[2017] UKUT 88 (TCC)

Appeal number: UT/2015/0136-0139

VAT – default surcharge – whether appellants could appropriate payments made to VAT not yet due – yes – whether in absence of appropriation a surcharge would be disproportionate if it could have been avoided had HMRC allocate payments differently – no – FTT decision set aside and case remitted for additional findings

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SWANFIELD LIMITED **Appellants**
QN HOTELS (WREXHAM) LIMITED
QN HOTELS (AYLESBURY) LIMITED
QN HOTELS LIMITED

- and -

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

TRIBUNAL: MR JUSTICE NUGEE
JUDGE SARAH FALK

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4A 1NL on 19 October 2016

David Bedenham, instructed by CTM, for the Appellants

Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. QN Hotels Ltd is the parent company of a group of companies which includes the other three appellants. Each of the appellants is separately registered for VAT purposes rather than forming part of a group registration. The appeals relate to default surcharges totalling in excess of £290,000 which the appellants claim would not have arisen if HMRC had allocated payments made by the appellants to current rather than historic VAT liabilities.

2. The appellants' appeals were considered and, subject to some amendments to the surcharges that are not material to this appeal, dismissed by the First-tier Tribunal (Judge John Clark and Caroline de Albuquerque) (**"FTT"**) at [2015] UKFTT 274 (TC).

3. The appellants had permission to appeal to this Tribunal on two grounds:

   (1) whether, when making a payment of VAT, they were able to appropriate that payment to VAT that was not yet required to be paid; and

   (2) whether, if no such allocation was made by the appellants, HMRC was nonetheless required for the purposes of the default surcharge to allocate the payment in the way that was most favourable to the appellants, namely, and as in (1) above, to VAT that was not yet due.

4. There was some question as to the nature of ground (2) above. The argument was put to the FTT as an argument about proportionality. Permission to appeal on grounds of proportionality was refused. The submission was also put to us in somewhat different terms to that described in the permission to appeal. The submission as put to us was that although HMRC were free to allocate as they chose if the appellants did not, a penalty would be disproportionate to the extent that it would have been avoided by a different allocation.

Background: the default surcharge regime

5. The appellants account for VAT on a quarterly basis and are accordingly subject to the default surcharge regime in s. 59 Value Added Tax Act 1994 (**"VATA"**). Section 59 is set out in the annex to this decision with other relevant legislation.

6. Under the regime defaults occur if either VAT is not paid in full or a VAT return is not made by the due date. The first default does not give rise to a penalty but triggers a "surcharge period" which runs to the first anniversary of the end of the period of default. Any further default within the surcharge period not only extends the period but, if the VAT is not paid in full, also triggers a penalty. The penalty is generally calculated as a percentage of the overdue VAT. The percentage rises from 2% to a maximum of 15% for the fourth and subsequent defaults occurring in the surcharge period for which there is unpaid VAT.

7. It is irrelevant to the amount of the surcharge how late the VAT is paid if it is paid after the due date. This means that, ignoring any other relevant considerations

(including for example the risk of enforcement action), it may be in a taxpayer's interest for a payment to be allocated to VAT that is not already overdue for payment, rather than to historic VAT liabilities. This is because any default surcharge in respect of the historic liability will not be increased, but a surcharge liability for the later period may either be avoided entirely, or the quantum of it could be reduced because the amount of overdue VAT on which the penalty is calculated would be lower.

8. We give here a simplified example to illustrate the effect (the example ignores specific rules dealing with electronic returns and payments, and HMRC's practice of not collecting surcharges below a certain amount in some circumstances):

(1) Suppose a taxpayer is obliged to account for VAT (as QN Hotels Ltd was) by reference to quarters ending in February, May, August and November each year, and that the VAT due from the taxpayer each quarter is exactly £10,000.

(2) The taxpayer is obliged to furnish a VAT return, and pay the VAT shown due on that return, by the last day of the month next following the end of the period in question.

(3) That means that the return for the quarter ending in February 2010 (**"Period 02/10"**) should have been made, and the VAT paid, by 31 March 2010. If not then paid that means the taxpayer is in default in respect of that period: see s. 59(1) VATA.

(4) That entitles HMRC to serve a surcharge liability notice under s. 59(2)(b), specifying as a surcharge period the anniversary of the last day of the accounting period, namely 28 February 2011.

(5) The next accounting period (**"Period 05/10"**) ends on 31 May 2010, and the due date for the taxpayer to furnish its return and pay the VAT due (£10,000) is therefore 30 June 2010. Suppose the taxpayer pays £10,000 before that date, say on 15 June 2010. If this payment is allocated to the arrears for Period 02/10, the inevitable result will be that the taxpayer will be in default for Period 05/10. That will trigger a surcharge of 2% or £200 under s. 59(5)(a).

(6) For Period 08/10 another £10,000 is due. The taxpayer makes payment of £10,000 on 15 September 2010. If that is allocated to the arrears of Period 05/10, the taxpayer will be in default for Period 08/10; that will be the second default in the surcharge period, and the taxpayer will be liable to a surcharge of 5% or £500 under s. 59(5)(b).

(7) Similarly if the taxpayer regularly pays £10,000 each quarter and it is in each case allocated to the previous period's arrears, then the taxpayer will be in default in each period, triggering a surcharge of 10% or £1000 for the third period under s. 59(5)(c), and 15% or £1500 for the fourth under s. 59(5)(d). Since HMRC can also serve successive surcharge liability notices extending an existing surcharge period under s. 59(3), the practical effect is that after four quarters, the taxpayer may continue to be liable for a 15% surcharge in each quarter.

(8) By contrast however suppose that the £10,000 paid on 15 June 2010 can be, and is, allocated to the current period, that is Period 05/10. That means that there is no default in respect of that period (although the taxpayer remains in default for Period 02/10). If each successive payment of £10,000 is duly allocated to the current period in this way, the taxpayer will not be in default for any of the succeeding periods, and will not trigger any surcharges at all. The taxpayer would of course be at risk, not having paid anything towards the arrears of Period 02/10, of HMRC taking action to enforce the liability for those arrears, including by way of petition to wind it up, but would not be liable for any surcharges.

It can be seen that the question of whether a payment can be, and is, duly allocated to the current period can have very significant consequences for the operation of the surcharge regime. It is this point that is at the heart of the appellants' appeal.

The FTT decision

The facts found

9. What follows is a summary of the facts set out in the FTT decision so far as relevant to this appeal.

10. The appellants incurred substantial capital expenditure in the late 1990s and early 2000s, and incurred VAT default surcharges at that time which are not the subject of this appeal. In 2007 the group refinanced existing debt and as part of that arrangement entered into interest rate hedging arrangements. There was a further refinancing in 2010, also subject to a hedging arrangement. As a result of the fall in interest rates these arrangements resulted in significant costs between 2008 and 2012. Each of the four appellants made losses, at least between 2008 and 2011, and had difficulties paying their VAT liabilities. The liabilities have now been cleared.

11. Three of the appellants entered the default surcharge regime during 2009. QN Hotels (Wrexham) Limited (**"Wrexham"**) entered the regime at the end of 2007. Full details of the surcharges under appeal are set out in the FTT decision at [79] and the minor amendments made by the FTT are set out in the decision at [136]. The surcharges in dispute were incurred between 2010 and 2012, and in the case of Wrexham for one period in 2009. Not every quarter is affected but for each appellant the majority of the surcharges, and in the case of Wrexham all the surcharges, are at the maximum 15% rate.

12. The appellants took a number of steps to address their financial problems. The action that is relevant to this appeal is that they sought to make payments of current VAT liabilities rather than historic liabilities, with a view to avoiding default surcharges in respect of the current period. There was evidence before the FTT of examples of this: for example, on 6 May 2010 a cheque for £25,000 was drawn on an account in the name of Holiday Inn Newport. This was one of the hotels owned by QN Hotels Ltd, and the cheque appears to have been sent under cover of a compliments slip which gave that company's VAT number (627 9246 13) and added

"Period 05/10". That is therefore an example of a VAT payment which the appellants appear to have attempted to allocate to the accounting period ending May 2010, but which was made before the end of that period. The FTT's decision records at [82] that many of the payments were made in this way before the end of the relevant VAT quarter.

13. Unfortunately there was a lack of clarity before the FTT about the details of the appellants' attempts at allocation. The appellants had produced a schedule but HMRC found a number of errors in it and the FTT concluded that it could not be relied on. In the event, and based on the view that it had taken of the law (namely – see below – that VAT for a period did not become a debt until the due date for return and payment for that period, and that no allocation of payments can be made in respect of VAT that has not become due), the FTT's sole finding of fact on the allocations made was that none of the examples produced by the appellants involved a payment made once VAT had become due. It is clear from [86] to [89] in the FTT decision that no specific findings were made in respect of allocations attempted in relation to VAT that in the FTT's view was not yet due.

The conclusions reached

14. Three grounds of appeal were considered by the FTT. These were whether the appellants had a reasonable excuse, whether HMRC had incorrectly allocated payments to historic rather than current VAT liabilities, and a question of proportionality. The appellants' argument about reasonable excuse related essentially to the effect of the interest rate hedging arrangements. The FTT's conclusion that the appellants did not have a reasonable excuse is not the subject of this appeal and is therefore not considered further.

15. On the question of allocation, the FTT noted that the parties both accepted that at common law the appellants could appropriate payments to debts as they chose if they did so before money changed hands, and agreed with HMRC's argument that, where no allocation was made by the appellants, HMRC were entitled to allocate payments to the oldest debt (see [56] and [57] in the FTT decision). The FTT went on at [62] to agree with HMRC's further argument that "the VAT for a VAT period does not become a debt until the due date for the return and payment in respect of that period, ie the last day on which the return may be submitted and payment may be made", and therefore that "any payment made before that last day is made before it has become due" (see [64]).

16. The FTT then referred at [65] to a comment in *Voicenet Solutions Ltd v HMRC* [2013] UKFTT 781 (TC) at [7] to the effect that there was no principle that a creditor must allocate a payment to a sum yet to become due. It held at [67] that HMRC was required to act on an allocation made by the appellants to a sum that had become due, but it is clear from the discussion that the FTT concluded that allocations made by the appellants in respect of debts that were not yet due were ineffective: see in particular [69], accepting HMRC's arguments as set out at [41] and [45].

17. On the question of proportionality, the FTT noted that the appellants did not argue that the system as a whole was disproportionate. The FTT found that proportionality was only relevant to the question of whether effective allocations were not acted on by HMRC ([71]). Since there was no evidence that HMRC had failed to act on the appellants' allocations in respect of "existing debts" the question of proportionality did not arise ([89]).

Ground (1): allocation to VAT not yet due

General principles- The Mecca

18. Both parties accepted before us that general legal principles apply to payments in respect of VAT debts, and that the VAT due in respect of each VAT quarter is a separate debt rather than there being a "running account" between HMRC and the taxpayer. Accordingly, the principles established in *Cory Bros v Owners of the Steamship Mecca ("The Mecca")* [1897] AC 286 apply. As Lord Macnaghten said at 293:

> 'When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he made the payment, the right of application devolves on the creditor…[T]he creditor has the right of election 'up to the very last moment'…"

In contrast, where there is a running account the rule in *Clayton's Case* (1816) 1 Mer 585, 608 applies, and credits are allocated to the earliest debits automatically, with no different appropriation being possible.

Scope of power to appropriate: the rival submissions

19. In essence the dispute between the parties was over the scope of the appellants' power to appropriate payments between VAT debts. As set out above, the FTT had held (i) that VAT for a period does not become a debt until the last date for payment (at the relevant time, usually the end of the month following the relevant accounting period), and (ii) that as a matter of law the appellants could not effectively appropriate a payment to a liability that had not become a debt. The practical consequence is that a taxpayer cannot allocate a payment of VAT to a current period (or indeed to a period which is complete but where the payment is made before the end of the following month).

20. Mr Bedenham, who appeared for the appellants, took issue with both points. He argued that the appellants had the power to appropriate payments made to VAT arising in the period current at the time of payment. There were two limbs to his argument:

(1) The taxpayer's liability for VAT arose on the making of a taxable supply. That constituted a debt, even though the taxpayer (i) was not obliged to pay it before the last day of the month following the end of the period and (ii) was entitled (although not obliged) to set off input tax arising in the period. That

meant that where a taxpayer made a payment which reflected output tax on supplies in the relevant VAT period that had already been made prior to the date of payment to HMRC, a liability to VAT had arisen, and hence there was an existing debt to which the taxpayer could appropriate the payment.

(2) In any event, there was no principle of law preventing a taxpayer from allocating a payment to a liability that would become due (what Mr Bedenham called a "future debt", although we do not think this is a conventional usage – see below).

Limb (1) of the argument admittedly depended on taxable supplies having already been made at the time of the payment, but limb (2) would cover both such supplies and supplies that would foreseeably be made later in the current VAT period.

21. Mr Watkinson, who appeared for HMRC, submitted on limb (1) (initially at least) that no debt arose until an amount fell due for payment, and that (at least in respect of VAT debts) an appropriation could only be made to a debt actually owing at the time the creditor receives the payment. He also submitted that until the VAT became due and payable, there was at most an unquantified liability, and the law did not allow an appropriation of a payment to an unquantified debt. On limb (2) his position was that an appropriation could not be made to a future liability.

The relevant legislation

22. Section 1(2) VATA (set out in the annex) provides that VAT due on any supply of goods or services "is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply". Section 25(1) VATA provides for accounting and payment in respect of VAT by reference to prescribed accounting periods in accordance with regulations. (The appellants were not subject to the rules in s. 28 VATA which require monthly payment on account, and therefore payment was required only after the end of each VAT period.) Section 25(2) VATA states that a taxable person "is entitled" at the end of each prescribed accounting period to credit for, and to deduct from any output tax, so much input tax as is allowable. Section 25(6) requires that any such deduction is made by way of claim.

23. The relevant regulations are in the Value Added Tax Regulations SI 1995/2518 (the **"VAT Regulations"**) and are also set out in the annex. Regulation 25 requires returns to be submitted no later than one month after the end of the relevant three month accounting period (subject to a power for HMRC to vary the period or due date of the return). Under regulation 29(1) any claim to input tax must generally be made in the return. Regulation 40(1) requires output tax to be accounted for in the return, and regulation 40(2) requires payment by the person required to make the return "not later than the last day on which he is required to make that return".

24. The language of s. 25(2) VATA and regulation 29(1) might suggest that an entitlement to deduct input tax only arises at or after the end of the accounting period. However, Counsel for both parties accepted that it was clear as a matter of EU law

that the entitlement to deduct input tax arises immediately, and is not deferred until the end of the period. Mr Watkinson said that the effect of this was that no debt could arise during the period. Although s. 1(2) did have the effect that a liability arose as supplies were made, the amount of that liability could not be quantified until the accounting period had ended, because until that time the amount of any input tax deductible from the liability could not be known. A liability that could not be quantified was not a debt for the purposes of allocation, and payments made could not be allocated to amounts that were not debts for those purposes. In contrast, Mr Bedenham argued that at any point in the period there was an (existing) debt, the amount of which could be calculated by deducting allowable input tax from output tax in respect of supplies up to that point.

The case law

25. Mr Watkinson relied on three non-tax cases to support his submissions, as well as the First-tier Tribunal decision in *Voicenet Solutions* referred to by the FTT.

26. The first case relied on was *Hammersley v Knowles* (1798) 2 Esp. 664. It appears that the events in question took place in 1797, but the underlying facts are somewhat unclear. In summary it appears that Knowles had issued a promissory note for £800 in favour of his brother-in-law, Jefferies. Jefferies endorsed the note with two other notes in favour of his bankers, Hammersley and another, effectively as security for advances to him. All three notes fell due on 27 February 1797 but before that date Jefferies had asked, and Hammersley had agreed, to hold the relevant notes over until another debt was paid to Jefferies. On 27 February Jefferies paid Hammersley £2000, leaving a balance due of £302. Nothing was said by Jefferies about appropriation at the time of payment. Although not stated in the report it appears that Hammersley subsequently advanced further funds to Jefferies which were not repaid. When Jefferies became insolvent Hammersley sought to recover by taking action against Knowles on the note.

27. Lord Kenyon held that Hammersley was required to ascribe the £2000 to the notes, because they were subsisting debts. In those circumstances, and in the absence of other agreement, the payment could not be treated as a deposit and had to be treated as a payment of the existing debts. Hammersley could therefore only recover £302, rather than effectively appropriate the balance of the note to later advances. This is reflected in the headnote which states "When a debtor makes a payment generally, without directing the appropriation, it shall be taken to be a payment on account of the subsisting debt, and on no other account."

28. The second case was *Goddard v Hodges* (1832) 1 C. & M. 33. In that case the question arose as to whether a payment of £200 on account to a solicitor who was found effectively to have become a partner in an undertaking should be appropriated to a prior debt, which it appears had arisen before the solicitor became a partner, or to amounts subsequently claimed by the solicitor in respect of expenses incurred in connection with the business. There was no specific appropriation by the paying party at the time of payment. Most of the decision discusses whether the solicitor was a partner and the principle that one partner cannot sue another until the partnership

balance is ascertained. However, it was made clear that the payment should be allocated to the prior debt on the basis that it was "that alone on which a legal claim can arise". In contrast the later claim "would only become a legal debt on a settlement of the partnership accounts and a striking of a balance" (Bayley B at 39).

29. The most recent of the three cases relied on by Mr Watkinson was a costs decision, *Dranez Anstalt & Ors. v Hayek & Ors.* [2008] EWHC 90104 (Costs), where Master Rogers commented at [52] that "for appropriation to take place there needs to be a quantified debt". The context in that case was that the beneficiary of a costs order sought to appropriate two amounts received by way of security for costs in a particular way. Counsel for the paying party successfully argued that an order for costs to be assessed was not a debt and could only become one once the costs were quantified, assessed and certified, which had not occurred before the alleged appropriation.

30. For the appellants Mr Bedenham referred to two First-tier Tribunal decisions which had proceeded on the basis that a payment could be allocated to a liability arising in the current period, *AJM Mansell Ltd v HMRC* [2012] UKFTT 602 (TC) and *GH Preston Partnership v HMRC* [2016] UKFTT 296 (TC). He also referred to an earlier summary decision of the VAT and Duties Tribunal relating to one of the appellants, *QN Hotels Ltd v Commissioners of Customs & Excise* (LON/2002/834), which also assumed that directions accompanying VAT payments to the effect that a specified proportion of them should be appropriated to new VAT liabilities as they arose were validly made by QN Hotels Ltd.

31. *AJM Mansell* related to penalties for unpaid monthly amounts of PAYE. HMRC had allocated payments made to the previous month rather than the current month, the effect being that instead of one default (for month 1) defaults were triggered in respect of each subsequent month and multiple penalties were incurred. The Tribunal held that each PAYE debt was a separate debt and that the principle in *The Mecca* applied. However, after noting at [41] to [43] that HMRC's payment systems permitted allocation to specific future or previous periods through the use of an additional four digit reference number, it held at [60] that no allocations were in fact made to the current month. The Tribunal also went on to infer at [63] that because the amounts paid were calculated based on employees' earnings for the preceding month, there was as a matter of fact an allocation to the debt arising for the previous month.

32. *GH Preston Partnership* was a default surcharge case. The Tribunal's conclusion that the taxpayer did not have a reasonable excuse for the defaults was based on the finding that it had not instructed HMRC to allocate payments to current VAT liabilities rather than to historic liabilities. The partnership was "fully entitled to instruct HMRC to apply the payments to current VAT liabilities" ([65]), and a reasonable businessman would have sought to do that. The defaults were therefore avoidable.

Discussion on Ground (1)

Limb (1) – is there a debt before the due date for payment to which an appropriation can be made?

33. The concept of a "debt" does not appear in the relevant VAT legislation. It is relevant only insofar as common law principles on appropriation of payments apply, and draw a distinction between amounts that are debts and amounts that are not.

34. We take first the question whether there can be a debt for these purposes even though it has not yet fallen due for payment. In our view it is clear that an amount that is owed but that has not yet fallen due for payment is properly described as a debt. This is an entirely standard and normal usage of the term debt. For example if A borrows £100 from B on terms that it is repayable in 12 months' time, it would be normal to regard A as owing B a debt of £100 even though the 12 months had not expired. This is a well-known type of liability, traditionally called "*debitum in praesenti, solvendum in futuro*", that is a sum presently owing but which is to be discharged in the future: see for example *Webb v Stenton* (1883) 11 QBD 518 at 524 per Brett MR ("The law has always recognised as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future") and 527 per Lindley LJ ("a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*"). This is incidentally what we think would normally be understood by the term "future debt", as opposed to Mr Bedenham's use of the term to describe a liability under an obligation which has not yet been incurred.

35. Section 1(2) VATA provides that, subject to provisions about accounting and payment, VAT on any supply of goods or services becomes due at the time of supply. Leaving aside for the moment the provisions enabling input tax to be deducted, the effect of this seems to us to be clear. The taxpayer who makes a taxable supply becomes thereby liable to pay the output tax on the supply to HMRC, even though he does not have to actually pay it until the due date for payment, which in the normal case (and ignoring rules applying to electronic returns) is the last day of the month following the relevant quarter. That seems to us to be a present obligation, albeit one that is to be discharged in the future, and on normal principles is a debt. We also note that this approach is entirely consistent with HMRC's ability under regulation 25 of the VAT Regulations to vary the period covered by a return: effectively there is power at any point to end the period and crystallise payment of the debt.

36. Mr Watkinson also submitted that, even if there was a debt prior to the due date for payment, the debtor's right of allocation, at least in respect of VAT debts, only extended to debts that are due for payment. On that approach, any payment made in advance of the due date for payment of a debt may not be appropriated to that debt by the debtor. In contrast, the creditor receiving the payment (HMRC in the case of VAT debts) would be entitled, but not bound, to elect to appropriate the payment to the debt once the due date for payment arrived. This followed from the fact that, under the principles in *The Mecca*, the creditor does not have to appropriate payments on receipt but can do so at a later time.

37. We do not accept this submission. We do not see any reason why a person should not appropriate a payment to a debt that has been incurred even if the due date for payment of that debt has not arrived. Any other view would be likely to give rise to serious inconvenience. Suppose a case where B has provided services to A at an agreed price of £100, and has invoiced A the sum of £100, the invoice providing that payment is due within 30 days. There is nothing in general to prevent A from paying B the £100 before the 30 days is up. Now suppose that A owes B another historic debt, but A prefers to pay the more recent invoice first. There are many reasons why A might wish to do so, and in general the law allows a debtor to choose which of two or more debts he is paying. A therefore pays B £100 shortly before the 30 days is up, expressly appropriating the payment to that invoice. It would seem very odd if he could not do so on the grounds that he had paid before the last date for payment, and hence the £100 was not a debt to which he could appropriate his payment. If this were really the law, it would mean A could only achieve his end by paying on or after the 30th day; and if he wished to do so without being in breach, only by paying on exactly the 30th day. We cannot believe that this is the law, and as we understood Mr Watkinson by the end of the oral argument he accepted that in such a case A could appropriate his payment to the invoice in question even though payment was made before the last date for payment.

38. But if this is right – and we agree that it is – then we see no reason why the same should not be true of a liability for VAT that has arisen on supplies during a VAT period. Assuming therefore that a taxpayer has no input tax in a VAT period, the position seems to us to be relatively straightforward. When the taxpayer makes a taxable supply, a liability for output VAT arises, even though it does not have to be then paid. At any point the amount payable in respect of cumulative output tax in the current period can be readily determined. We think that this can properly be regarded as a debt that is in existence and which increases as each supply is made, even though it is not presently payable; and we see no reason why the taxpayer cannot appropriate a payment made in the current period (or indeed after the end of the current period but before the last date for payment) to such a debt.

39. The next question is whether the fact that the taxpayer has a right to deduct input tax makes a difference.

40. Here the recent discussion by this Tribunal in *Aspect Capital Limited v HMRC* [2014] UKUT 0081 (TCC), [2014] STC 1360, to which we drew Counsel's attention, appears to us to be in point. One question in that case was whether amounts owed by employees to their employer in respect of an employee share arrangement, the quantum of which could be reduced in certain circumstances (or even eliminated on death), were "debts" for the purposes of specific rules in s. 419 Income and Corporation Taxes Act 1988. Warren J referred to a number of cases, including the House of Lords decision in *Marren (Inspector of Taxes) v Ingles* [1980] STC 500 (which related to "a *possible* liability to pay an *unidentifiable* sum at an *unascertainable* date": see per Lord Fraser at 506), and concluded that the employees had incurred a debt on entering into the arrangement, even though the date and amount of the repayment were not fixed until a later date ([66] and [68]). Warren J explained at [71] that, unlike the facts in *Marren v Ingles*, there was a liability to pay

an ascertained amount, albeit that the obligation to repay could be reduced or extinguished. This was a debt for s. 419 purposes.

41. That seems to us to establish that an obligation to pay a sum can properly be regarded as a debt even though it was not only payable in the future but was liable, by the time that it fell to be paid, to be reduced, or even extinguished. We agree.

42. Mr Watkinson correctly pointed out that Lord Fraser made clear in *Marren v Ingles* at 506 that "the meaning of the word 'debt' depends very much on its context". He submitted that, in the context of appropriation of payments, only debts that were quantified were relevant.

43. We do not accept this submission either. As Mr Bedenham pointed out, the amount of the taxpayer's entitlement to input tax deductions can be determined at any point. However, we do not think that it would be right to say that this means that the amount of the debt is necessarily fixed at any point by reference to the amount of input tax that has arisen to date. It is clear that there is an entitlement, rather than obligation, to claim deductions for input tax, so it is not the case that at any point in time the amount of the debt can be identified as the output tax less input tax to date. Rather the debt arising in respect of output tax can be reduced by claims to deductions for input tax, both where the entitlement to deduct arises prior to that time and where it arises later in the period. Just as in *Aspect Capital* the amount payable to HMRC (by way of output tax) can be identified at any point although that amount can be reduced by subsequent events. And unlike *Aspect Capital* in this case the due date for payment is fixed.

44. We can see no reason why the principles in *The Mecca* should not apply to the debt arising in respect of output tax. None of the cases cited by Mr Watkinson related to an existing debt. The advances in question in *Hammersley v Knowles* were made some time after the payment in question, the amounts at issue in *Goddard v Hodges* were amounts that could only be determined on settlement of partnership accounts and the striking of a balance between partners, and the costs in *Dranez Anstalt* had not been quantified. None of these amounts could properly be described as existing debts of the kind in question here.

45. In addition, in each of the three cases it was the creditor and not the debtor that was seeking to make the allocation. The position of the debtor and creditor in respect of appropriation are not directly comparable, and we do not think that it is correct to assume that a principle that applies to one necessarily applies to the other. We do not find it at all surprising that, where a debtor makes an unallocated payment, the law does not permit the creditor to allocate it to a future amount in circumstances where there is an existing debt that has fallen due. Effectively, the debtor is assumed to pay the debt that he already owes. That makes sense and accords with the debtor's presumed – and in most cases actual – intention. It is the natural inference from his actions. In addition, under *The Mecca* the debtor's right to appropriation expires at the time of payment. The creditor has much greater flexibility and can even delay appropriation until a case is being heard. The result of a conclusion that the debtor is not entitled to allocate a payment to an amount that is not presently due is that the

debtor never has the chance to allocate a payment made in advance of the due date, whereas the creditor acquires that right as from the due date. We return to this below.

46. Our conclusion on limb (1) of Mr Bedenham's argument is that a taxpayer is entitled at the time of making a VAT payment to allocate that payment to the cumulative output tax that has already arisen on supplies in the current period, notwithstanding (i) that the due date for payment has not arisen and (ii) that the amount may fall to be reduced by a claim to input tax when the return comes to be made.

Limb (2) – payments on account of future liabilities?

47. Mr Bedenham also submitted that the appellants had power to appropriate sums paid which exceeded the tax that had accrued at the time of payment. He put this argument as relating to a case where the amount paid exceeded the output tax accrued in that part of the period that had elapsed before the time of payment, less the input tax in respect of which an entitlement to credit had already arisen. On the view we have taken this argument would in fact only be relevant if the amount paid exceeded the output tax that had arisen, rather than output tax less input tax, since we consider that the full amount of output tax accrued can be regarded as an existing debt. It is not clear whether this would be relevant on the facts, but we will give our views on it in case it does prove relevant.

48. It is clearly more difficult to conclude that the principles in *The Mecca* apply to permit a debtor to appropriate a payment to an amount that can in no sense be described as an existing debt. There is no current liability of any kind, and however likely the debt is to arise it is at most a possible future liability. It is therefore more closely analogous to the amounts considered in *Hammersley v Knowles*, *Goddard v Hodges* and *Dranez Anstalt*. However, there remains the important distinction that in each of those cases the question was whether the *creditor* was permitted to appropriate a payment to a future debt. The position of the debtor was not considered. As already explained, we do not think that the position of debtor and creditor are comparable. To permit the creditor to allocate a payment made in advance of an amount becoming due to that amount when it does fall due, but not to permit the debtor to make any such allocation, strikes us as not only unjust but wrong in principle.

49. We also think that considering the position solely in the context of *The Mecca*, which relates to the allocations of payments between different debts, is rather too narrow. The concept of a "payment on account" is commonplace and well understood. Payments may well be made on account, for example in respect of a building project, where the final amount due is uncertain. It would be very surprising if the customer was unable to specify that a payment to his builder was indeed a payment on account in respect of that project, rather than it being open to the builder either to allocate it to that project or, if he chose, to a separate historic debt which had not been paid, for example because the work had not been fully completed. No case was referred to that supported the proposition that such an allocation could be made by the payee in contravention of the payer's express stipulation, and we do not think that it can be

correct. In the absence of a specific contractual term the payee would not usually be bound to accept a payment which the payer has allocated in a particular way, but if he does accept payment then we think that he must be regarded as doing so subject to the terms on which it is paid.

50. We conclude on limb (2) of Mr Bedenham's argument that a taxpayer can allocate payments to VAT for the current period whether or not the payment exceeds the cumulative output tax to that date. If the payment does exceed the then accrued amount, the balance is to be regarded as a payment on account of the tax still due to accrue during the current period. If HMRC accept such payments (and we have difficulty seeing that HMRC would ever have a good reason not to) then having accepted the payment as a payment towards the current period's liability, HMRC cannot allocate it as a payment to a historic liability.

Structure of the legislation

51. In our view the structure of the legislation also supports our conclusions that VAT payments made in advance of the due date may be allocated by the payer, and that this is the case even in circumstances where the payment made exceeds the output tax that has arisen by the date of payment. Our reasons are as follows:

(1) It is clear that the entitlement to deduct input tax is only exercised, and becomes effective, by claiming it on the return. Unless and until it is claimed, which it need not be, the full amount of output tax is due. It is only by completing the VAT return that the entitlement to input tax is crystallised and deducted from output tax. This means that, even after the VAT period has ended, the precise amount due is not ascertained, and will not be until the return is completed and submitted. There is therefore never a point in advance of that time when any debt is precisely quantified. It follows that, if the argument that unquantified debts are incapable of allocation by the taxpayer was correct, there would be no time prior to submission of the VAT return when the taxpayer could make an allocation. This would be so even assuming that the further argument that no appropriation could be made to a debt that was not presently due was wrong. It would not be the case that an allocation could be made at any point after the period had ended, since the debt is in fact not finally quantified until the return is made.

(2) The legislation clearly contemplates that VAT payments may be made before the (final) due date, and before a return is filed. Regulation 40(2) of the VAT Regulations refers to payment being made "not later than" the last day on which a return is required. Under regulation 25(1) this is generally the last day of the month after the period ends. (We have ignored for present purposes rules applying to electronic submissions and payments.) It is clear from this that payment need not be made at the same time as the return is filed. The same point is also apparent from the default surcharge regime itself, which contemplates that defaults can occur if either the payment or the return is late.

(3) The concept of "outstanding VAT" in the default surcharge regime also applies to VAT for which the taxpayer "is liable in respect of that period" that is not paid "by" the last day on which the taxpayer is required to make a return (s. 59(6) VATA). The regime draws no distinction between amounts paid before or on the final due date. In our view it also assumes that payments may be earmarked to particular periods.

(4) Not only is it clear that payments can be made in advance of the due date, but such payments are effectively encouraged. Payments made even one day late potentially result in a default surcharge (see *Revenue and Customs Commissioners v Trinity Mirror plc* [2015] UKUT 0421 (TCC), [2016] STC 352 ("*Trinity Mirror*")) so a prudent taxpayer will arrange payment in good time. Unless an electronic payment system is used which the payer is confident will ensure payment on precisely the right date, the default surcharge system will undoubtedly encourage the taxpayer to err on the side of caution since he cannot be certain of the date on which HMRC's systems will recognise payment as having been received. However, if Mr Watkinson was right this would effectively preclude any allocation by the taxpayer. It cannot be right that the system should, on the one hand, penalise late payment but on the other effectively discourage early payment in any case where the payer wishes to make an allocation.

(5) The default surcharge system is designed to incentivise future compliance. The initial default in a cycle of defaults is not penalised. Subsequent defaults are penalised on an increasing basis to the extent they involve unpaid or late paid VAT. No "credit" is given in respect of later defaults for the fact that VAT due in respect of an earlier default has now been paid (or a late return has now been made). Effectively, the earlier default cannot be remedied. The incentive is therefore to ensure that future payments are made, and returns filed, on time. Since Parliament has not chosen to take account of whether a historic default has been remedied we do not think that it can have intended that a payment earmarked for a later period should be capable of being unilaterally allocated by HMRC to a historic default in circumstances where the taxpayer does what he is incentivised to do and makes the payment before the due date, whereas if the payment is received on the due date (or at least once the return is filed) that allocation would be respected.

(6) For similar reasons, we do not see that a logical distinction can or should be drawn between amounts paid that can be related to output tax already incurred (and which therefore could be described as a debt) and other amounts that the taxpayer seeks to allocate to the current period. The language of "debt" is not used in the VAT legislation, and in our view nothing precludes payments being made on account. It is highly unlikely that Parliament would have contemplated that such payments, which benefit the Exchequer, should effectively be discouraged. In our view the First-tier Tribunal cases referred to by Mr Bedenham as assuming that taxpayers could allocate payments to current periods were quite correct to make that assumption. We also note that in *Voicenet Solutions*, a case relied upon by Mr Watkinson, it was clear both that

the taxpayer had made no attempt at allocation and further that HMRC's own published practice (in that case in respect of monthly PAYE amounts) recognised the taxpayer's ability to allocate payments in the manner most favourable to it.

Conclusions on Ground (1)

52. The FTT reached the view that VAT does not become a debt until the final due date for payment ([62] and [64] in the decision). The FTT also concluded that the debtor's right of allocation is limited to debts that are already due for payment (see [66] and [69]). We have concluded that these were errors of law. In our view the taxpayer does have the right to appropriate a payment of VAT to VAT that is not yet due for payment, and that this extends both to the situation where the payment made reflects output tax that has already arisen, and to a case where (or to the extent that) the payment exceeds the output tax that has already accrued.

Ground (2): favourable allocation required?

53. The appellants' second ground of appeal was whether, if no allocation was made by the appellants in respect of a VAT payment, HMRC was nonetheless under an obligation to allocate the payment in the way that was most favourable to the appellants in relation to the default surcharge, namely, to current VAT rather than historic liabilities. This was dealt with very briefly by the FTT as an argument about proportionality, the FTT agreeing with HMRC at [71] that proportionality was only relevant if effective allocations (on the FTT's view, allocations between existing due debts) were made by the taxpayer but not acted on by HMRC.

54. Mr Bedenham did not dispute the general proposition that, if a debtor makes no appropriation of a payment on or before the date on which it is paid, that right falls to the creditor. He also did not seek to argue that this Tribunal has jurisdiction to determine whether HMRC had any general duty of care to the appellants in respect of allocations, or any obligation to allocate in a reasonable manner. The way in which he framed the submission was as follows. The appellants accepted that, if no allocation was made by the taxpayer, the right to allocate fell to HMRC. However, if HMRC chose to allocate the payment in question to a historic liability then, to the extent that the payment would otherwise have discharged current VAT, it would be disproportionate to levy a penalty for that current period. The default surcharge regime was intended to secure compliance with accounting and payment obligations by taxable persons. It would conflict with the principle of fiscal neutrality to go beyond that by putting a disproportionate burden on taxable persons. Where a payment was made by the due date but a default was treated as arising because the payment was allocated to an earlier period then charging a penalty would be disproportionate to the gravity of the infringement. As the facts of *AJM Mansell* illustrated (see [31] above), the effect of allocating payments to past liabilities can be that what is really a single late payment can trigger successive and increasing penalties in respect of each later period. In reality culpability would be limited to the first period, when payment was actually late. What happened in later periods did not increase the level of infringement.

55. The source of the principle being put forward by Mr Bedenham was therefore founded in the EU law principle of proportionality, although he made it clear that the appellants were not seeking to argue that the default surcharge system as a whole was disproportionate. Permission to appeal to this Tribunal was refused in respect of any argument that the penalties were disproportionate in themselves, but was granted in relation to an argument that HMRC should have allocated the payments in a manner favourable to the appellants. Judge Bishopp, who granted the permission, noted that that argument was put as one of proportionality but said that he did not think that was the correct description.

56. We have concluded that it is appropriate, as Mr Watkinson accepted that it is open to us to do, to address the arguments put forward on this issue, irrespective of the fact that the principle of proportionality is being used to justify the appellants' position. We also note that the appellants' argument on this issue is subtly different to the one referred to by Judge Bishopp and indeed to the way in which it was initially expressed by Mr Bedenham before us: the appellants are not arguing that HMRC has a duty to allocate in a particular way, but are instead saying that penalties may be disproportionate to the extent that they result from a particular allocation and would have been avoided if a different allocation had been made.

57. Mr Bedenham referred to the discussion of proportionality in the context of the default surcharge regime in *Trinity Mirror*, which considered the earlier decision of this Tribunal in *Revenue and Customs Commissioners v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), [2013] STC 681. *Total Technology* had decided that the default surcharge regime was not generally flawed as being disproportionate. The main focus of the discussion in *Trinity Mirror* was whether the regime could be disproportionate in an individual case, in particular in view of the absence of a maximum cap on penalties. After referring at [58] to *Paraskevas Louloudakis v Elliniko Dimosio* (Case C-262/99) [2001] ECR I-5547 and the requirement that to be disproportionate a penalty must be "so disproportionate to the gravity of the infringement that it becomes an obstacle to [the underlying aims of the directive]", and discussing the potential for the relevant aim, namely the principle of fiscal neutrality, to be undermined by compliance failures, the Tribunal made the following comments:

> "61. The Upper Tribunal in *Total Technology* determined, at [99], that the default surcharge system was not fatally flawed so as to give rise to disproportionate penalties generally, although at [100] it entertained some residual doubt about the absence from the regime of an upper limit on the penalty which might be imposed. It regarded certain aspects of the regime, however, as capable of leading to the conclusion, in an individual case, that the penalty is disproportionate. Chief amongst these was the question of the absence of a maximum penalty which the tribunal addressed at [93] in a passage we have set out above.
>
> 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.

63. The correct approach is to determine whether the penalty goes beyond what is strictly necessary for the objectives pursued by the default surcharge regime, as discussed in detail in *Total Technology* and whether the penalty is so disproportionate to the gravity of the infringement that it becomes an obstacle to the achievement of the underlying aim of the directive which, in this context, we have identified as that of fiscal neutrality. To those tests we would add that derived from *Roth*[1] in the context of a challenge under the Convention to certain penalties, namely "is the scheme not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?"

[The Tribunal then quoted from *Total Technology*.]

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.

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."

58. We have concluded that it is not disproportionate for a penalty to arise from the manner in which HMRC chooses to allocate a payment, in circumstances where the

[1] *International Transport Roth GmbH v Secretary of State for the Home Dept* [2003] QB 728 at [26], per Simon Brown LJ.

taxpayer could have but failed to make a different allocation at or before the time of payment, as we have decided that it could. Such a system might appear harsh in some cases but is not "plainly unfair", and is not in our view so disproportionate as to be an obstacle to the aim of fiscal neutrality (*Total Technology* at [63]). A taxpayer that has had previous defaults should be aware of them – and indeed the default surcharge system requires notifications to be made to that effect – and if the taxpayer chooses to make a payment without allocating it to a particular period it is not particularly surprising, or unfair, that HMRC may choose to allocate it to an historic debt.

59. We reach no conclusion as to what the position would be if we were wrong on Ground (1). We note Mr Watkinson's submissions that proportionality was being used to mask the real point, which was that the Tribunal had no jurisdiction over HMRC's decision to allocate, and that it would be an impossible task for HMRC to be required to allocate or be treated as allocating payments in a way that somehow suited the taxpayer, or to be required to try to decide on a case by case basis whether a penalty charged was disproportionate. However, we also note that if Mr Watkinson had succeeded on Ground (1) then that could lead to real unfairness. Any allocation made by the taxpayer in respect of any payment made in advance of the due date for payment could potentially be ignored, and HMRC could instead choose to allocate the amount in a way that was contrary to the taxpayer's express wishes, thereby triggering a penalty that might have been avoided if the taxpayer had paid later and its allocation had been respected.

Decision

60. We have concluded that there were errors of law in the FTT's decision. The FTT should have found that effective allocations could be made by the appellants in respect of VAT that was not yet due. We have therefore concluded that we should set aside the decision.

61. The question then arises as to whether, pursuant to s. 12(2) of the Tribunals, Courts and Enforcement Act 2007, we should either remit the case to the First-tier Tribunal with directions for its reconsideration or remake the decision. The FTT restricted its findings of fact by reference to the view it took of the law and simply concluded that there were no cases where the appellants had attempted to allocate payments to debts that were already due for payment. There are therefore no findings in relation to allocations made to VAT that was not due. In addition, although it is clear from the decision that at least some attempts were made to make such allocations, it is also apparent that there was no agreement between the parties as to the details, with HMRC finding errors in the appellants' schedule of VAT payments.

62. In the circumstances we have concluded that we should remit the case to the First-tier Tribunal to make findings in respect of (a) the amounts and dates of relevant VAT payments and (b) the allocations made by the appellants in respect of those payments on or before the date of payment, in order to enable the Tribunal to determine the extent to which allocations were made by each of the appellants in respect of payments of VAT that are relevant to any of the periods in dispute, and therefore whether and to what extent the default surcharges in dispute should be

reduced or removed. This would include, if relevant, making findings in relation to allocations made in respect of periods prior to any of the periods in dispute insofar as any default in respect of that earlier period affects the amount of the surcharge in respect of a period in dispute.

MR JUSTICE NUGEE

JUDGE SARAH FALK

RELEASE DATE: 2 March 2017

Annex – relevant legislation

Section 1(2) VATA

(2) VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply.

Section 25(1), (2) and (6) VATA

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(6) A deduction under subsection (2) above… shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations; and, in the case of a person who has made no taxable supplies in the period concerned or any previous period, payment of a VAT credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to repayment in specified circumstances.

Section 59 VATA

(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.

…

(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.

…

(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.

VAT Regulations: regulations 25(1) and (2), 29(1) and 40(1) and (2)

25(1) Every person who is registered or was or is 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… showing the amount of VAT payable by or to him and containing full information in respect of the other matters specified in the form…;

provided that—

…

(c) where the Commissioners consider it necessary in any particular case to vary the length of any period or the date on which any period begins or ends or by which any return shall be made, they may allow or direct any person to make returns accordingly, whether or not the period so varied has ended;

…

(2) Any person to whom the Commissioners give any direction in pursuance of the proviso to paragraph (1) above shall comply therewith.

29(1) …save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable ….

40(1) Any person making a return shall in respect of the period to which the return relates account in that return for—

(a) all his output tax,

….

(2) Any person required to make a return shall pay to the Controller such 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.