Neutral Citation: [2023] UKFTT 740 (TC)

Case Number: TC08923

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2022/13517

VAT – late payment of VAT – surcharge liability notices sent to principal place of business – whether notices received – section 98 of the Value Added Tax Act 1994 & section 7 of the Interpretation Act 1978 considered – statutory due date for submission of VAT returns and payment of VAT – length of delay and amount of surcharge – whether a reasonable excuse established - Appeal dismissed

Judgment date: 29 August 2023

Decided by:

JUDGE NATSAI MANYARARA

Between

ECHO CONSTRUCTION LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 7 June 2023 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 (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

INTRODUCTION

1. The Appellant (Echo Construction Ltd) appeals against a VAT default surcharge that was issued by HMRC for the late payment of VAT in relation to the period 04/22. The default surcharge was in the sum of £480.71 (reduced from £961.43); which represents 5% of the outstanding tax due that was due at that time.

BACKGROUND FACTS

2. The Appellant is a limited company and its business activity is "Building and Construction Services". The Director is Matthew James Crocker. The Appellant has been registered for VAT, with effect from 6 April 2019, and submits VAT returns on a quarterly basis.

3. The Appellant entered the default surcharge regime during the period 01/21 (late payment of VAT). This was followed by a number of defaults leading up to the default under appeal (for the period 04/22). On 28 June 2022, the Appellant requested a review of the decision to issue a surcharge for the relevant period. HMRC issued a review conclusion on 26 August 2022. The outcome of the review was to uphold the surcharge. On 8 September 2022, the Appellant requested a further review. HMRC issued a letter upholding the surcharge on 27 October 2022.

4. On 14 November 2022, the Appellant submitted an appeal to the Tribunal.

THE WRITTEN SUBMISSIONS

5. HMRC's case can be summarised as follows:

(1) By failing to pay VAT liability by the due date, the Appellant failed to comply with the Value Added Tax Act 1994 ('VATA') and the Value Added Tax Regulations 1995 SI 1995/2518 ('the VAT Regulations').

(2) The Appellant failed to pay VAT due on the return for the period 01/21 by the due date and a Surcharge Liability Notice ('SLN') was issued. The SLN gave a surcharge period of 24 March 2021 to 31 January 2022.

(3) The Appellant failed to pay VAT due for the period 04/21 by the due date and became liable to a surcharge at 2%, as it was within the surcharge period. As the penalty was less than £400, HMRC decided not to issue a financial penalty. The Surcharge Liability Notice of Extension ('SLNE') notified the Appellant that the surcharge period was extended until 30 April 2022.

(4) The default surcharge for the period 07/21 was removed as the Appellant's return and payment were received by the due date.

(5) The Appellant failed to pay VAT due for the period 04/22 by the due date and became liable to a surcharge at 5%, as it was within the surcharge period. The total amount of outstanding VAT was £9,614.34 and the penalty charged was £961.43. The SLNE notified the Appellant that the surcharge period was extended until 30 April 2023. As a result of the removal of the default surcharge for the period 07/21, the default surcharge for 04/22 was reduced to £480.71.

(6) All of the notices were sent to the address that HMRC had on file for the Appellant at Brent House, Beaconsfield Road. The Appellant has not submitted any evidence to displace the statutory presumption that the notices were properly served and received.

(7) An insufficiency of funds is not a reasonable excuse.

Appellant's Grounds of Appeal

6. The Appellant's arguments can be summarised as follows:

(1) The default surcharge notices for the periods 01/21, 04/21 and 07/21 were not received by the Appellant and HMRC are invited to provide proof of delivery.

(2) The Appellant was awaiting funds in order to be able to pay the VAT bill.

(3) The periods 01/21, 04/21 and 07/21 fall within the time that the Appellant had opted for the VAT deferral scheme.

APPLICABLE LAW

59 The default surcharge.

(1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

(a) the Commissioners have not received that return, or

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period, then that person shall be regarded for the purposes of this section as being in default in respect of that period.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to 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)."

71 Construction of sections 59 to 70.

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

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

(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."

DISCUSSION

7. This is an appeal by the Appellant against a default surcharge in respect of the late payment of VAT for the period 04/22. The surcharge is in the sum of £480.71 (reduced from £961.43), which represents 5% of the outstanding tax that was due at that time. The amount of the surcharge was reduced as the default surcharge for the period 07/21 had been removed.

8. An appeal to the Tribunal against a penalty imposed in respect of VAT is governed by the provisions of s 83 VATA. The issues under appeal are firstly, whether HMRC were correct to issue the penalty in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the defaults which have occurred. In this regard, HMRC bear the initial burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse.

9. Neither party has requested an oral hearing. From the papers before me, I make the following findings of fact and give my reasons for the decision.

Findings of Fact

10. The period 01/21, covering the period 1 November 2020 to 31 January 2021, due date for electronic return and payments was 7 March 2021. The return was received on 4 February 2021 and VAT was paid on 11 March 2021 and 5 May 2021, by Wordpay Internet Payment ('WIP'). The Appellant failed to file a VAT return and pay VAT by the due date, and became liable to a surcharge. HMRC, therefore, issued a SLN. The SLN gave a surcharge period of 24 March 2021 to 31 January 2022.

11. The period 04/21, covering the period 1 February 2021 to 30 April 2021, due date for electronic return and payments was 7 June 2021. The return was received on 5 May 2021 and VAT was paid between 31 May 2021 and 28 September 2021, by WIP. The Appellant failed to pay VAT by the due date and became liable to a surcharge at 2% of the outstanding VAT, as it was within the surcharge period. As the penalty was less than £400.00, HMRC decided not to issue a financial penalty. The SLNE notified the Appellant that the surcharge period was extended until 30 April 2022.

12. The period 07/21, covering the period 1 May 2021 to 31 July 2021, due date for electronic return and payments was 7 September 2021. The return was received on 9 August 2021 and VAT was paid on 6 September 2021, by WIP. The default surcharge for the period 07/21 was removed as the return and payment had been received by the due date.

13. The period 04/22, covering the period 1 February 2022 to 30 April 2022, due date for electronic return and payments was 7 June 2022. The return was received on 4 May 2022 and

VAT was paid on 21 June 2022, by Faster Payment Service ('FPS'). The Appellant failed to pay VAT by the due date, and became liable to a surcharge at 5% of the outstanding VAT, as it was within the surcharge period. The total amount of outstanding VAT was £9,614.34, so the penalty charged was £961.43, which was subsequently reduced to £480.71 as a result of the removal of the default surcharge for the period 07/21. The SLNE notified the Appellant that the surcharge period was extended until 30 April 2021.

Consideration

14. It is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute. In *Perrin v R & C Comrs* [2018] BTC 513 ('*Perrin*'), at [69] (Judges Herrington and Poole), the Upper Tribunal explained the shifting burden of proof as follows:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

15. The factual prerequisite is therefore that HMRC have the initial burden of proof and the standard of proof is the civil standard; that of a balance of probabilities.

Q. Was the Appellant in default of an obligation imposed by statute?

16. VAT is a tax that is imposed on the supply of goods or services in the United Kingdom, made in the course of a business carried on by the taxpayer. The tax is imposed by VATA. Responsibility for the collection of the tax is primarily placed on the supplier of the goods or services, the supply of which has attracted the tax. Section 25(1) VATA requires a taxable person to account for, and pay, VAT for a prescribed accounting period at such a time, and in such manner, as determined by regulations. Those regulations are the VAT Regulations. Regulation 25(1) of the VAT Regulations provides that a return must be submitted to HMRC by no later than the last day of the month following the end of the period to which it relates, as follows:

> "**25. Making of returns**
>
> (1) Every person who is registered or was required to be registered shall, in respect of every period of a quarter or in the case of a person who is registered, every period of 3 months ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return [in the manner prescribed in regulation 25A] showing the amount of VAT payable by him or to him and containing full information in respect of the other matters specified in the form and a declaration, [signed by that person or by a person authorised to sign on that person's behalf], that the return is [correct] and complete;"

…

17. Regulation 25A of the VAT Regulations provides that:

> "[**25A-**
>
> [(A1) Where a person makes a return required by regulation 25 by means of electronic communications using functional compatible software, such a method of making a return shall be referred to in this Part as a "compatible software return system".]
>
> (1) Where a person makes a return required by regulation 25 using electronic communications [other than functional compatible software], such a method of making a return shall be referred to in this Part as an 'electronic return system".
>
> …

18. Regulation 25A (20) provides that:

> "(20) Additional time is allowed to make-
>
> (a) a return using an electronic system, [a compatible software system] or a paper return system for which any related payment is made solely by means of electronic communications (see regulation 25(1)-time for making return, and regulations 40(2) to 40(4)-payment of VAT), or
>
> (b) a return using an electronic return system [or compatible software return system] for which no payment is required to be made."

19. Regulation 40 provides that:

> "**40 VAT to be accounted for on returns and payment of VAT**
>
> …
>
> (2) Any person required to make a return shall pay to the Controller such an amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.
>
> [(2A) Where a return is made [or is required to be made] in accordance with [regulations 25 and 25A] above using an electronic return system, the relevant payment to the Controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.]

20. The law, therefore, allows a taxable person a calendar month from the end of each of their prescribed periods to prepare their return and arrange for the payment of the net amount due. HMRC have discretion, under reg. 25A (20) and reg. 40 of the VAT Regulations, to allow extra time for the filing of a return and the making of payment where these are carried out by electronic means. The legislation makes clear that there is a statutory obligation to both file a VAT return on time, and pay VAT on time. I find the words of Judge Colin

Bishopp in *R & C Comrs v Enersys Holdings UK Ltd.* [2010] UKFTT 20 (TC) ('*Enersys*') to be of material relevance. At [33], he said this:

> "…The legislation draws the clear line at a calendar month after the end of the prescribed period…Against that background I can see no possible scope for judicial discretion to draw the line somewhere else. If the statutory requirement was to render the return and payment on the due date, neither before nor after, there might, perhaps, be some merit in the argument that missing the target by one day was excusable…the obligation requires no more than that the return and payment are received not later than the due date."

21. In the appeal before me, the due date for payment of VAT in respect of the period 04/22 was 7 June 2022. The period 04/22 covered the period from 1 February 2022 to 30 April 2022. The Appellant's VAT return was, indeed, submitted by the due date, on 4 May 2022. The Appellant pays VAT by WIP but payment for the period 04/22 was by FPS. VAT was only paid on 21 June 2022, which is after the due date. By a letter, dated 28 June 2022, the Appellant said this:

"…The due date of the payment was 15th June 2022 and we made payment on 21st June 2022."

22. This is incorrect as the due date was a week before 15 June 2022. This date does not change regardless of the method of payment. The incontrovertible fact in this appeal is that VAT was not paid by the statutory due date.

23. The default surcharge regime was introduced in the United Kingdom as one of a range of measures designed to promote VAT compliance. Default surcharges are considered in law to be civil, rather than criminal, penalties. The first default does not give rise to a penalty, but brings the taxpayer within the regime. The taxpayer is sent a SLN, which informs them that a further default will lead to the imposition of a penalty. There is no fixed maximum penalty. The amount levied is simply the prescribed percentage of the net tax due. The penalty is the same no matter how long the delay.

24. The surcharge provisions are contained in s. 59 VATA.

25. Section 59(1) VATA provides that a person is in default in respect of a period if he has not furnished a VAT return for that period, or paid the VAT shown as payable on that return, by the due date. Where a person defaults in respect of a period, the Commissioners may serve a SLN specifying a period (a surcharge period) which ends 12 months after the last day of the period for which he was in default (i.e., the period ending on the first anniversary of the last day of the period in default and beginning on the date of the notice). When a SLN is served by reason of a default in a VAT period that ends at, or before, the end of an existing surcharge period already notified, the existing surcharge period is extended: s. 59(3) VATA.

26. Section 59(4) provides that if a person defaults in respect of a period ending within a surcharge liability period and has outstanding VAT for the period, he becomes liable to a surcharge. This is an amount which is the greater of £30 and a percentage of the outstanding VAT. The £30 surcharge thus might, for example, apply where the return showed VAT due to the taxpayer. Section 59(5) VATA specifies the rates of penalty for any further default within a surcharge period. The first default within a surcharge period results in a penalty of 2% of the outstanding VAT at the date of the surcharge. The second default within a surcharge period results in a penalty of 5% of the outstanding VAT. The third default within a surcharge period results in a penalty of 10% of the outstanding VAT, and the fourth and any subsequent defaults within a surcharge period result in a penalty of 15% of the outstanding VAT at the ate of the surcharge.

27. By failing to pay VAT by the statutory deadline, the Appellant failed to comply with the legislation and I am satisfied that the Appellant was in default of an obligation imposed by statute. Subject to considerations of 'reasonable excuse', the surcharge imposed is due and has been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the default that has occurred?

28. A taxpayer may escape the penalty if s/he has a reasonable excuse. Section 59 (7) VATA provides a relief for excusable defaults. There is no statutory definition of a 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Comrs* (2006) Sp C 548 ('*Rowland*'), at [18]. The test I adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 ('*Clean Car*'), in which Judge Medd QC said this:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. 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?"

29. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word 'reasonable' imports the concept of objectivity, whilst the words 'the taxpayer' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer exercising reasonable foresight and due diligence in the position of the taxpayer in question, and having proper regard for their responsibilities under the Tax Acts: *Collis v HMRC* [2011] UKFTT 588 (TC). The decision, therefore, depends upon the particular circumstances in which the failure occurred.

30. I proceed by firstly determining whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and, accordingly, give rise to a valid defence. In this regard, I have assessed whether the facts put forward, and any belief held, by the Appellant are sufficient to amount to a reasonable excuse. In essence, the Appellant submits that: (i) the notices for the periods 01/21, 04/21 and 07/21 were not received; (ii) the Appellant was waiting for funds owed in order to pay the VAT bill; and (iii) the periods 01/21, 04/21 and 07/21 fell within the time that the Appellant opted for the VAT deferral scheme.

31. In respect of the first of the Appellant's submissions, in *R & C Comrs v Medway Draughting and Technical Services Ltd* [1989] STC 346, Macpherson J held that the default surcharge scheme was dependent upon the service of the SLN, as follows:

> "I have come firmly to the conclusion that in the present cases it was the intention of Parliament that a warning should be given before a surcharge could be levied. And thus I agree with Hs Honour Judge Medd's first conclusion. As a matter of construction of s 19, the whole scheme of default surcharge is dependent upon service of the surcharge liability notice."

32. The provisions of s 98 VATA and s 7 of the Interpretation Act 1978 are relevant to establishing whether the notices were sent to, and received, by the Appellant. Section 98 VATA provides that:

> "**98 Service of notices**
>
> Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this 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."

33. Section 7 of the Interpretation Act 1978 (which relates to service by post), provides that:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying 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".

34. I find that the notices were sent to the address that HMRC had on file for the Appellant and there is no suggestion that they were returned undelivered. There is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries; and the Appellant has not supplied any evidence to displace the statutory

presumption at s 98 VATA. The notices are, therefore, deemed to have been delivered, unless the contrary is proved. The Appellant has not suggested that the address held on file by HMRC was the wrong address. Indeed, the Appellant's letters of appeal use the same address, as does the Companies House documentation. The address has been effective since 22 March 2019.

35. In respect of the second of the Appellant's submissions, s. 71 VATA limits the types of conduct which may afford a reasonable excuse within section 59(7)(b) by providing that:

> (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
>
> (b) where reliance 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."

[Emphasis added both above and below]

36. In *Customs & Excuse Comrs v Steptoe* (1992) STC 757 ('*Steptoe'*), the Court of Appeal held that the provision at s 71 VATA meant that an insufficiency of funds, or reliance, can never *of itself* constitute a reasonable excuse, but that the tribunal was obliged to consider whether the reasons for an insufficiency of funds, or the underlying cause of a default, might do so. In the case of a default occasioned by an insufficiency of funds, Lord Donaldson MR indicated that:

> "if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non payment."

37. In *Steptoe*, the taxpayer argued that although the proximate cause of his default was a shortage of funds, the underlying cause of that shortage, namely the unexpected failure by his major customer to pay him on time, did amount to a reasonable excuse. The court determined that the seemingly absolute exclusion by statute of an insufficiency of funds as an excuse did not preclude consideration of the underlying cause of the insufficiency, and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable foresight and due diligence, it could not have been avoided. The court nevertheless made it clear that the test was to be applied strictly.

38. I have considered whether the reasons for an insufficiency of funds, or the underlying cause of the default, might constitute a reasonable excuse in the circumstances of this appeal. I find that the Appellant's case is that the underlying cause of the default is that the Appellant was awaiting payment owed to the business. I find that the reasonable excuse being advanced in this respect amounts to little more than that the conditions of trade have produced cashflow problems. I am satisfied that a taxpayer is not relieved of the duty in respect of VAT by conditions of business that produce cashflow problems. There is no evidence before me to support a finding that the Appellant ever contacted HMRC to discuss the delays in being paid

by a customer, which would foreseeably impact on prompt payment of VAT. I have already found that the Appellant had wrongly assumed that the due date for payment of VAT was 15 June 2022.

39. I find that the Appellant made a conscious decision to wait for funds owed. It seems to me that a trader who makes a choice of that kind must take great care to ensure that they do not leave payment late. I find that the Appellant could easily have contacted HMRC to appraise them of the situation that had arisen. The late payment was, ultimately, due to the Appellant's simple error of judgment. The obligation on a trader is to submit the payment and return no later than the due date. There is a public interest in the timely payment of taxes. The scheme of collection of VAT involves a trader having received the amount of tax which s/he must subsequently pay over to HMRC. In *C & E Comrs v Salevon Ltd; C & E Comrs v Harris & Anor* [1989] STC 907, Nolan J said this (in the context of the Finance Act 1985):

> "…There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so…But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to invoke s 19(6)(b)."

40. There is no suggestion that the Appellant stopped trading as a result of the delayed payment owed to the business. I find that it is reasonable to expect the Appellant to have put measures in place to ensure compliance with legal obligations in respect of VAT. Following a default from the period 01/21, the Appellant has been in the default surcharge regime and HMRC issued a SLN. From the period 04/15, each SLN issued details, on the reverse, how surcharges are calculated, as follows:

> *"**About surcharges***
>
> - *If you don't submit your return and make sure that payment of the VAT due has cleared to HMRC's bank account by the due date you will be in default. Each time you default, we will send you a Surcharge Liability Notice.*
> - *The notice will explain what will happen if you default again in the following 12 months. This is your **Surcharge Period**.*
> - *If you default during the surcharge period you may also have to pay a surcharge which is a percentage of the VAT unpaid at due date.*
> - *For the first late payment during a surcharge period the surcharge will be 2%, increasing to 5%, 10% and 15%. There is a minimum surcharge of £30 for surcharges calculated at the 10% and 15% rates. We do not issue a surcharge at the 2% and 5% rates if we calculate it to be less than £400."*

41. I find that the Appellant would have been aware of the rates of surcharge, having received the SLN, and would have been aware of the financial consequences of continued default. Each SLN further provides details of how to avoid further defaults in the future, as follows:

*"**Think ahead***

...

If you cannot pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge."

42. In respect of the third of the Appellant's submissions, the VAT deferral guidance says this:

*"**Pay VAT deferred due to coronavirus (COVID-19)***

If you deferred VAT payments between 20 March 2020 and 30 June 2020 you can:

- *pay the deferred VAT in full now*
- *join the VAT deferral new payment scheme – the online service is open between 23 February 2021 and 21 June 2021*
- *contact HMRC on 0800 024 1222 by 30 June 2021 if you need extra help to pay*

You may be charged a 5% penalty or interest if you do not pay in full or make an arrangement to pay by 30 June 2021

Pay your deferred VAT in full

If you were unable to pay in full by 31 March 2021, you may still be able to avoid being charged penalties or interest by either:

- *joining the new payment scheme by 21 June 2021*
- *paying your deferred VAT in full by 30 June 2021*

Join the VAT deferral new payment scheme

The VAT deferral new payment scheme is open from 23 February 2021 up to and including 21 June 2021…"

...

The VAT deferral period covered accounting periods for:

- *February 2020*

- *March 2020*
- *April 2020*
- *May 2020 – for payment on account customers and certain non-standard tax periods only, in addition to the above periods*

If you're not able to pay your deferred VAT

…

If you're still unable to pay and need more time, find out what to do if you cannot pay your tax bill on time.

To find out what support is available, use the Get help and support for your business guide."

43. I find that any deferral of VAT would have been for payments that were due between 20 March 2020 and 30 June 2020. The Appellant does not suggest that it joined the VAT deferral new payment scheme, which was open from 23 February 2021 to 21 June 2021.

44. In relation to the error as to the due date for payment of VAT, I have borne in mind the comments of the tribunal in *Hesketh & Anor v HMRC* [2018] TC 06266, where Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. The onus is upon an appellant to ensure that they properly understand their obligations under the law. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [48], Judge Mosedale said this:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

45. Similarly, in *Lau v HMRC* [2018] UKFTT 230 (TC) ('*Lau*'), at [33], Judge Anne Scott held, at [37] to [38], that:

> "Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed. In all these circumstances, ignorance of the law simply cannot amount to a reasonable excuse."

46. In *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176, Lord Denning said this:

> "…it is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law."

47. As held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

48. Ignorance of the law cannot therefore amount to a reasonable excuse: see also *Qualaphram Ltd v HMRC* [2016] UKFTT 100 (TC), at [121].

49. Whilst the default may not have been intentional, that too does not amount to a reasonable excuse in the circumstances of this appeal. In *Garnmoss Ltd. T/A Parham Builders v HMRC* [2012] UKFTT 315 (TC), the tribunal held that:

> "12. What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse."

50. Furthermore, whilst the Appellant may have honestly believed that payment could be delayed without consequence, having registered for VAT in 2019 and having received the SLN and SLNEs, the initial belief is not objectively reasonable. I am not told of any other efforts by the Appellant to inform itself (through its director(s)) of the requirements of VAT. I am satisfied that the Gov.uk website provides taxpayers with information in relation to the statutory due dates for payment of tax. In *Katib v HMRC* [2019] UKUT 189 (TCC) ('*Katib*'), the Upper Tribunal concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The differences in fact in *Katib* and the appeal before me do not negate the principle established in relation to the need for statutory time limits to be adhered to, and the duty placed upon taxpayers to adhere to statutory duties.

51. In relation to proportionality, in *R & C Comrs v Total Technology (Engineering) Ltd.* [2012] UKUT 418 (TCC) ('*Total Technology*'), at [83], the Upper Tribunal said this concerning the default surcharge regime:

> "(a) The regime does not distinguish between a trader who has made a trivial slip and a trader who deliberately fails to file a return and to pay on the due date. Nor does it cater for degrees of culpability between those two
>
> (b) A trader who is late but has a reasonable excuse is not subject to a penalty. Nor, however long he then delays in payment, is he subjected to a penalty.
>
> (c) In contrast, a trader who is late is subject to a penalty which cannot 30 be reduced even though his payment is only a single day late.
>
> (d) The regime does not distinguish between traders who are a day late, a week late or even a month late, in contrast with some other regimes to be found in the United Kingdom tax system.

(e) The potential hardship to a trader is not a factor to be taken into 35 account. In particular, the amount of the penalty is not related to profitability.

(f) The previous compliance record of the trader is not taken into account save in the negative sense that previous defaults within the preceding 12 months affect the amount of the penalty (as a percentage of the tax overdue).

(g) The correlation between the turnover of the trader and the size of the penalty is far from exact even where there is a failure to pay any of the tax due.

(h) There is no maximum penalty.

(i) There is no discretion to reduce or waive a penalty once imposed. Although the 'reasonable excuse' exception provides some relief from the harshness of the regime, there are meritorious cases where a penalty, it is suggested, should not be paid that cannot be brought within that exception."

52. In *Total Technology* the Upper Tribunal identified, at [84], features of the regime which supported an argument that the scheme was fair. The Upper Tribunal said this:

"However, from HMRC's point of view, the regime has a lot to commend it. It is mechanistic and therefore comparatively easy to administer. There 20 is no need for hard-pressed officers of HMRC to spend scarce time and resources in dealing with a vague and amorphous power to mitigate a penalty. The following factors can be prayed in aid in response to the unfairness alleged by the Company:

(a) The simplicity of the system makes it easily understood, as well as 25 being relatively easy to operate.

(b) The surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if defaults again within a year. Taxpayers thus know their positions and should be able conduct their affairs so as to avoid any default.

(c) The penalty is not a fixed sum but is geared to the amount of outstanding VAT. Although a somewhat blunt instrument, it does bring about a broad correlation between the size of the business and the amount of the penalty. It does not suffer from the objections which could be made to the fixed penalty in *Urbán.*

(d) The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within 12 months of each other. This is a rational and reasonable response to successive defaults by a taxpayer.

(e) The 'reasonable excuse' exception strikes a fair balance. The gravity 40 of the infringement is reflected in the absence of 'reasonable excuse' and the amount of the penalty reflects the extent of the default, that is to say the amount of tax not paid by the due date."

53. The Upper Tribunal noted that the aim of the default surcharge regime was twofold - from a general perspective it aimed to ensure compliance with a taxpayer's obligations to file returns and to pay tax and, more specifically, it aimed to ensure submission of returns and the payment of tax on the due date. For the reasons explained at [86] – [98], the Upper Tribunal concluded, at [99], in relation to the default surcharge regime itself that *"there is nothing in the VAT default surcharge which leads us to its conclusion that its architecture is fatally flawed"*. The Upper Tribunal urged caution in the assessment of whether an individual penalty is disproportionate, saying:

> "... the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged)."

54. The Upper Tribunal summarised the position thus, at [100]:

> "…the regime viewed as a whole does not suffer from any flaw which renders it non-compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

55. Having reached its conclusion as regards the regime as a whole, the Upper Tribunal turned to the factors put forward in support of the company's complaint of unfairness on its particular facts. Those factors, described at [101], were: (a) the payment was only one day late; (b) previous defaults had been innocent, even if no reasonable excuse could be established; (c) the company's excellent compliance record; and (d) the amount of the penalty represented an unreasonable proportion of the company's profits. The Upper Tribunal held that at the individual level of the company, the amount of the penalty, even if looked at in isolation, could not be regarded as disproportionate. Furthermore, at [103], the Upper Tribunal held that although the surcharge might be considered harsh, it could not be regarded as plainly unfair. The decision in *Enersys* was referred to in *Total Technology*.

56. In *R & C Comrs v Trinity Mirror plc* [2015] UKUT 421 (TCC) ('*Trinity Mirror*') (Rose J and Judge Roger Berner), the Upper Tribunal said this, at [55]:

> "For proportionality to be in issue it is axiomatic that there will have been no reasonable excuse for the default; if there had been, the effect of s 59A(8) VATA (or, in a normal case, s 59(7)) is that the trader would not be liable to a surcharge at all, and will not be treated as having been in default in respect of the relevant VAT period. Accordingly, the mere fact that there is no reasonable excuse will be a factor universally applicable, and can have no bearing on the question of proportionality. Contrary to Mr Mantle's submissions, the absence of reasonable excuse goes to the fact of the default, and not to the gravity of it. "

57. And at [62]:

> "62. In our judgment, it is not appropriate for the courts or tribunals to seek to set any maximum penalty, or range of maximum penalties. That would in effect be to legislate. The task of the tribunal is to consider the relevant tests in the context of the individual case before it. It must not seek to establish a maximum and then compare the actual penalty to that benchmark. That was what the FTT attempted to do in this case, and it was wrong in law to have done so."

58. The Upper Tribunal in *Trinity Mirror* held that the default surcharge regime, viewed as a whole, is a rational scheme which is a proportionate method of enforcing statutory deadlines for filing returns and making payment of VAT. The First-tier Tribunal ('FtT') has no jurisdiction to determine issues of fairness. The default surcharge regime seeks to ensure that taxable persons who fail to pay VAT on time do not gain a commercial advantage over the majority who comply with time-limits. Since the requirement to make VAT payments is imposed by law, the issue of proportionality does not arise.

59. I have also considered the case of *R & C Comrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. There, the Upper Tribunal similarly held that the FtT did not have power to discharge penalties on the ground that their imposition was unfair. In *Rotberg v R & C Comrs* [2014] UKFTT 657 (TC), it was accepted that the FtT's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. The Upper Tribunal held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Upper Tribunal found, at [116], that the jurisdiction of the FtT in cases of that nature was limited to considering the application of the tax provisions themselves. In *Marks & Spencer plc v Customs & Excise Comrs* [1999] STC 205, at 247, Moses J said this:

> "…in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. It jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct."

60. This principle was applied by Warren J in *HMRC v Abdul Noor* [2013] UKUT 071, at [28].

61. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and, as such, not imposing the penalty, HMRC would not be adhering to its own legal obligations. The Tribunal has no jurisdiction to discharge the penalties if they are properly due. Its jurisdiction in respect of this and other similar penalty provisions is limited to whether or not payment was late, as a matter of fact, and, if so, whether there is a reasonable excuse for lateness. Only if it decides the issue of a reasonable excuse in favour of the Appellant may it discharge the penalty and fairness is not a permissible consideration. Having regard to the findings of fact, and in light of the relevant test, I am satisfied that the Appellant has not established a reasonable excuse. For all of the foregoing reasons, the appeal is dismissed. In reaching these findings, I have applied the test set out in *Clean Car.*

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 29th AUGUST 2023