conversation with HMRC asking to delay the VAT payment (which Mareel could not afford) until September. The adviser told her that this was not possible as Mareel already had a TTP plan and the condition of a TTP arrangement is future payments are made in full. As the adviser explained, "… if you go on the website it's all clearly stated that next return has to be paid in full". Because there were already two TTP arrangements, the adviser indicated that they could not set up another. Miss Owens referenced an earlier call with HMRC where the adviser had indicated "that they're helping with financial difficulties and to contact you, so that's what I'm trying to do to be honest with you".

42. Miss Owens had two previous calls with HMRC on 11 June 2021. In the first call she referred to Mareel suffering a "fine" because it had missed a VAT payment deadline and asking if she could enter into a TTP arrangement for 03/21 and 12/20 including the two surcharges. There was a long discussion covering a number of issues, but in the course of conversation the adviser expressly indicated that "normally you only get one time to pay arrangement for any twelve-month period". In a later wide-ranging conversation on the same day focusing on PAYE to start with the adviser observed "Because normally as I say you'd normally only get one time to pay, if you've got one running for that we wouldn't be able to include anything because part of that agreement are your future agreements have to be on time and have to be paid in full else it can cancel so it's important to get those paid because you don't want the time to pay agreement to cancel." Miss Owens asked the adviser, in relation to a VAT TTP arrangement "So is this the same with the VAT, if we paid that off we wouldn't be able to put another arrangement in anyway?" and the adviser replied, "No because you have to have like twelve months ..." and Miss Owens cut in "Yeah a gap in between."

43. It is clear from the opening words of Section 59 (7) ("If a person … satisfies the Commissioners or, on appeal, a tribunal …") that it is for Mareel to establish that it had a reasonable excuse for its default. Insufficiency of funds is not of itself a reasonable excuse, although the cause of the insufficiency may be. The cause here, Miss Owens asserted, was fundamentally the impact of Covid-19. As she put it in her note to HMRC, "the COVID-19 pandemic hit Mareel hard. Whilst we struggled with the day to day running of the business there was a heavy impact to sales." All of this, however, took place in 2020. It is clear from the turnover figures in Mareel's VAT return that business levels were recovering very swiftly in the late Spring and Summer of 2021. So far as we can see, on the limited information we have, the reason behind Mareel's default in August 2021 (when it failed to pay the VAT for 06/21 on time) was that it was juggling a variety of costs (suppliers, increased employee numbers and PAYE/VAT) which were increasing as the volume of business expanded, but where the company's activity had not yet (not least because of the 60-day terms given to customers) turned into cash. Covid-19 depleted Mareel's cash resources and its ability to meet all its cash flow needs out of its own funds, but the company had put the immediate impact of the pandemic on business levels behind it and it was managing the cash flow pressures felt by any expanding business. Assuming that it knew of and intended to comply with its VAT payment obligations, Mareel should have anticipated and managed these cash flow pressures, which would not have been difficult to foresee. Miss Owens has not produced any evidence (to HMRC or to us) to show that this is not the case or to suggest (still less, prove) why, assuming Mareel had prudently managed its resources (including exploring alternative short-term funding avenues), it would not have had sufficient funds to pay its VAT debt as it fell due. So, even assuming that the facts alleged by Miss Owens are proven, they would not present Mareel with a reasonable excuse for its default.

44. Mr Thaver particularly noted, and we also note, that when HMRC received Miss Owens' letter of 7 February 2022, they immediately asked (by email also on 7 February), "My request also asked you to provide additional evidence such as bank statements and company accounts. Will you be providing any additional information shortly?" Miss Owens then replied, still on 7 February, "We are happy to provide our bank balance at the time but I don't think it strengthens our case. However, if you do want this information I can provide this." She then requested a little more time to seek approval from her Director to provide "our bank statement at the time and also confirmation of lost contracts". However, it appears that no such evidence was then provided to HMRC, nor was it produced to the tribunal.

45. Turning to the TTP issue, in answer to a question from the tribunal, Miss Owens indicated that she only became aware that Mareel would not be able to have another TTP accommodation on 6 August, and until then she had been under the impression that HMRC would keep on helping the company and give it time to pay. Whilst she may genuinely have believed or hoped that she would be able to arrange this (and we do not understand Mr Thaver to suggest that she did not), it is clear to us that she had no reasonable basis on which to hold that opinion. The telephone transcripts made it abundantly clear that there are important conditions attached to TTPs, that these must be complied with and Mareel would not be able to enter into another TTP arrangement in the timescale Miss Owens needed.

THE PROPORTIONALITY ISSUE

46. In the letter received on 7 February 2022, Mareel stated that they believed the surcharge to be disproportionate in relation to the amount of time the payment was delayed. This point was not addressed before us by Miss Owens, although it was touched on briefly by HMRC in their Statement of Case. We set out our conclusion on this issue (briefly, given the lack of discussion before us) in the following paragraphs.

47. The VAT due on 31 July 2021 was paid electronically on 30 September 2021. A 10% surcharge is clearly a high price to pay for a two-month delay in paying VAT due, although it should also be borne in mind that Mareel only hit the 10% surcharge level after four consecutive periods of default; this surcharge is the price for a prolonged period of non-compliance. It is also the inevitable result of the way the levels of surcharge are calculated and the fact that VATA, whilst it provides for the mitigation of various penalties, does not allow for any mitigation of the default surcharge. Mareel's misfortune is to have hit the 10% surcharge level in a period where its VAT liability soared to £641,195 (nearly six times its VAT liability in the previous period).

48. Whether the default surcharge regime complied with EU law proportionality principles was considered by the Upper Tribunal in *Trinity Mirror plc v HMRC*, [2015] UKUT 421 (TCC), where it commented as follows:

> "65. We agree with the tribunal in *Total Technology* that the default surcharge regime, viewed as a whole, is a rational scheme. The penalties are financial penalties, calculated by reference to the amount of tax unpaid at the due date. Although penalties may vary with the liability of the taxable person for the relevant VAT period, and increase commensurately with an increase in such liability (and, consequently, such default), the penalties are not entirely open-ended. The maximum liability for a fifth or subsequent period of default is 15% of the amount unpaid. In common with the Upper Tribunal in *Total Technology*, we consider that the use of the amount unpaid as the objective factor by which the amount of the surcharge varies is not a flaw in the system; to the contrary, the achievement of the aim of fiscal neutrality depends on the timely payment of the amount due, and that criterion is therefore an appropriate, if not the most appropriate, factor.
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> 66. However, we accept that, applying the tests we have described, the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgment, given the structure of the default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances. Although the absence of a maximum penalty means that the possibility of a proper challenge on the basis of proportionality cannot be ruled out, we cannot ourselves readily identify common characteristics of a case where such a challenge to a default surcharge would be likely to succeed.
>
> 67. We should, in particular, not be taken to have endorsed the suggestion put forward by Mr Mantle that the exceptional circumstances that might give rise to a disproportionate penalty could include cases, such as *Enersys*, where there had been what was described as a "spike" in profits, such that for a particular VAT period the liability to account for and pay VAT was of a different order of magnitude that was normal for the trader concerned. Attempting to identify particular categories of case in this way is not, in our view, helpful. Whilst it might be tempting to seek to isolate, and thus confine, cases by reference to particular criteria, such cases, by reason of their exceptional nature, are likely to defy such characterisation."

49. The situation Mareel finds itself in is exactly the position discussed in paragraph [67]; profits (or at least net VAT liability) "spiked" by over 500% just as the surcharge percentage doubled (from 5% to 10%), but, given the comments the Upper Tribunal made about the default surcharge regime in general and this fact pattern in particular, we cannot conclude that the level of surcharge here is "not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be

permitted" (*International Transport Roth GmbH v Home Secretary*, [2002] EWCA Civ 158, per Simon Brown LJ at [26]) or that this is a "wholly exceptional case" (*Trinity Mirror plc* at [66]) where the result offends the principle of proportionality. Given that conclusion, we do not need to consider the effect of paragraph 3(2) of Schedule 1 to the European Union (Withdrawal) Act 2018 on any argument that a surcharge can be dismissed in any particular case if it offends the principle of proportionality.

DISPOSITION

50. We have determined the issues before us as follows:

    (1) The default surcharge notice for the period 09/20 was served on Mareel as required by Section 57 VATA;

    (2) Mareel has no reasonable excuse for its default in respect of the 06/21 period;

    (3) There is nothing in the Proportionality Issue.

51. It follows that this appeal must be, and is, dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 11th JANUARY 2023