



TC05695

Appeal number: TC/2016/06095

VALUE ADDED TAX – default surcharge – Section 59 Value Added Tax Act 1994 - whether there was a reasonable excuse for the default – no – whether the penalty was disproportionate to the default – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RIGHT INTERNATIONAL LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JANE BAILEY
MR JOHN CHERRY**

Sitting in public at Fox Court, London on 13 February 2017

Mr David Pike, director, for the Appellant

Mr David Hopkins, presenting officer, for the Respondents

DECISION

Introduction

5 1. This appeal by the Appellant is against the Respondents' decision, dated 28 October 2016, to confirm the imposition of a surcharge in the sum of £3,861.50 in respect of the Appellant's late payment of Value Added Tax ("VAT") due for the period 06/16. The VAT was due on Sunday 7 August 2016 and was paid in full by the Appellant on Monday 8 August 2016.

10 The relevant legislation

2. The relevant legislation is set out in Section 59 of the Value Added Tax Act 1994 ("VATA 1994"). Subsection (1) of Section 59 provides that if a person has not provided a VAT return, or paid the amount of VAT shown on that return as due, by the last date on which a VAT return for a particular accounting period is required,
15 then that person is to be regarded as being in default.

3. Once a person is in default, HMRC serves a surcharge liability notice ("SLN") on that person. A SLN specifies a surcharge period, beginning with the date of the notice and ending on the first anniversary of the last day of the accounting period for which the person was in default. Once a person is in default and has been served with
20 a SLN, then subsection (4) applies.

4. Section 59(4) provides that, if a person who has been served with a SLN is in default during the surcharge period which is specified in the SLN, then that person shall be liable to a surcharge. Subsection (4) provides that the surcharge shall be the greater of a prescribed percentage of the outstanding VAT for the relevant period, and
25 £30. In practice the Respondents do not impose surcharges of less than £400 until the prescribed percentage is 10% or more – see Notice 700/50/2011.

5. The relevant prescribed percentage for each surcharge is specified in Section 59(5), with the percentage increasing with the number of defaults in the surcharge period. Subsection (5) provides that for the first default while in a surcharge period,
30 i.e. the second default overall, the prescribed percentage for a surcharge is 2%. The percentage is 5% for a third default overall, 10% for a fourth default overall and 15% for any default after the fourth overall default.

6. However, under Section 59(7), a person who would otherwise be liable to a surcharge is not liable if either:

35 (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

40 (b) there is a reasonable excuse for the return or VAT not having been so despatched.

7. Section 71 VATA 1994 qualifies Section 59(7) by specifically excluding from the categories of reasonable excuse: an insufficiency of funds to pay any VAT due, and reliance on any other person to perform a task.

Appellant's submissions

5 8. On behalf of the Appellant, Mr Pike accepted that the VAT due for the period 06/16 had been paid on 8 August 2016, and that the due date for payment was 7 August 2016.

10 9. Mr Pike told us that the Appellant was engaged in the business of senior executive recruitment and sometimes payment would not be made until 3-6 months after the work had been completed. Mr Pike told us that times had been difficult since the recession in 2008 and that over the succeeding years the Appellant had reduced its employees from 50 to 3. On occasion the Appellant had sought a Time to Pay arrangement with the Respondents but Mr Pike had not considered that would be necessary on this occasion.

15 10. Mr Pike submitted that there was no intention not to pay the VAT due for 06/16 on time but that he had believed payment could be made on the next working day when the due date fell on a Sunday; he had not known that the payment still needed to be made on or before the due date. Mr Pike referred to a Time to Pay arrangement agreed between the Respondents and another company: under that arrangement the direct debit in favour of the Respondents had operated on the next working day for one instalment when the due date had fallen on a Saturday. Mr Pike submitted that the same rules ought to apply for the Appellant.

25 11. Mr Pike told us that, as director, he knew everything that went on in respect of the Appellant and that he was only aware of one previous surcharge, which had been reduced to about £400. Mr Pike told us that the Appellant had not received notification of any other surcharges. Mr Pike also told us that the quarter preceding the one in dispute had been a repayment quarter, and that VAT due for the two quarters following the one in dispute had been paid on time.

30 12. In his reply to the Respondents' submissions, Mr Pike accepted that not appreciating the correct last date for payment was an error on his part. He told us he had kept funds in the Jefferson Maguire account until the last minute. Mr Pike submitted it was unfair to small businesses to pay a surcharge of nearly £4,000 for being one day late in paying the VAT due, and that the surcharge imposed was very harsh. Mr Pike told us that he had no intention of avoiding paying the VAT due and that to have a surcharge of that size imposed did not encourage small businesses. Mr Pike submitted it was difficult enough running a small business in the current economic climate without the Respondents "nit-picking" over just one day's delay.

Respondents' submissions

40 13. On behalf of the Respondents, Mr Hopkins took us through Sections 59 and 71 VATA 1994 to set out the statutory background. Mr Hopkins submitted that the

Appellant had been issued with five SLNs and confirmed the address to which these were sent and that there was no record of post being returned.

14. The Respondents' case in respect of the default for the period ended 06/16 was that the Appellant should have identified the correct date and should have ensured that payment was made on time. Mr Hopkins submitted that the Faster Payment Scheme, which was the Appellant's preferred method of payment, would enable payment on Sundays. Although there was no definition of reasonable excuse, the Respondents view was that it would be the action of a prudent person exercising reasonable foresight.

15. Mr Hopkins submitted that an insufficiency of funds could not itself be a reasonable excuse although the reason for the insufficiency might be. In this case the insufficiency appeared to be due to the difficulties of the recession. The Respondents were aware of previous Time to Pay arrangements with the Appellant but the payment for the period 06/16 appeared to be late as a result of a lack of care as to the date and a genuine error. Mr Hopkins referred to *Garnmoss Limited (t/a Parham Builders) v HMRC* [2012] UKFTT 315. Mr Hopkins also pointed to advice which had been given to the Appellant's directors over the previous few years regarding the due date.

16. Mr Hopkins referred us to *HMRC v Trinity Mirror plc* [2015] UKUT 0421 and *Total Technology (Engineering) Limited v HMRC* [2012] UKUT 418 in response to the Appellant's comments regarding the size of the surcharge imposed. Mr Hopkins submitted that the scheme as a whole was rational and that the surcharge imposed here was not disproportionate. The Respondents asked for the surcharge to be upheld.

Findings of fact

17. Mr Pike gave oral evidence as part of his submissions to us. On the basis of the oral evidence and the documents in the bundle before us, we find the following facts:

Background and historical VAT periods

a. The Appellant is engaged in the business of senior executive recruitment. The nature of that business is such that the Appellant often does not receive payment until 3-6 months after completing its work. That has been the case throughout the period in which the Appellant has been trading.

b. Mr Pike is a director of the Appellant, and also of another company called Jefferson Maguire. The Appellant does not have an overdraft facility on its bank account, and on occasion Mr Pike found it necessary to juggle funds between the Appellant and Jefferson Maguire. Jefferson Maguire does have an overdraft facility on its bank account but it incurs a fee for using this facility.

c. Following the recession in 2008, the Appellant was forced to make a number of cuts in order to continue trading, including reducing the number of employees. From the Respondents' historical ledger details and telephone call history notes provided in our bundle of documents we find that the Appellant was having difficulties in paying its VAT on time throughout 2011 and 2012 and that it was in a surcharge period

towards the end of this time. A 10% surcharge was imposed for the period 12/12 and a 15% surcharge was imposed for the period 03/13. Thereafter the Appellant appeared to recover financially, either paying the VAT due on time or agreeing a Time to Pay arrangement with the Respondents.

- 5 d. In May 2014 the Appellant notified the Respondents that it had moved to a new address which is its current address. This move was to further reduce the Appellant's overheads. There were some initial difficulties with post for the Appellant being sent to its previous address.

Period 09/14

- 10 e. The due date for the Appellant to file its VAT return and pay the VAT due for the period ending 09/14 was 31 October 2014. This deadline was extended to 7 November 2014 for payment by electronic means. The Appellant filed its VAT return on 17 October 2014. This showed VAT due of £18,904.84. £1,824.85 was paid by the due date. The remaining £17,079.99 was paid in three instalments, one in
15 December 2014 and two in January 2015.

f. On 14 November 2014 the Respondents issued a SLN to the Appellant, addressed to the Appellant's correct current address. The Appellant entered a surcharge period.

Period 12/14

- 20 g. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 12/14 was 7 February 2015. The Appellant filed its VAT return on 30 January 2015 showing VAT due of £11,840.87. Only £920.01 had been paid by the due date with the remaining £10,920.86 paid in two instalments, on 24 February 2015 and 4 March 2015.

- 25 h. On 13 February 2015, the Respondents issued the Appellant with a further SLN which extended the Appellant's surcharge period. This was addressed to the Appellant's correct address. As 2% of the VAT outstanding on the due date was less than £400, the surcharge imposed was calculated as zero.

Period 03/15

- 30 i. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 03/15 was 7 May 2015. The Appellant filed its VAT return on 6 May 2015 showing VAT due of £25,399.60. The Appellant had credit of £919.14 at the due date. Two payments, totalling £25,399.60 were paid on 13 May 2015.

- 35 j. On 15 May 2015 the Respondents issued the Appellant with a default surcharge, calculated at 5% of the VAT outstanding at the due date, in the sum of £1,224.03. The Respondents issued a further SLN, extending the Appellant's surcharge period.

k. By an undated letter, received by the Respondents on 9 July 2015, Mr Neil Dodgson, a director of the Appellant, wrote to appeal against the surcharge imposed upon the Appellant for the period ended 03/15. The basis of the appeal was that payment had been only a few days late due and this was due to a small clerical error.
5 The Appellant suggested that the size of the surcharge was extreme for a small business struggling to keep its head above water. By letter dated 13 August 2015 the Respondents refused to cancel the surcharge for the period 03/15, stating:

10 Having considered all the information you have supplied, I regret to inform you that the Commissioners of HM Revenue and Customs do not accept that you have a reasonable excuse for the above mentioned default.

This is because the payment was late due to genuine error and this is not a reasonable excuse for surcharge purposes.

l. However, the Respondents did cancel the Appellant's default for the period 09/14, having belatedly appreciated that the Appellant had a Time to Pay arrangement in place for that period and so a SLN should not have been issued. The effect of the Respondents cancelling the SLN for the period 09/14 was that the default for period 12/14 became the Appellant's first default. Therefore the 2% surcharge imposed for the period 12/14 was removed. The default for the period 03/15 became the first default after the Appellant had entered a surcharge period, and so the percentage was reduced from 5% to 2%. This resulted in the surcharge being reduced from £1,224.02 to £489.60.
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m. The Respondents enclosed an "information sheet" with their letter of 13 August 2015 but did not specify which information sheet. On the balance of probabilities we find that the information sheet enclosed was form VAT FS2, entitled "Top tips on how to avoid VAT surcharges".
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n. By letter 20 August 2015 Mr Dodgson wrote again to the Respondents, asking for the reduced surcharge of £489.60 to be removed. The basis of this request was as follows:

30 On the occasion in question we were literally a few days late due to an accounting error, and therefore I would again ask if you could waive the surcharge rather than the figure only adding to our financial burdens.

o. The Respondents replied on 20 October 2015, refusing to cancel or reduce the 2% surcharge. The Respondents explained their reason for not removing the 2% surcharge:

35 This is because genuine error is not accepted as a reasonable excuse for the late payment of VAT and Section 71(1)(A) of the VAT Act 1994 specifically excludes insufficiency of funds from being a reasonable excuse for the late payment of VAT.

p. The Respondents again enclosed an “information sheet” with their response but did not specify which information sheet. Again, on the balance of probabilities, we find that the information sheet enclosed was form VAT FS2.

Period 06/15

5 q. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 06/15 was 7 August 2015. The Appellant filed its VAT return on 16 July 2015 showing VAT due of £28,713.38. On 17 July 2015, Mr Dodgson telephoned the Respondents to enquire about the possibility of a Time to Pay arrangement but this option was refused by the Respondents. Mr Dodgson was
10 advised that the Appellant would incur a 10% surcharge if the VAT was not paid on time. Mr Dodgson telephoned the Respondents again on 22 July and was advised that a surcharge would be imposed on any VAT outstanding at the due date. The Appellant paid all of the VAT due for this period, in various instalments, by the due date.

15 Period 09/15

r. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 09/15 was 7 November 2015. The Appellant filed its VAT return on 21 October 2015 showing VAT due of £8,915.60. Although £734.16 of this VAT due was paid by the due date, £8,181.44 remaining outstanding. This amount
20 was paid in instalments in January and February 2016.

s. On 13 November 2015 the Respondents issued the Appellant with a default surcharge, calculated at 5% of the VAT outstanding on the due date, in the sum of £409.07. The Respondents issued a further SLN, addressed to the Appellant’s correct address, further extending the surcharge period.

25 Period 12/15

t. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 12/15 was 7 February 2016. The Appellant filed its VAT return on 27 January 2016 showing VAT due of £4,654.26. The VAT was paid on 17 February 2016.

30 u. On 12 February 2016 the Respondents issued the Appellant with a default surcharge, calculated at 10% of the VAT outstanding on the due date, in the sum of £465.42. The Respondents issued a further SLN to the Appellant’s correct address.

Period 03/16

35 v. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 03/16 was 7 May 2016. The Appellant filed its VAT return on 22 April 2016 showing a repayment of £126.51 was due to the Appellant. The Respondents authorised this repayment to the Appellant on 25 April 2016.

Period 06/16 – the period under appeal

w. The extended due date for the Appellant to file its VAT return and pay the VAT due for the period ending 06/16 was 7 August 2016. 7 August 2016 fell on a Sunday.

5 x. On 29 July 2016 the Appellant filed its VAT return showing VAT due of £25,743.34. Also on 29 July 2016 the Appellant's accountants instructed the Appellant's bank to pay the Respondents the VAT due of £25,743.34 on Friday 5 August 2016. The printout of that instruction showed that on 29 July 2016 the Appellant had insufficient funds in its account for the VAT due to be paid. We find that Mr Pike was aware on 29 July 2016 that the Appellant had insufficient funds in its account to pay the VAT due.

10 y. Mr Pike initially told us that the bank had not told him that there was insufficient money in the Appellant's bank account for the VAT to be paid on 5 August 2016. Mr Pike told us that he had an arrangement with the bank that it would honour payments due to be made out of the Appellant's account and then Mr Pike would "top up" the account. Mr Pike told us that on this occasion there had been no
15 information from the bank to say that the Appellant did not have enough money and that the bank would not pay the VAT due on the date instructed. We do not accept that Mr Pike or the Appellant was waiting for a communication from the bank. We also do not accept that Mr Pike believed that, in the absence of an overdraft facility, the bank would carry out the Appellant's instruction to pay £25,743.34 to the
20 Respondents on 5 August 2016 when there were insufficient funds in the Appellant's bank account on that day. We do not accept the account of events set out above in this paragraph because Mr Pike subsequently told us that he was not waiting for a telephone call from the bank (although he believed a call should have been made) and that he knew he would need to transfer funds into the Appellant's bank account before
25 the VAT would be paid to the Respondents. We find that Mr Pike knew at all relevant times that the Appellant needed sufficient funds in its account before the bank would carry out the instruction to pay £25,743.34 to the Respondents.

z. Mr Pike had not known that if the due date for payment of VAT fell on a Sunday then payment must still reach the Respondents on or before the due date. Mr
30 Pike erroneously thought that if payment was made on the next working day after the due date then the payment would be treated as having been made on time.

aa. We find that, as he told us, Mr Pike waited until as late as possible to move funds from Jefferson Maguire's account to the Appellant's account, so as to minimise the overdraft fees which would be incurred by Jefferson Maguire. On Monday 8
35 August 2016 Mr Pike instructed the transfer of £12,000 from Jefferson Maguire's bank account to the Appellant's bank account. We find that Mr Pike organised this transfer of funds specifically so that the Appellant would have enough funds in its bank account to pay the VAT on 8 August. The transfer of funds from Jefferson Maguire on 8 August 2016 brought the funds in the Appellant's account to over
40 £26,000.

bb. On 8 August 2016 the Appellant paid VAT of £25,743.34 to the Respondents.

cc. On 12 August 2016 the Respondents issued the Appellant with a default surcharge, calculated at 15% of the VAT outstanding on the due date, in the sum of £3,861.50. The Respondents issued a further SLN.

5 dd. By an undated letter received by the Respondents on 31 August 2016, the Appellant appealed against the 15% surcharge. On behalf of the Appellant, Mr Pike wrote:

The payment in question fell due on Sunday 7th August and was therefore subsequently paid on the next working day, Monday 8th August.

10 I have attached a copy of our company bank statement showing that the payment was indeed made in full on Monday 8th August.

In these very difficult days for small businesses, who are struggling hard to keep going, is it not fair to expect some level of leniency, especially as the due date fell on a weekend.

I would respectfully ask you to reconsider this fine.

15 ee. By letter dated 28 October 2016 the Respondents refused the Appellant's request that the surcharge be cancelled. The Respondents took the view that the Appellant's appeal did not disclose a reasonable excuse for the delay. With their letter the Respondents enclosed an information sheet, this time specified as form VAT FS2.

20 ff. Form VAT FS2 is a one page leaflet comprised of four columns, one of which is headed "Pay your VAT by the due date". That column contains the following advice:

Make sure your payment clears to HMRC's bank account by the due date. You can use the VAT payment deadline calculator (...) to work out how much time to allow.

25 If your due date falls on a weekend or bank holiday, payment must clear to HMRC's bank account by **the last working day before** (unless your bank allows faster payments on weekends or bank holidays).

30 gg. On 7 November 2016 the Appellant appealed to this Tribunal against the imposition of the surcharge in the sum of £3,861.50 for late payment of the VAT due for the period 06/16.

Discussion and decision

18. In an appeal against the imposition of a default surcharge the burden of proof lies first upon the Respondents to establish that the Appellant was in a surcharge period and that, while in this surcharge period, the Appellant filed its return late or
35 made late payment of the amount of VAT shown in the return as having been due. Once the surcharge has, on the face of it, been established, the burden of proof in establishing that there was a reasonable excuse for late submission or payment lies

upon the Appellant. The standard of proof in each case is the civil standard of the balance of probabilities.

Was the Appellant in a surcharge period?

5 19. There was some dispute as to whether the Appellant had been served with the SLNs for the periods 12/14, 09/15 and 12/15. Mr Pike was clear that he did not recollect any surcharges other than the one imposed for the period 03/15, which had been reduced to £489.02, and the surcharge for 06/16 which is under appeal. Mr Pike told us that he was in the office every day and he would know if the Appellant had incurred surcharges.

10 20. Section 7 of the Interpretation Act 1978 provides as follows:

15 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.

20 21. Therefore, unless the Appellant can prove to the contrary, Section 7 deems service of an item sent by post to have been effected at the time at which the letter would be delivered in the ordinary course of post. We considered the surrounding circumstances to ascertain whether, on the balance of probabilities, the Appellant did not receive the SLNs for the periods 12/14, 09/15 and 12/15.

25 22. At our request, Mr Pike confirmed that the address which the Respondents had on record was the Appellant’s correct address. It is clear that the SLNs for the periods 03/15 and 06/16 were both received by the Appellant as it was against these surcharge notifications that the Appellant had appealed. The remaining SLNs were sent to the same address. Mr Hopkins confirmed that the Respondents had not had any post addressed to the Appellant returned to them.

30 23. We note that Respondents’ letter dated 13 August 2015 (which reduced the surcharge imposed for the period 03/15 to £489.02) also refers to the surcharge imposed for the period 12/14. If the Appellant was unaware of having received that Notice then we would have expected this to have been mentioned in the Appellant’s letter in response dated 20 August 2015, particularly as it should have been clear that any irregularity in an earlier SLN could result in the removal of the surcharge for 35 03/15. We would also have expected that Mr Dodgson would have told the Respondents that the Appellant had not received any prior warning of a surcharge when, during the telephone call of 17 July 2015, he was advised that a 10% surcharge was likely if the VAT was not paid on time. In neither case was non receipt raised.

40 24. We also looked at whether the surcharges had been paid. For the period 12/14 there was no charge. Mr Pike accepted that a surcharge of £489.02 had been imposed

for the period 03/15. This surcharge was paid out of £4,018 which the Appellant paid to the Respondents on 15 October 2015.

25. For the period 09/15 a surcharge of £409.07 was imposed, and for the period 12/15 a surcharge of £465.42 was imposed. Both of these surcharges were paid out of a payment of £12,069.86 the Appellant made to the Respondents on 17 February 2016. Together these two surcharges amount to £874.49. Given the Appellant's financial struggles we would expect the Appellant to notice and respond if the Respondents appropriated a sum that large to surcharges of which it was unaware. There is no record of any such complaint.

26. In the circumstances, despite Mr Pike being clear that the surcharges were not received, we conclude that the Appellant has not demonstrated that it did not receive the SLNs for the periods ended 12/14, 09/15 or 12/15. We are satisfied, from the details in the Respondents ledger and Mr Pike's confirmation of the Appellant's correct address, that these SLNs were properly addressed and posted. Section 7 of the Interpretation Act deems these SLNs to have been correctly served upon the Appellant.

27. It follows that we are satisfied that the Appellant entered a surcharge period when it was issued with a SLN for late payment of the VAT due for the period 12/14 and that, by virtue of the SLNs for the periods 03/15, 09/15 and 12/15, the Appellant remained in that surcharge period for the period 06/16.

Was the VAT due for the period 06/16, the period under appeal, paid late?

28. The Appellant accepts that the VAT due for the period 06/16 was paid on 8 August 2016 and that the due date was 7 August 2016. Therefore we are satisfied that the Appellant was late in paying the VAT due for the period 06/16.

29. The onus of proof therefore moves to the Appellant to demonstrate that it has a reasonable excuse for paying its VAT one day late.

Is there a reasonable excuse?

30. The Appellant's ground of appeal in its Notice of Appeal was that it was ridiculous and unfair to impose a surcharge on a small business when the due date for payment of the VAT fell on a Sunday and the VAT due had been paid in full on the Monday, the first working day thereafter.

31. As we explained to Mr Pike at the conclusion of the hearing, Section 59 VATA 1994 does not differentiate between degrees of lateness, or distinguish between working days and non-working days. The legislation operates in such a way that, unless there is a reasonable excuse for the delay, a surcharge becomes due if a taxpayer is in a surcharge period and pays its VAT after the due date. This is the case even when the due date falls on a Sunday.

32. We conclude that Mr Pike made a mistake as to what constituted the last day to pay the VAT on time. In order to minimise the overdraft facility fee which Jefferson

Maguire would incur, Mr Pike waited until what he thought was the last possible date to transfer funds to the Appellant. Mr Pike had not read the form VAT FS2, “Top tips on how to avoid VAT surcharges”, and he had not appreciated that payment must be made before a weekend or bank holiday if the payment method would not allow transfer on a weekend or bank holiday. As Mr Pike himself put it, he had not read the small print.

33. We repeat what was said by the Tribunal in *Garnmoss Limited (t/a Parham Builders) v HMRC* [2012] UKFTT 315:

10 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.

15 34. We accept Mr Pike made an honest mistake. But we do not consider that a mistake as to the deadline for payment when the due date falls on a Sunday can constitute a reasonable excuse for the Appellant’s late payment of the VAT due for the period 06/16.

20 35. Mr Pike sought to persuade us that, as the Respondents did not operate a direct debit in their favour on a Sunday, it was unfair for the Appellant to be penalised for not making its payment on a Sunday. We do not consider that the dates on which the Respondents chose to collect instalments under a Time to Pay arrangement with another taxpayer can affect the due date for the Appellant’s payment of its quarterly VAT. If the Respondents (or any other creditor) choose to take payment instalments later than they are strictly entitled to, that is their choice. Here, it was the Appellant, and not the Respondents, who chose to pay the VAT due for 06/16 on 8 August 2016. There was no indication from the Respondents that they would refrain from issuing a surcharge if the Appellant paid its VAT on the next working day after a due date. Indeed, every indication from the Respondents was that there was no leeway with regard to the due date. The Appellant would have been aware from its appeal against the surcharge imposed for the period 03/15 that the Respondents would not remove a surcharge even if the VAT payment was late by just a few days.

35 36. At one stage Mr Pike told us that he was surprised that the bank had not rung him to tell him that there were insufficient funds in the Appellant’s bank account for the VAT payment to be made on 5 August 2016 (the date set out on the payment instruction). We note that relying on someone else is also specifically excluded by Section 71 VATA 1994 from being a reasonable excuse. However, as Mr Pike subsequently accepted that he was not waiting for a call, that he knew there were insufficient funds in the Appellant’s bank account for the payment to be made and that no payment would be made until he transferred more funds into the Appellant’s account, it seems unlikely that a telephone call from the bank on 5 August would have resulted in a different outcome.

40 37. Mr Pike also told us that it had been difficult for the Appellant since 2008 and that he had to juggle funds between the accounts of the Appellant and Jefferson

Maguire. This is borne out by the selection of bank statements Mr Pike provided and the Respondents' records. However, insufficiency of funds is specifically excluded by Section 71 VATA 1994 from being a reasonable excuse. We do not consider the underlying event which caused the Appellant's insufficiency of funds – the 2008 recession and the economic climate which followed – constitutes a reasonable excuse for the Appellant's late payment of the VAT due for the period 06/16.

38. We conclude that no reasonable excuse has been shown for the Appellant's late payment of the VAT due for the period 06/16.

Is the surcharge disproportionate?

39. Mr Pike submitted that the surcharge imposed was disproportionate for a delay of just one day. Mr Hopkins submitted that there was no unfairness, referring us to the decision in *HMRC v Trinity Mirror plc* [2015] UKUT 0421 where the Upper Tribunal considered whether a 2% default surcharge of £70,906, imposed for a delay of one day, was disproportionate:

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 aims 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* 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?”

...

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.

40. Applying the test laid down by the Upper Tribunal in *Trinity Mirror*, we ask ourselves whether a surcharge of £3,861.50 for one day's delay in paying VAT of £25,743.34 goes beyond what is strictly necessary for the objectives of the default surcharge regime. We bear in mind that the surcharge regime is intended to dissuade late payment and that it does not distinguish between degrees of lateness. Although a surcharge of 15% of the amount of VAT unpaid at the due date is undoubtedly severe, even for a fifth default in the space of 18 months, we cannot say that it is so excessive as to be disproportionate to the Appellant's delay.

41. We have considered whether there are any circumstances here which might make this the "wholly exceptional case" described in *Trinity Mirror*. We take into account that the VAT due from the Appellant fluctuated quarter to quarter and that the VAT due for the period 06/16 was much larger than it had been since 03/15; and also that the delay was caused by human error and that mistakes are easily made. However, we conclude that these are not enough to amount to exceptional circumstances. We conclude that a surcharge of £3,861.50 is not disproportionate to the gravity of the Appellant's infringement.

The surcharge percentage to be applied

42. Having established that a default surcharge is due for the period 06/16, we look at the number of previous defaults in order to ensure that the surcharge imposed is at the correct percentage. As set out above, we satisfied that the Appellant entered a surcharge period following late payment of the VAT due for the period 12/14, and that the Appellant was subsequently late in paying the VAT due for the periods 03/15, 09/15 and 12/15. Therefore the default for the period 06/16 is the fourth default since the Appellant entered the surcharge period and the fifth default overall. We are satisfied that the correct penalty percentage to be applied is 15%.

Conclusion

43. Therefore, for the reasons set out above, we are satisfied that this surcharge was correctly imposed and that the correct percentage for this surcharge was 15%. Therefore we confirm this surcharge in the sum of £3,861.50 and we dismiss this appeal. We informed the parties of our decision at the conclusion of the hearing. On hearing our decision Mr Pike expressed some dissatisfaction with the outcome, indicating that there were a number of people to whom he wished to refer this matter.

44. To enable Mr Pike to take this further, as he indicated he would wish to do, this document contains full findings of fact and reasons for the decision. Any party

dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 21 FEBRUARY 2017