[2019] UKFTT 324 (TC)

TC07152

VALUE ADDED TAX – default surcharge – whether reasonable excuse for default – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08140

BETWEEN

GRAVITAS GROUP LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 17 May 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 17 December 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 4 April 2019. The taxpayer did not submit a Reply and the taxpayer's director confirmed to the Tribunal on 4 April 2019 that there was no further information to add.

DECISION

INTRODUCTION

1. This is an appeal by Gravitas Group Ltd ("Gravitas") against a VAT default surcharge for period 06/18. That surcharge had been imposed by HMRC at the rate of 15% amounting to £605.70. After Gravitas gave Notice of Appeal to the Tribunal and as explained further below, HMRC adjusted the surcharge to apply the rate of 10% and the surcharge under appeal was reduced to £403.80.

RELEVANT LEGISLATION

2. Regulation 25(1) of the VAT Regulations 1995 provides that a person who is registered for VAT (or liable to be so registered) must submit a VAT return to HMRC no later than the last day of the month next following the end of the VAT accounting period to which it relates. Under regulation 40(2), any person required to make a return must pay any VAT shown as payable on the return to HMRC not later than the last day on which that return is due. However, there is a seven day extension for persons who pay electronically and a ten day extension for persons who submit their VAT returns online and pay by direct debit.

3. Liability for a default surcharge arises under section 59 Value Added Tax Act 1994 ("VATA 1994"). Section 59(1) provides that a taxable person is in default where HMRC do not receive a VAT return and any VAT shown as payable on such return on or before the due date. Where a person is in default, HMRC may issue a surcharge liability notice (a "SLN"). If, having been served with a SLN, the taxable person defaults again during the period of one year (the "Surcharge Liability Period") from the end of the period of default, the person becomes liable to a surcharge. On each subsequent default, the Surcharge Liability Period is extended to run for 12 months from the end of the latest period of default.

4. The surcharge is the greater of £30 and a specified percentage of the outstanding VAT. The percentage specified increases according to the number of VAT periods in respect of which the person is in default during the Surcharge Liability Period, starting with 2% for the first period of default. For the second period in respect of which the taxable person is in default during the Surcharge Liability Period, the specified percentage is 5% and for the third period it is 10%. The maximum percentage is 15%, which applies where there have been four or more periods in default during the Surcharge Liability Period.

5. Section 59(7) VATA 1994 provides that a taxable person is not treated as in default in respect of any VAT period if the person satisfies HMRC, or on appeal the FTT, that in respect of the period:

> (1) the return or the VAT due was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by HMRC within the time limit; or
>
> (2) there is a reasonable excuse for the return or VAT not having been so despatched.

6. Section 71(1)(a) VATA 1994 provides that for these purposes an insufficiency of funds to pay any VAT due is not a reasonable excuse. Section 71(1)(b) VATA 1994 further provides that, where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

7. Sections 59 and 71 VATA 1994 are set out in full below.

"**59 The default surcharge**

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

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

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

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

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

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

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

71 Construction of sections 59 to 70

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

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

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

(2) In relation to a prescribed accounting period, any reference in sections 59 to 69 to credit for input tax includes a reference to any sum which, in a return for that period, is claimed as a deduction from VAT due."

BACKGROUND

8. HMRC have the burden of proving that the taxpayer failed to pay the VAT on time and is liable to pay the default surcharge. The onus then passes to the taxpayer to prove that they had a reasonable excuse for their failure to pay on time. The standard of proof is the civil standard of balance of probabilities.

9. There is no dispute about the relevant facts. On the basis of the bundle, I find that the material facts are as set out below.

10. HMRC produced a schedule (on 24 January 2019) of Gravitas' defaults which has not been challenged. This was produced in the context of HMRC withdrawing and reducing certain defaults, as explained below. This then formed the basis of HMRC's Statement of Case.

Period	Surcharge Rate Issued (%)	Amount (£)	Amended Surcharge Rate (%)	Amended Amount (£)
09/15	Help Letter (HL)	0.00	Withdrawn	-
12/15	0-First Default	0.00	Withdrawn	-
03/16	2	0.00	Help Letter	0.00
09/16	5	0.00	0-First Default	0.00
09/17	10	151.34	2	0.00
03/18	15	77.17	5	0.00
06/18	15	605.70	10	403.80

11. The surcharges for 09/15 and 12/15 were withdrawn by HMRC as it was not deemed appropriate that a business should enter the surcharge system as a result of a repayment return.

12. The due date for 03/16 was 7 May 2016 for electronic payments. Payment was received on 8 May 2016. This period has been amended to a help letter.

13. The due date for 09/16 was 7 November 2016. Payment was received on 29 November 2016. This period has now been amended to a First Default and SLN.

14. The due date for 09/17 was 7 November 2017. Payment was received on 17 November 2017. This period has now been amended to a 2% surcharge and Surcharge Liability Extension Notice.

15. The due date for 03/18 was 7 May 2018. Payment was received on 8 May 2018. This period has now been amended to a 5% surcharge and Surcharge Liability Extension Notice.

16. The due date for 06/18 was 7 August 2018 and payment was received on 13 August 2018. This period, which is the subject of the appeal, has now been amended to the 10% rate, with a default surcharge of £403.80.

17. As surcharge notices (including the help note, SLN and assessment notices) are computer-generated by an automated process, there were no copies of the actual notices which had been issued to Gravitas. Examples of the forms of the relevant notices were provided in the bundle.

18. On 10 September 2018 Amar Saleem, a director of Gravitas, wrote to HMRC referring to a letter from HMRC of 17 August 2018. (No copy of HMRC's letter was available, which I assume to be for the reason in [17] above.) Mr Saleem's letter refers to HMRC as having imposed a "fine" of £605.70 for late payment, and I therefore conclude that HMRC's letter of 17 August 2018 had been a notice of assessment of the default surcharge. Mr Saleem explains that the due date had been whilst he was on leave and he made the payment the first day he was back. He said that he hoped HMRC would "consider the above in taking away the surcharge".

19. HMRC treated this letter of 10 September 2018 as a request for a review of their decision. On 4 December 2018 HMRC wrote to Gravitas with the outcome of that review, informing them that they had decided not to cancel the default surcharge assessment.

20. On 17 December 2018 Gravitas gave Notice of Appeal to the Tribunal against the surcharge. The amount is expressed in one box therein as £604.83. I find this to be an error, as it is inconsistent with the amount of £605.70 specified elsewhere by both Gravitas and HMRC. The grounds of appeal state:

> "The deadline for payment was 7th August 2018 and I made the payment some days after on the 13th August 2018. I had been on leave for 3 weeks therefore although the VAT [return] was sent in on time I was away when the amount was calculated with no access to emails. I made the payment first day I was back which was the 13th August.
>
> I try to ensure that payments are made on time, I am a one man business so I do everything myslefand [sic] as there was nobody in my place the payment was made late. I have a small business not making a huge amount so this amount is critical to my business and is a huge amount of money.
>
> I certainly wouldn't risk a £605.70 fine as I just couldn't afford to pay this as business is going pretty slow.
>
> I hope you can consider the above in taking away the surcharge and I will ensure this doesn't happen again in the future."

21. On 24 January 2019 HMRC Solicitor's Office wrote to Gravitas. They had reviewed the appeal prior to preparing a Statement of Case and had made adjustments to the surcharges. The effect of these adjustments is set out at [10] above. In consequence, the surcharge for the period under appeal was reduced from £605.70 to £403.80.

SUBMISSIONS

22. Gravitas' grounds of appeal are set out at [20] above. No additional information was provided.

23. HMRC argue that the directors have ultimate responsibility for the timely submission of the VAT return and any tax due thereon. The fact that the director was on leave does not constitute a sufficient reasonable excuse - measures should have been put in place to ensure Gravitas met its legal obligation to pay the tax due. Where responsibility for any matter rests solely with one person within a business, then the business knowingly accepts that there is a risk that the absence of that person will result in matters not be dealt with on time.

24. The return was submitted 12 days before the due date, on 25 July 2018. Given the anticipated period of absence, Mr Saleem could have initiated payment electronically in advance, to be settled on a future date, or made payment by telephoning HMRC's telephone payment service.

DISCUSSION

25. The grounds of appeal set out in [20] above raise three issues, namely:

(1) reasonable excuse;

(2) fairness or proportionality;

(3) lack of funds to pay the surcharge.

26. These are addressed below. However, it is first necessary that I consider whether the default surcharge was properly levied. The history of defaults set out by HMRC is not challenged by Gravitas, but the fact that HMRC (after having confirmed the surcharge in its own review) then concluded, at the time of preparing its Statement of Case, that earlier surcharges needed to be withdrawn and the current surcharge under appeal be reduced does raise an issue as to whether a SLN had been issued

SLN and effect of subsequent withdrawal and adjustments to default surcharges

27. Section 59(2) VATA 1994 makes it clear that a taxpayer's liability to pay a surcharge arises only if "the Commissioners serve notice on the taxable person (a "surcharge liability notice") ...". Furthermore s59(4) VATA directs that a surcharge may only be charged on a taxable person "on whom a surcharge liability notice has been served ... ".

28. It seems clear therefore from the legislation that if no SLN has been served on Gravitas, it cannot be liable for the surcharges for the default periods.

29. This principle was expressly recognised in the High Court in *Customs & Excise Commissioners v Medway Draughting & Technical Services Ltd; Customs & Excise Commissioners v Adplates Offset Ltd* [1989] STC 346. In that case, Medway had appealed to the VAT Tribunal against a default surcharge assessment on the basis that it had not received a SLN prior to the assessment and accordingly was not liable to the surcharge. It was found as

a fact that Medway had not received the notice in time. The Tribunal granted Medway's appeal and the Commissioners appealed against that decision.

30. In the High Court it was held that it was Parliament's intention that a warning in the form of a surcharge liability notice should be given before a surcharge could be levied. Receipt of the notice was crucial so as to enable the taxpayer to avoid the surcharge. Macpherson J said at [348j] and [351g]:

> "The scheme of the Act therefore provides that taxpayers shall be given notice of their liability to surcharge. And it is right to stress at the outset that a taxable person conversant with the provisions of s19 could say to himself that he could expect a warning in the form of a surcharge liability notice before surcharge could be levied in respect of any further default during the surcharge period...
>
> I have come firmly to the conclusion that in the present cases it was the intention of Parliament that a warning should be given before a surcharge could be levied. And thus I agree with His Honour Judge Medd's first conclusion. As a matter of construction of s19, the whole scheme of default surcharge is dependent on service of the surcharge liability notice. If this were not so the legislature could simply have decreed (for example) that a third default in any defined period would of itself trigger the commissioner's right to surcharge the taxpayer. It was decided that this should not be the scheme of the section and that even defaulting taxpayers were entitled to be warned of an impending surcharge. I am not sure that the phrase "condition precedent" used by His Honour Judge Medd is wholly apt in a non-contractual case. But the requirement for the warning notice is express, and the time for its service, namely after the first two relevant defaults and before the next default, is explicit. It is perfectly true that the taxpayer has a duty in any event not to default in respect of each return and payment of tax. And he is warned that this is so and that penalties may follow if he is late in making his returns. But there are quite separate penalties which may be incurred in respect of individual defaults. And in my judgment Parliament intended that the taxpayer should be properly warned before the additional default surcharge could be exacted".

31. HMRC's table at [10] above sets out how they have concluded that the relevant defaults need to be re-defined or re-characterised. However, this re-characterising of certain of the earlier defaults does not change the fact that the various computer-generated notices would have been sent to Gravitas in accordance with HMRC's original view of the defaults. This means that the SLN would have been sent to Gravitas once there was (what was at that time treated as) a default for 12/15. HMRC now conclude that this should not have been issued, but the fact remains that it was. That notice should instead have been issued after the default in 09/16. HMRC's letter of 24 January 2019 is silent as to whether a new set of computer-generated notices had been or would be prepared and sent to Gravitas reflecting the revised position, but I consider this to be irrelevant in any event. The question is whether, when imposing the surcharge for 06/18, for what is now £403.80, the relevant statutory conditions in s59(2) had been fulfilled.

32. The SLN was sent automatically once there had been a default for 12/15. That SLN has now been "withdrawn". Nevertheless, it was sent and its receipt has not been challenged by Gravitas. Therefore, to the extent that a purpose of the SLN is to put a taxpayer on notice, or give them a warning, that they are now within the surcharge regime and liable to a surcharge

in the event of further defaults then that was achieved by the SLN which was issued. Furthermore, I do not consider that the withdrawal of this default by HMRC renders the original notice invalid or of no legal effect. Section 59(1) provides that a taxpayer is in default for a period if HMRC do not receive a return by the due date or they receive a return on time but not the amount of VAT shown as payable. In the present instance, there was in law a default for 12/15, as the return which was due on 7 February 2016 was not submitted until 10 June 2016.

33. Subsequently, Gravitas was sent further notices on each subsequent default, in respect of 03/16, 09/16, 09/17 and 03/18, before the default occurred in the period subject to this appeal.

34. I note that HMRC's "VAT Surcharge liability notice extension" contains the standard language:

> "We have extended the surcharge period previously notified to you to [ ]. If you did not receive a previous notification of your surcharge period, please note your surcharge period begins on the date of this notice and ends on [ ].
>
> You will not have to pay a surcharge on this occasion. If you default again for an accounting period ending between the date of this notice and [ ] you may receive a [ ]% surcharge and your surcharge period will be extended."

35. HMRC's "VAT Notice of assessment of surcharge and surcharge liability notice extension" contains similar language:

> "We have also extended the surcharge period previously notified to you to [ ]. If you did not receive a previous notification of your surcharge period, please note your surcharge period begins on the date of this notice and ends on [ ].
>
> If you default again for an accounting period ending between the date of this notice and [ ] you may receive a [ ]% surcharge and your surcharge period will be extended."

36. I consider that Gravitas had been served notice for the purpose of s59(2), in the form of the original SLN and that this is not affected by HMRC's subsequent withdrawal of the defaults for the periods 09/15 and 12/15. Even if this were not my conclusion, the language quoted in [34] and [35] above in subsequent notices sent to Gravitas would fulfil the statutory requirement of a SLN.

Reasonable excuse

37. In Gravitas' grounds for appeal, Mr Saleem states that he had been on leave for three weeks and was away when the VAT due was calculated and at that time he had no access to emails. He is a one man business and made the payment on his first day back.

38. In *The Clean Car Co Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?…
>
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be

> exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

39. That this is the correct test has recently been confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

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

40. This fourth stage is not relevant, because the statutory provisions being considered in *Perrin* contained an extra requirement which does not apply to default surcharges.

41. Applying that approach here, the only information available is that set out in the Notice of Appeal, and the underlying facts have not been challenged by HMRC. However, I do not accept that it is reasonable that a director of the taxpayer, when going on leave for a period of three weeks, fails to put in place any alternative arrangements to ensure that Gravitas' legal obligations are complied with in his absence. This could have involved appointing a third party to make the payment, or, as HMRC submit, making a payment over the phone.

Proportionality

42. The grounds refer to the surcharge as being a huge amount of money for a small business not making a huge amount. I have taken this to be a challenge to the fairness or proportionality of the default surcharge regime.

43. In *Total Technology (Engineering) Ltd v HMRC* [2012] UKUT 418 (TCC) the Upper Tribunal carried out a detailed analysis of the default surcharge regime at [83]-[98], and then continued:

> "99. In our judgment, there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are, however, some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's Convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to Convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged).
>
> 100. Our conclusion, therefore, is that with the possible omission of an upper limit on the penalty which may be imposed, the regime viewed as a whole does not suffer from any flaw which renders it non-compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

44. In *Trinity Mirror Plc v HMRC* [2015] UKUT 421 (TCC) the Upper Tribunal said:

> "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."

45. The default surcharge provisions were therefore found to be proportionate by the Upper Tribunal in *Total Technology* and *Trinity Mirror*, and both those decisions are binding on me.

46. I note that in *Trinity Mirror* the Upper Tribunal said that there might be a "wholly exceptional case" where the imposition of the surcharge was disproportionate, but this is not such a case. Gravitas had been subject to default surcharges in the past, was familiar with the rules, and had not put forward anything unusual about its facts so as to bring it within such an exception.

Lack of funds

47. Gravitas did not submit that shortage of funds was a reason why the VAT was paid late, but as a reason why it cannot pay the surcharge. This Tribunal only has jurisdiction to decide whether the surcharge was properly levied, and in that context, a later shortage of funds is irrelevant.

CONCLUSION

48. The Tribunal confirms the surcharge of £403.80 for 06/18 and refuses Gravitas' appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 22 MAY 2019